



**Republic v Chirchir (Criminal Case 31 of 2019)
[2023] KEHC 21263 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 31 OF 2019
RB NGETICH, J
JULY 20, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ERICK KIPKOECH CHIRCHIR ACCUSED

JUDGMENT

1. The accused person has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#). Particulars are that the accused on the 11th day of August, 2015 at Ossen Location in Baringo North Sub- County within Baringo County murdered Jeremiah Kendele Chepkwony.
2. The accused pleaded not guilty to the charge and the matter was set down for full trial where the prosecution availed a total of 10 witnesses in support of the charge preferred against the accused.

Prosecution Evidence

3. Pw 1 Musa Bargason Toroitich who is the Assistant Chief of Tiloi Sub-location testified that the deceased was his boss senior chief of Ossen Location. He said on the 11.08.2015 at 2: 30p.m, the deceased arrived for a baraza meeting which was adjourned because there was a burial at Talawal location. After adjourning the meeting, they decided to go to the accused's house to see whether there was illegal brew (*busaa*) having been a known dealer and had previously been arrested on 20.07.2015 with illegal busaa. He said they were implementing the government directive to get rid of the illegal brews and they divide themselves into two groups one being led by the senior chief and the other by him.
4. He testified that in the deceased's group were Festus Kiprop, William Rutto, Patrick Kiprop, Wilson Sumukwo and others and in his team, line were Komen, Chebon, David Chepchieng, Abraham Chebii and others. They agreed to take different paths and meet at the accused's home. He said at about 100



metres to the accused's home, they heard a woman scream in the house. They run to the house, and they found the accused calling his sons saying that they should come back with weapons as he had been attacked by the chief.

5. He said he found the deceased outside the house near the door of the house sitting on the ground with his hands holding the ground supporting himself and blood on the mouth and the persons who were with the deceased struggling to hold the accused. He joined them and found the accused holding a knife on his hand; they managed to snatch the knife from him and handcuffed him and at this time the deceased was passing out. He said the deceased's wife court went with a panga to cut the deceased but he was restrained by Abraham and the panga taken away.
6. He testified that they went to attend to the deceased who was now weak and on examination, they found that he had a stab mark in his chest and another on the back which appeared to have been caused by a sharp knife. He was bleeding from the wounds, nose and mouth. He said the deceased was wearing his uniform which was stained by the blood and as they were examining the deceased, the accused tried to escape but was arrested.
7. Pw1 said the deceased passed on at the scene. They left the body and called the D.C Baringo, police and the AP Commandant who went to the scene and arrested the accused. Police from Kabarnet Police station went to collect the body of the deceased and two knives and a panga recovered from the scene.
8. Pw 2 Patrick Kipchumba Kiprop a member of community policy team confirmed that on 11.08.15 at about 3:00 p.m the deceased herein who was the area chief asked them to go with him to accused's home after a public meeting was adjourned due to a funeral. He said they were a group of 15 people. They divided themselves into two groups and he was in the group led by the deceased. He said on arrival at the accused's home, they found the accused taking beer with his wife and the chief entered the house. He said he remained outside the house within the compound with William Rutto and Wilson Sumukwo and after a short while, he heard noises and screams by the accused's wife. He went near the door and saw the accused holding the deceased and had something in his hand. He said he saw blood oozing from the mouth of the deceased who was at the door of the house as they were struggling near the door.
9. He testified that William and Wilson tried to restrain the accused and took away the knife. The accused's wife then came with a panga and tried to cut Wilson Sumukwo from the back but pw2 helped him and took away the panga from her. He said at that time, the deceased fell as he was becoming weak from the injury. Assistant Chief arrived and assisted to handcuff the accused and went to examine the deceased but found that he had passed on, outside the house.
10. Pw2 said he saw blood oozing from deceased's chest. He confirmed that the deceased was wearing his uniform. He said the accused was later arrested by the police and after leaving the home, he saw the house of the accused on fire. He recorded his statement the next day.
11. Pw 3 one William Cheboi Rutto testified that on the 11.08.15 at 4:00 p.m, the Area Assistant Chief called them and 15 village elders and informed them that Erick Kipkoech (accused) had Busaa Liquor at his place and they agreed to accompany the chief to accused's home but before leaving the deceased who was the area chief arrived.
12. He confirmed that they divided themselves into two groups. He was in the deceased's group and when they arrived at accused's home, the deceased asked them to wait outside as he went inside the house. Pw3 said he heard the deceased inquire from the accused where the illicit brew was and the accused replied that he did not have.



13. Pw3 further stated that the deceased came out of the house carrying busaa in a cup, requested him to hold the cup with the busaa and went back inside the house and requested the accused to come outside the house. He said for some time, the accused was quiet then he heard the deceased tell accused he should get out first and he will follow and as the deceased was coming out from the house, he turned back and he saw the accused with a knife which he used to stab the deceased on the back. He said the accused stabbed the deceased again on the chest when he turned back and tried to stab him the third time.
14. Pw3 said he intervened and held the accused's hand and assisted the deceased by holding his arm under his armpit. He said at that time, the accused called his wife to bring a *panga*. He said the accused's wife came with a panga and a knife and as he was trying to get to the wife, the accused bit pw3 on the right hand at the elbow. He stated that Patrick (Pw2) got hold of the accused's wife hand as she was trying to cut the deceased using the panga. She dropped the panga and the knife.
15. He further stated that at this point, the group led by the assistant chief arrived and assisted in removing the knife from the accused's hand. He said the deceased fell down and started bleeding from the mouth. The assistant chief handcuffed accused and took him to Tiloi Centre where he was locked in awaiting police to arrive. The deceased's body was removed from the scene by the police
16. Pw 4 Wilson Sumukwo confirmed that he accompanied the team to accused's house to check illicit brew and was in the group led by the deceased He stated that while at the homestead, he went to the plantation where he saw traces of alcohol leading to the deceased home and while there, he heard screams and ran back to accused's house and on arrival, he found the deceased sitting outside the accused with blood oozing from his mouth and the assistant chief had already handcuffed the accused. He said the assistant chief had 2 blood-stained knives on his hand and the accused had blood stains on his hands. He realized that the accused had stabbed the deceased. He said the accused tried to escape but was held. He later learnt that the deceased had died. He confirmed that the deceased was in uniform at the time of the incident.
17. Pw 5 Isaac Barkiso Kendele and Pw 6 Kiplagat Joseph Chepkwony a son and a brother to the deceased respectively identified the body of the deceased for postmortem examination at Kabarnet District Hospital.
18. Pw 7 one Isaac Lagat testified that he accompanied APC Jacob Nderitu and 2 other officers to rescue the deceased at Tiloi sub-location. He testified that the assistant chief had already arrested the suspect with the help of members of public and was being held in one of the rooms at the nearby center.
19. He said they arrested the accused and visited the scene. He said the deceased had blood stains in his clothes and blood oozing from his mouth. They collected the body and took it to Kabarnet Referral Hospital Mortuary and presented accused to Kabarnet Police station where they handed him over to the CID officers for further investigations.
20. Pw 8 Richard Kimutai a Government Analyst attached to Government Chemist in Kisumu testified that on 3.09.15 under the escort of Zebedia Wawire from DCI Baringo County, he received police exhibit memo form marked Baringo North CR 790/158/2015. That the accused was indicated as Erick Kipkoech Chirchir and deceased was indicated as Jeremiah Kendele Chepkwony Ref. No. A15/2015. On performing examination. He found that blood stains on Kitchen Knife marked P and the shirt marked Q and Grey Shirt and trousers were of same origin. He conducted DNA from the listed items and generated profiles which established that the DNA profiles from the knife, grey shirt and the trouser matched the DNA profile of the deceased. That he signed the report on 9.9.2015.



21. Pw 9 Corporal Zebedayo Wawira testified that on 11.08.15, he working with DCI Baringo central when he was called by the OCPD Baringo North Chemonges Ndiema to accompany him to a scene of murder at Tiloi sub-location Ossen location where the area chief Jeremiah Chepkwony was killed while on official duty raiding illicit brew. He said they visited the scene at around 8:00p.m and found the body with stab wounds and the chief was in full uniform. He said that they collected the body and took it to Kabarnet mortuary.
22. He said the arresting officer, AP Isaac Lagat and PC Joel Nderitu were handed over two knives and blood-stained and one of the knives and shirt was blood stained. He prepared exhibit memo form and took the items to Government Chemist Kisumu and results have been brought to court. He said mental assessment was done on accused on 19.8.15 and was found fit to stand trial; and postmortem report was done on 21.08.2015 by Dr. Chesimet who established that the cause of the death was stab wounds through the chest. He compiled the file and charged accused with the offence of murder. He produced all the exhibits.
23. Pw 10 Doctor Gerishon Abakelwa testified that on 21.08.2015, he performed postmortem on the body of Jeremiah Chepkwony at Baringo Referral Hospital and found that the cause of death was penetrating chest injury with other multiple stab wounds; he produced the report as exhibit.
24. Upon the closure of the prosecution case, by ruling delivered on the 28th day of March, 2023 the court found accused had a case to answer and was placed on his defence in accordance with Section 306(2) of the *criminal procedure code*.

Accused's Defence

25. The accused testified that he was at his home when the deceased entered his house without knocking while holding his walking stick. He said the deceased who was the area chief asked him where the liquor was but he replied that he did not have any liquor and at that point, the deceased used the walking stick to hit him on his shoulder twice, got hold of him and pulled him outside. He said he felt a lot of pain from the beatings and feared for his life since those who were standing outside started laughing at him. He said when he approached the door, he pulled a kitchen knife which was placed on the top of the door.
26. He further stated that outside the door, the deceased pressed him down on the ground and lay on top of him and at that point, he used the knife to stab the chief on the back on the hip just to inflict some pain so that he could leave him. He said the deceased did not leave him and it was at that time that he stabbed the deceased on the chest once and the deceased fell down and lay on top of him and died shortly thereafter. He said he had no intentions of killing the deceased.

Submission's By Victim's Advocate

27. The Advocate watching brief for the family of the deceased filed submissions dated 23rd May,2023 and argues that the issue for determination is whether the accused unlawfully caused the death of the deceased.
28. Counsel submitted that there is no doubt that the deceased lost his life as a result of the unlawful act of the accused; that sufficient evidence has been adduced to proof that the deceased was in the cause of his duties as he was in full uniform and in the company of the local security committee members and it is evident that the cause of death was multiple stab wounds inflicted by the accused; that the accused does not deny having committed the heinous act but he seem to insinuate that he was constrained to stab the deceased allegedly because he tried to force him to reveal where the illicit brew was while flogging



- him as he dragged him out of his house; that the accused came up with a second narrative that when he saw a large number of people outside his house, he panicked and attack the deceased.
29. Counsel submitted that the two justifications cannot hold because none of the prosecution witness stated that they were armed with whips or any assault weapon when they visited the accused's home. Secondly, no cross examination of the prosecution witness was led to suggest that the accused was beaten up; that indeed the accused did not sustain injuries but on the contrary, the accused attacked the deceased and bit PW3 on his right arm as confirmed by P3 issued to pw3.
 30. On the two reasons given by accused for attacking the deceased, counsel posed a question as to how did the accused's mind quickly switch from deciding to attack because he was being beaten to stabbing because he was in fear of crowd and moreso when the members of the public did not do anything that threatened the accused's life and if he felt threatened by the crowd outside, why would he attack the complainant who was nologer a threat to him.
 31. Counsel submitted that the accused deliberately and clinically executed the offence; he admitted that he has had several run ins with the local administration because of his illicit brew business. He admitted having been charged in a court of law, found guilty and fined and even though he initially denied having illicit brew on the material day, he later admitted that he had.
 32. Counsel further submitted that the accused admitted that he had tacked the assault weapon within an arm's length on the roof just above the main door and used it to attack the deceased while exiting the accused's house; stabbing the deceased when he least expected.
 33. In conclusion, counsel submitted that the accused had a grudge with the chief and the local administration officers because they kept raiding his home in search of illicit brew; that there is no likelihood that an habitual offender could be friends as alleged with the area chief who was the head of the law enforcement team within their locality. He submitted that the accused prepared 3 assault weapons. 2 knives and a *panga*/machete, all were recovered from the scene and positively identified by the witnesses and accused did not disown any of the said exhibits and urged court to find that the accused willfully and unlawfully caused the death of a public servant who was in ordinary in the course of his duty as a law enforcement agent, whose duties, among others, is to rid location of illicit brew.

Accused's Submissions

34. The accused submits that the prosecution has not proved its case beyond reasonable doubt on the charge of murder and urge this court to acquit the accused under section 215 of the *Penal Code*. The accused submit that it is not in doubt that the deceased died and that the cause of death was chest injury with stab wound and it has also been established that the accused admitted he stabbed the deceased.
35. As to whether the act which caused the death of the deceased was unlawful, the accused submits that the accused was provoked and he acted under the heat of the moment to defend himself from attack by the chief and his people who were outside the house and defence of acting under the heat of the moment or under extreme provocation is a defence recognized by the provisions of Section 207 of the *Penal Code*.
36. On the issue as to whether the accused had malice aforethought, he submits that the accused was not seized with malice aforethought to commit the offence of murder and the ingredients of the offence of murder has not been proved; that it is glaring that the accused was extremely provoked; that he felt severe pain as a result of the chief hitting him on the shoulder with his walking stick twice; that he was harassed and intimidated by the acts of the chief such as holding of his color and forcing him to



show the deceased the alcohol he denied having and forcefully pulling him out of the house and while pressing him down and lied on top of him with his hand on his neck set to strangle him.

37. Counsel further submit that accused also felt intimidated and feared for his life when the people who accompanied the chief started laughing outside his house and even though accused gave unsworn evidence and did not call a witness, he was candid, elaborate and detailed on the issue of extreme provocation which was not shaken at all by the prosecution in cross examination.

Analysis And Determination

38. I have considered evidence adduced and submissions by both parties and wish to consider whether ingredients for offence of murder were proved. Ingredients being proof of death, the cause of that death and whether the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.
39. On proof of death, Dr. Chesimet who performed postmortem on the deceased's body confirmed that the deceased died as a result of penetrating chest injury with other multiple stab wounds and produced postmortem report as exhibit in court. There is therefore no doubt that Jeremiah Kendele Chepkwony the deceased herein died.
40. On whether the deceased died as a result of unlawful act or omission by the accused, Pw1, Pw 2, Pw 3 and Pw 4 who were around at the scene narrated what happened; they all stated that it was the accused who stabbed the deceased. The accused too has not denied killing the deceased and it is therefore not in dispute that it is the accused who caused the death of the deceased by stabbing him severally with a knife.
41. On whether there was malice aforethought on the part of the accused, Section 206 of the [Penal Code](#) defines Malice aforethought as follows:

- “206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
- (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.”

42. Court of Appeal in the case of [Joseph Kimani Njau v R](#) [2014] eKLR, held as follows:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;



- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

43. The accused alleged that he acted out of self defence after provocation and as a result of being subjected to intimidation by the deceased. The defence of self-defence is provided for under Section 17 of the [Penal Code](#) which provides as follows: -

“Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”

44. The said common law principles were spelt out in the case of *Palmer v Republic* [1971] AC 814 where the court held as follows: -

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case these circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury.”

45. Further the Court of Appeal in the case of *Mokwa v Republic* [1976 – 80] 1 KLR 1337 held that: -

“Self-defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applied excessive force.”

46. In respect to provocation Section 207 of the [Penal Code](#) provides as follows:-

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the



heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”

47. Further in the case of *Mungai v Republic* [1984] KLR 85 the Court of Appeal held that: -

- “ 1. It is a doctrine recognized in East Africa that the excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter – *R v Ngolaile s/o Lenjaro* [1951] 18 EACA 164; *R v Shausbi* [1951] 18 EACA 198.
2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered – *Palmer v Reginam* [1971] 1 ALL ER 1077.

48. Evidence adduced by the prosecution witnesses show that the deceased, his deputy and members of community policing were on a raid for illicit brew and headed to accused’s house in two groups one group led by the deceased and the second group led by his deputy. The deceased’s group arrived in accused’s house earlier and he entered the house alone and was heard by the team outside asking the accused whether he had illicit.

49. In his testimony while defending himself, the accused admitted removing a knife placed on top of his door as the deceased led him out of the house. He admitted that he stabbed the deceased on the back and as he turned back, he again stabbed him on the chest; for the third time, he tried to stab the deceased but pw2 intervened and held the accused’s hand and assisted the deceased by holding him. The accused then called his wife to bring a panga. His wife took a panga to him and as the accused tried to get to his wife, he bit the hand of pw2 at the elbow. Accused’s wife tried to cut the deceased but one Pw2 held her hand; at that point the group led by the assistant chief arrived and took the knife from accused.

50. Even though the accused talked of being provoked and acted under the heat of the moment, he did not demonstrate extreme action on part of the deceased which provoked him. From evidence adduced, the accused was asked to show illicit brew which turned out from evidence that he had. This was done as part of routine work by the deceased. There is no prove of any injuries inflicted on part of the accused by the deceased or his team. The accused admitted that he had been arrested and charged for being in possession of illicit brew before. From his fierce actions, it appeared that he had prepared himself to retaliate and placed murder weapon in a strategic position for if confronted on being in possession of illicit brew. This could have been due to the fact that his house had been raided before and he continued brewing and selling illicit brew. He knew a raid would occur any time and placed offensive/murder weapon in a strategic position.

51. Even though the accused alleged that he was forced out of the house and also felt intimidated and feared for his life when the people who accompanied the chief started laughing outside the house, in my view it did not warrant the action he took; he stabbed deceased three times and even after stabbing the deceased, he called for a panga to continue assaulting the deceased; in my view, this cannot be an act of self defence; the acts stated did not warrant use of excessive repeated force on part of accused who even after stabbing the deceased twice called for a panga from his wife to continue with the assault .Apart from the mention of walking stick, there is no mention of any dangerous weapon in the hands of the deceased at the time and there is also no prove that he used force on accused; there is no evidence of any injuries inflicted on him. The deceased was not armed and the accused had no reason to repeatedly assault him.



52. In view of the above, defence of provocation and self defence cannot stand. Evidence adduced by the prosecution clearly demonstrate malice aforethought on part of the accused. The ingredients of the offence of murder have been proved beyond reasonable doubt.

53. Final Orders:

1. Accused is hereby convicted of the offence of Murder contrary to section 203 as read with section 204 of the *penal code*.
2. Right of appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 20TH DAY OF JULY 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Mr. Mwaita for accused.

Accused present.

