



REPUBLIC OF KENYA



**Republic v Rotich (Criminal Case 21 of 2018)
[2023] KEHC 18874 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18874 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL CASE 21 OF 2018**

**RL KORIR, J
JUNE 15, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

KELVIN KIMUTAI ROTICH ACCUSED

JUDGMENT

1. Kelvin Kimutai Rotich (Accused) was charged with the offence of murder contrary to section 203 and read with section 204 of the *Penal Code*. He was alleged to have murdered one Samuel Chumo on 4th October, 2018 at Yakanek Location in Sotik Sub-County within Bomet County.
2. The Accused took plea on 11th November, 2018 and pleaded not guilty. The trial proceeded before Muya J, who heard four witnesses before I took over the case Under Section 200 of the *Criminal Procedure Code* and heard the last four Prosecution witnesses and the Defence case.
3. In a Ruling dated 21st November 2022, this court after considering the Prosecution case and the submissions of both the Prosecution and Defence found a prima facie evidence against the Accused and placed him on his defence.

The Prosecution Case

4. The Prosecution presented 8 witnesses in support of its case. PW1 was the deceased's wife and mother of the Accused. Her testimony was that the three were having supper in her kitchen around 7pm when the Accused demanded one hundred shillings (ksh.100/=) from his father and threatened to kill him if he didn't pay. She beseeched him not to kill the father and after supper the Accused followed his father to his house and started beating him. The Accused locked the house from the inside and PW1 went round the house screaming. Shortly, the Accused pushed out the father and followed him out of the house holding a panga and she saw the deceased bleeding profusely. Members of the public arrived and assisted in taking the deceased to hospital.



5. Christopher Chumo (PW2) was the deceased's brother. According to his evidence he found the deceased around 200 meters away from his house naked and bleeding. He had panga cuts on the neck and was not talking. They took him to Kaplong then Kapkatet hospital where he passed on.
6. Winnie Siele (PW3) told the court that she heard screams on 4th October, 2018 at around 8pm and when she got out she saw Rael (PW1) asking Kelvin why he was beating his father. She saw one Bernard with a torch searching for the deceased. She also saw Kelvin (Accused) armed with a panga and a torch. That Kelvin threatened her and she retreated back to her house.
7. The Pathologist Dr. Mutai Nelson Kiplangat testified as PW4. He found the cause of death to be severe hemorrhage secondary to assault. PW5 was Government Analyst Elizabeth Wathero Oiyee. She examined exhibits and produced her report Exh. 3(a) and (b).
8. The Investigating Officer No. 113791 PC Nelson Muhaya testified as PW6. According to his evidence, he was assigned the case and he proceeded to the home of the deceased. He found a crowd at the home where he also saw blood stains at the doorstep of the deceased's house. By then the Accused had been arrested and was at the Police Station. The Investigating Officer found the Accused wearing a black hooded blood-stained jacket which he recovered from him (Exh. 4). PW6 further stated that the arresting officer recovered a panga which was the murder weapon (Exh. 1).
9. PW7 was Chibayi Christine a psychiatric nurse at Kapkatet hospital who first assessed the mental health of the Accused upon arrest. She testified that she found him normal and fit to stand trial. She produced the Mental Assessment Report (Exh.5).
10. No. 217953 PC Christopher Terer of Sotik Police Station was the arresting officer and testified as PW8. He told the court that he was called by one Mr. Maritim the area chief of Yakanet location with a report of a person who had killed his father. Together with APC Cheruiyot they rushed to the scene where they found the Accused having locked himself in his house. They ordered him to open the door and he complied. Upon searching the house, they found the blood-stained panga (Exh.1). They arrested the Accused.

The Accused's Defence.

11. Upon being placed on his defence, the accused elected to exercise his right to silence and the same was duly noted by the court.

The Law and Principles

12. The law on the offence of murder is contained in Section 203 of the [Penal Code](#) which provides: -

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
13. In Halsbury's Laws of England, 'Criminal Law', (Volume 25 (2020) at paras 1–552 and Volume 26 (2020), paras 553–1014), the elements of murder are outlined at paragraph 129, as follows: -

“ To establish a case of murder, the prosecution must prove: -

 - i. That the unlawful death of the victim was caused by an act or omission of the defendant.



- ii. That the defendant did that act or omitted to act with malice aforethought, express or implied.”
14. In the case of *Johnson Njue Peter vs. Republic* (2015) eKLR, the Court of Appeal listed the three elements that must be proven to sustain a charge of murder as follows: -
 - i. The death of the deceased and the cause of that death.
 - ii. That the accused committed the unlawful act which caused the death of the deceased.
 - iii. That the accused had the malice aforethought.
15. For the offence of murder to be proven, like any criminal offence, the onerous task of proof falls on the Prosecution. Section 107 of the *Evidence Act* provides that: -
 - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
16. With respect to the burden of proof in criminal cases, the Court of Appeal in *Stephen Nguli Mulili v Republic* (2014) eKLR held that: -

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case.”
17. The standard of proof in a criminal case is that of proof beyond reasonable doubt. In the famous case of *Miller v Ministry of Pensions*, (1947) 2 All ER 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt that: -

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
18. In *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt stating that: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just



what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”

19. Having restated applicable law and principles, I now consider the evidence adduced to prove the elements of the offence.

i. Death and Cause of Death

20. The fact that the deceased died on the night of 4th October 2018 at his home in Yaganek location was not in dispute. His wife (PW1) and his brother (PW2) testified that the deceased was attacked and hacked and was found outside his home lying naked near a shrub. PW2 testified that he was the one who took him to hospital at Kaplong from where they were referred to Bomet. Due to lack of transport, they took him to Kapkatet hospital where he passed on.
21. Evidence on the cause of death was conclusively given by the pathologist Dr. Mutai (PW4). He testified that he conducted the post-mortem on the deceased, who was aged approximately 73 years’ old, on 10th October 2018. He observed multiple cut wounds on the face, neck, arm, chest, forehead, skull, right ear lobe. There was a cut on the neck which cut through the jugular vein and carotid artery; cuts on the left posterior upper chest and upper shoulder joint. The deceased had also sustained fractures on the 3rd, 5th, 6th and 7th ribs and multiple cuts on the head. According to Dr. Mutai, the cause of death was excessive blood loss or severe hemorrhage due to assault.
22. I am satisfied on the basis of the pathologist’s findings that the cause of death was proved by the Prosecution. The defence did not dispute the cause of death. Further analysis shows that the cause of death stated by the pathologist accords with the evidence of the witnesses who were at the scene who testified stated that the deceased was assaulted by the son using a panga. The death was clearly unlawful. The first ingredient of the offence was therefore proven to the required legal standard.

ii. Whether the Accused Caused or was Linked to the Unlawful Death of the Deceased

23. There can be no conviction unless the Accused is clearly identified and linked to a crime. The Prosecution must prove that the deceased died as a result of the unlawful acts or omissions of the Accused and evidence of identification of the Accused must be watertight.
24. In the often-cited case of *R v Turnbull* (1977) QB 224 the court held as follows: -

“If the quality (of identification evidence) is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution”.
25. In submissions dated 23rd March 2023, and filed on 28th March 2023, the Prosecution submitted that the Accused was properly identified as the perpetrator. They submitted that PW1 testified that she was present when the Accused murdered his father the deceased. That PW1 testified that the accused threatened to kill the deceased and proceeded to attack him with a panga cutting him severally on his head, neck and chest. That PW1 was a relative of the accused and was therefore well known to her.



26. In their submissions dated 3rd March 2023 filed on 8th March 2023, the Defence submitted that the evidence of PW1 was not corroborated and none of the witnesses saw the accused commit the offence.
27. I have considered the evidence of PW1. PW1 testified that the deceased and the accused who are father and son were in her kitchen on the fateful evening. In her examination in chief she said that she was with a grandchild aged 9 when Kelvin (accused) started quarrelling with his father (deceased). That Kelvin (Accused) threatened to kill his father. She intervened and told him not to kill his father. That after eating, the accused followed his father to the main house and locked the door. She heard the father wailing and when she pushed the door it couldn't open. She started screaming and shortly the accused pushed out his father and followed him while slashing him with a panga.
28. In cross - examination PW1 said that the quarrel was about money. That the Accused was demanding one hundred (kshs 100/=) from his father. He snatched 80/= from the father and demanded the balance which PW1 offered to give him.
29. From the evidence of PW1 it is clear to the court that she was present and witnessed the quarrel and saw the Accused slash the father. She could not have mistaken him for anybody else and therefore even though it was 7pm she could not have mistaken him. Her action of following them into the main house while pleading with the Accused not to kill the father confirms that she was clear in her identification of both the deceased and the Accused. She saw the deceased being pushed outside and being slashed by the Accused. This was therefore the evidence of an eye witness which was overwhelming and needed no corroboration.
30. There was however corroborating circumstances. This was a homestead and PW1 screamed calling out the names of the other relatives who responded. PW2 who is the deceased's brother was in his home and was informed by his wife one Grace that the person screaming was Rael Chumo (PW1) and who was saying that Kimutai was fighting his father. When PW2 got out, his nephew Anthony who is also the deceased's son told him that his father had been attacked by Kimutai. They searched for him and found him lying naked in the bushes near the home with cuts on the neck by which time the deceased was not talking. PW2 did not see the Accused slashing the father but he found the deceased lying having been slashed.
31. Further corroborative circumstantial evidence was given by Winnie Siele a neighbour who testified as PW3. When she responded to the screams, she found the Accused armed with a panga and a torch. She told the court that the Accused threatened her away and she retreated to her house. Her evidence was that the neighbours who responded had torches and lanterns. She therefore managed to see clearly.
32. The arrest of the Accused provided further evidence linking him to the offence. His uncle PW2 told the court that they reported the incident to the chief who called in the police the next morning. The police arrived when the Accused was inside his house. PW8 APC Christopher Terer testified that together with APC Cheruiyot they went to the scene and found the suspect one Kelvin Kimutai whom they arrested inside his house. They also recovered a panga inside the house. The panga was identified by PW1 as belonging to the family.
33. Forensic evidence presented in this case was the final nail in the identification of the Accused. There was evidence that the Accused was arrested while wearing a blood-stained jacket. The Investigating Officer (PW6) testified that he recovered the jacket from the Accused who was already in custody. The jacket (Exhibit 4) together with the panga (Exhibit 1) were subjected to DNA Analysis.
34. Government Analyst Elizabeth Wathero Oiyee (PW5) testified that the Government laboratory in Nairobi received four items namely blood sample of Samwel Chumo (deceased) blood sample of Kelvin Kimutai (Accused), a black jacket which was stained and a panga all marked Items A,B,C & D



respectively. They were received vide an Exhibit Memo Form from PC Nelson Injera of DCI Sotik. PW5 testified that upon analysis, it was found that the DNA extracted from the blood stains in the jacket (Item c) and from the panga (Item D) matched the DNA profile of the blood sample of the deceased Samuel Chumo (Item A). PW5 produced the Government Analyst Report [Exhibit 3 (a)] and the Police Exhibit Memo [Exhibit 3(b)].

35. The forensic evidence above clearly links the Accused to the commission of the offence and clearly corroborates the eye witness account that he slashed his father to death. His panga (Exhibit 1) and his jacket (Exhibit 4) bore his father's blood. The jacket was recovered from the Accused's body while the panga was recovered from the Accused's house. Both the murder weapon and the Accused's blood-stained jacket clearly boldly identified the killer. There was no explanation by the Accused why or how his deceased father's blood found its way onto the Accused's jacket. The panga was identified by PW1 as belonging to the family.
36. From my consideration and analysis of the evidence above, I am satisfied beyond a shadow of doubt that it was the Accused and no one else who caused the unlawful death of his aged father Samuel Chumo (now deceased).

iv. Whether the Accused in Causing the Unlawful Death of the Deceased Acted with Malice Aforethought.

37. Not every homicide can be considered murder. For the offence of murder to be proven there must be both the intent and the act or omission. In other words, there must be both a guilty mind and a criminal act. The authors in 'The Common Law of England', (2nd Edn. Smith and Maxwell Ltd, 1920) p. 106 stated as follows: -

“Every common law crime consists of two elements: first, the voluntary commission of an act which is declared by the law to be criminal; second, the existence in the offender of a state of mind which is declared by law to be consistent with criminality.”

38. Section 206 of the *Penal Code* (Cap 63) Laws of Kenya sets out the circumstances from which malice aforethought can be inferred. It provides: -

- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- c. an intent to commit a felony;
- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

39. In this case the Prosecution evidence has already established that the Accused was the person who hacked his father to death. The issue now is whether in so doing he possessed the necessary *mensrea* or malice aforethought. The prosecution led no evidence to show what might have transpired between the Accused and his father (deceased) before the material date. PW1 however, testified that on the material date, the Accused picked up a quarrel with his father by demanding that the father gives him his money Kshs 100/= . The father could only afford to give him Kshs 80/= which the Accused took and demanded that he gives the balance. This quarrel occurred in the kitchen.



40. The hapless father left for his main house and the Accused followed him there armed with a panga. He must have attacked the deceased inside the house because in the evidence of PW1, she followed them to the main house when she heard the deceased wailing. She tried to open the door but found it locked and thereafter she saw the deceased being pushed out of the house and with the Accused slashing him using the panga. There was evidence that the deceased tried to escape towards the river but was found having fallen on the footpath some 200 meters from the house. By that time, he had sustained serious injury. The merciless slashing and hacking of the deceased by the Accused brings the case squarely within the provisions of Section 206 of the Penal Code.
41. In the case of *Republic v Tubere S/O Ochen* (1945) 12 EACA 63, the former Court of Appeal for East Africa listed the circumstances from which malice aforethought may be inferred to include: -
- a. The nature of the weapon used.
 - b. The part of the body targeted by the assailants. This involves the vulnerability of body injury is aimed at to inflict harm.
 - c. The manner in which the offensive, dangerous weapon is used against the victim. Questions like the number of stab wounds, multiple injuries on the body of the deceased.
 - d. The conduct of the accused before, during and after the attack.
42. In the present case, the pathologist (PW 4) detailed the injuries inflicted on the deceased. He captured them in the P3 Form (Prosecution Exhibit 2) as follows: -
- “A body lying supine soiled with dry blood all over the body with multiple cut wounds on the face, neck, arm and posterior chest. A cut wound on lateral middle 1/3cm right arm measuring 2 7cm long x 2 cm width x 2 cm depth. Cut wound on anterior right frontal region measuring 6cmx4cmx3cm extending to the skull with some bone chippings. Cut right lower right ear lobe measuring approximately 4 cm x 3cm x 1cm. Deep cut wound on left lateral neck cutting through jugular vein and carotid left carotid artery and vein measuring 6cm x 4 cm x 4cm cut wound or left posterior upper chest measuring 10 cm x 5cm x3cm with fracture of 3rd posterior rib. Cut wound on left upper shoulder joint measuring 8cmx2cmx2cm
- Respiratory system: Anterior fracture of left ribs starting from 5th ,6th and 7th ribs. Hematoma on upper 1/3 sternum, fracture of posterior left rib number 3.
- Head: Multiple cut wound on right anterior frontal region measuring 6cmx4cmx3cm extending to frontal bone cut wound on left lateral neck cutting through jugular vein and carotid artery and vein.”
43. The injuries sustained by the deceased shows that the Accused had no other intention than to end the life of his father, the deceased. He had threatened to kill and he did kill in the most horrendous fashion. The evidence has shown, and I have no hesitation in finding that the Accused acted with malicious intent. The Prosecution proved beyond reasonable doubt the 3rd ingredient of murder which is the mensrea.
44. The Accused was subjected to a psychiatric mental evaluation upon arrest. He was found to be well oriented in place and time with good concentration, insight and intact memory. He had no features of psychosis. He was therefore mentally in control of his senses when he quarreled and hacked his father to death. I am fortified in this finding by the fact that no less than 2 relatives being his mother (PW1), his



uncle (PW3), and his neighbour (PW2) testified and none of them hinted at any prior state of mental disturbance of the Accused.

45. The Accused elected not to say anything when placed on his defence. It was his Constitutional right to do so. Even then, at the end of his defence, this Court once more considered the Prosecution evidence and came to the conclusion that the Prosecution proved the charge against the Accused beyond reasonable doubt.
46. I find the Accused Kelvin Kimutai Rotich guilty of the offence of murder contrary to section 203 as read with Section 204 of the *Penal Code*. He is accordingly convicted.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 15TH DAY OF JUNE, 2023

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr.Njeru for the State, Ms. Chirchir holding brief Mr.Kenduiwo for the Accused and Siele(Court Assistant)

