



**Republic v Kipcheu (Criminal Case 9 of 2019)  
[2023] KEHC 20926 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20926 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL CASE 9 OF 2019  
RB NGETICH, J  
JULY 20, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**RERIMOI KIPCHEU ALIAS ALVESTINE ..... ACCUSED**

**JUDGMENT**

1. The accused Rerimoi Kipcheu Alias Alvestine has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. Particulars are that on the 26<sup>th</sup> day of May, 2019 at Maji Moto trading centre of Mogotio sub-county within Baringo county the accused murdered Michael Chebureti Kimagal.
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 6 witnesses in support of the charge preferred against the accused.

**Prosecution Evidence**

3. Pw 1 Michael Kimeli testified that on the 26.05.19 at around 9:30 a.m as he arrived at Gateway bar at Maji moto, he heard a loud bang coming from the bar. On entering the bar, he found the deceased lying on the floor and the accused was raising a table about 2 metres from where the deceased lay while saying that he should finish the job and one Mitei (Pw2) was trying to prevent him from hitting the deceased who was on the floor.
4. Pw1 shielded the deceased on the floor and with the help of one Kiprono, he took him outside where they noted that he was weak and had eyes closed. He said a boda boda rider suggested that they take the deceased home and since the road to his home was bad, they took him to a neighbour called Joseph; at the home of the said Joseph, the deceased was able to speak and told them that the neck and the head were paining. He said he left him with his brother Simon and on the next day they brought him to hospital at Marigat.



5. He later learnt from his brother Vincent that the deceased's condition did not improve and the next day he was referred to Kabarnet Hospital and then to Moi Teaching and Referral Hospital Eldoret and on the 31.05.19, he was informed by Vincent that the deceased had passed on. He stated that he did not know whether there was dispute between the deceased and the accused at the time or before the incident. He said the accused was arrested after a long time.
6. Pw 2 James Mitei testified that on the 26.05.19 at about 9.30 p.m, he was from a burial meeting with the deceased when the deceased entered the bar and after a short while, he heard noise and screams from the bar. He went into the bar and found the accused lifting a table while saying he should finish the deceased. He said the deceased was on the floor lying on his back. He pleaded with the accused to stop the fight. The accused stopped and put the table down.
7. He further stated that the accused was taken out of the bar by his step brother Collins Jacob Kipcheu (Pw4) who was the bar operator. Pw2 followed the accused to inquire from him what the matter was. He said the accused told him that he was angry with the deceased because he had an affair with his wife when the accused was sick. Pw2 said he later went to follow up on the deceased outside the bar who could not speak. He went for his motor bike and together with Kiprono took the deceased home but they were not able to reach the deceased's home as the road was impassable. He called other friends and brothers of the deceased Joseph and Julius who came and they took the deceased to a neighbor's home namely Joseph as his home.
8. Pw2 said the next he learnt from the deceased's brother Vincent (Pw3) that the condition of the deceased had worsened and he had been taken to Marigat Hospital and later transferred to Kabarnet Hospital and to referred to Eldoret. On 31.5.19, he heard from the deceased's father that the deceased had passed on. He said he had known the deceased for about 15 years and the accused for more than 20 years as his cousin but he did not know if they had a dispute before the date of the incident.
9. Pw 3 Vincent Kimagal testified that on the 26.5.19 at about 5: 00a.m he was informed was informed that his brother Michael had been attacked and injured at Maji Moto Centre and had been taken to the home of Joseph Korir. He went there and found his brother Michael injured and was lying on the floor of house of Joseph Korir. He said he went there with his sister, father and their last-born brother. He said he was informed that Alvestine (accused) had slapped him the previous evening and had been brought from the centre to the home of Joseph Korir. He said the deceased could not talk and had pain on the neck.
10. He said they looked for a car and took him to Marigat Hospital where he was treated and transferred to Kabarnet County Hospital where a CT scan was done and deceased was referred to either Nakuru or Eldoret but they took him to Eldoret and arrived at 2:00a.m. MRI was done which showed a crack on the neck and he passed on at around 5;20 a.m. He later identified the body of the deceased for postmortem which showed a fracture of the neck and there was blood in the chest. He later recorded a statement at Mogotio police station.
11. Pw 4 Collins Kicheu testified that on the 26.05.2019 at about 9: 30p.m, they were at Gateway bar with the accused who is his step brother, James Mitei, Kiprono Songol and Michael Kimeli where he was selling alcohol and other customers. He said the deceased Michael Kimagal later joined them and on entering the bar, he quarreled with the accused. The accused slapped him on the face and he fell down. He stated that they removed him outside the bar and took him home. He said the deceased and Alvestine (accused) did not take alcohol in his bar. He said the next day he was called to the home of Kiprono Songol where he found deceased's father and others. He said the deceased could not talk and he was taken to Marigat Hospital on the 31.5.19 in the morning



12. He later learnt from James Mitei that Michael had died and neighbors had looked for accused and found him at the bush, arrested and had taken him to Mogotio police station. He reiterated that he saw accused slap the deceased in the bar. He later recorded statement at Mogotio police station.
13. Pw 5 Dr. Kibett Keitany a pathologist from Moi teaching and referral hospital Eldoret testified that on 6.6.2019, he performed postmortem examination on the body of Michael Cheburet Kimagal at Moi Teaching and Referral Hospital mortuary. He said on examination of the body, he found that there was a complete transverse fracture of the spinal bone at the neck region, associated injury of the spinal cord around the bones and there was hemorrhage into the soft tissues. That the lungs were congested and showing increased fluids. He formed an opinion that the cause of death was severe oedema due to cervical spine fracture and spinal cord injury due to blunt force trauma. He produced the copy of the report as exhibit before court.
14. Pw6 No. 240078 PC Sarah Bokosh testified that on the 31.5.2019 she was at DCI Mogotio as an investigator when at around 11: 00 a.m, she was informed that a murder suspect had been arrested at Maji Moto area by the area chief Mr. Johana and had been brought to the station where he had been re-arrested by the OCS Chief Inspector Maurice Situma in connection with a case of murder. She said the case was assigned to her to investigate. She visited the scene at Maji Moto. She restated what the witnesses stated as captured above.
15. Upon the closure of the prosecution case, the court delivered a ruling on the 18<sup>th</sup> day of July, 2022 finding that the prosecution had established a prima facie case against the accused and he was placed on his defence in accordance with Section 306(2) of the *Criminal Procedure Code*.

#### **Accused's Defence**

16. The accused gave sworn statement in his defence. He stated that he did not kill the deceased Michael Cheburet Kimagal. He said on 26.5.2019, he woke up in the morning and went to his usual work and completed the work at 2p.m then went to the river to take a bath and came back at 3:00p.m. and went Burudika bar where he found it closed and the back door was being used. He entered and found people drinking and asked for drinks.
17. He said they were about 6 people in the bar and they drunk up to 6:00 p.m. He said the deceased arrived at around 4p.m with Vincent Kimagal. The accused stated that he left the bar when it was approaching 7:00p.m and that he left the deceased with other people; and went to Gateway bar which belongs to his stepbrother, reaching there at 7:00 p.m and asked for a drink and drunk up to 9:30 p.m when the deceased arrived to the bar with his brother Vincent. He said Vincent entered and left through the back door while the deceased remained at the main bar where they were.
18. He stated that the deceased took his alcohol and drunk. He said he asked him why he had drunk his alcohol yet he had finished money and they quarreled while sitting facing each other. Accused said he slapped the deceased and he fell down. He said they were both drunk, that the deceased woke up and accused asked him to buy alcohol since he had finished his and they quarreled.
19. The accused said the deceased's brother James Mitei came, held his brother and they went out. Accused said he did not follow them; they boarded a motor cycle and left. Accused testified that he stayed there up to 10:30 p.m then left for home and the next morning he met a person called Kelenyei who informed him that Kimagal had fallen in a motor bike last evening on the road and was at Korir's place. They went to see him and found him asleep; they looked for a vehicle to take him to hospital. Accused remained at home and on 30.5.2019, the chief called him and he was taken to police station.



20. The accused reiterated that he hit the deceased with normal slap and not a heavy one. He stated that he had heard that the deceased had epilepsy. He said other than the slap, he did not hit him again and he cannot tell what broke the deceased's neck; and he had not heard that the deceased had an affair with his wife. He denied killing the deceased.

### **Submissions**

21. The prosecution opted to rely on evidence on record but the accused filed submissions dated 19<sup>th</sup> May, 2023. The accused submitted that the prosecution did not prove its case beyond reasonable doubt. That it is only Pw 4 who saw the accused slapping the deceased; the other witnesses only heard that the accused was slapped.
22. The accused further submitted that the deceased was mishandled right from the time he fell down to the time he was taken to Hospital; that most of the witnesses testified that the deceased was dragged on the floor while unconscious. The accused argues that the deceased was carried using a motor bike and he must have suffered on the bike and/or fell down and hurt himself.
23. Counsel further submit that deceased was taken to a neighbor's home unconscious instead of hospital and the delay in taking him to hospital could have caused his death since he was taken to three hospitals.
24. Further most witnesses are relatives of the deceased and were drunk at the time of the incident hence could not have correctly described what happened in the bar and have given biased evidence against the accused; and the fact that the accused was arrested after the death of the deceased show that the charge against him was an afterthought as no report was made immediately at the police station regarding the alleged assault.
25. Counsel submitted that the evidence by the deceased's brother was based on hearsay since he was left sleeping at Burudika bar by the accused and the deceased and according to the doctor's evidence, the deceased had no external injuries yet there could have been visible external injuries from the slap.
26. Counsel further submitted that the deceased regained consciousness at the neighbor's house and said that he had neck and head pains which could have been caused by the dragging from the bar; that the deceased did not mention anything to do with the altercation with the accused after he regained consciousness and or make a dying declaration regarding the accused; and no witness connected that slap to the death of the deceased and that there was no demonstration that the slap led to the death of the deceased.
27. Counsel further submitted that the deceased died 5 days after the incident and the accused has been charged with murdering the deceased on 25/5/2019 yet on that day, the deceased was alive hence the charge is defective. Further that the investigation officer only presented what other witnesses testified to and that she simply charged the accused based on witnesses' evidence alone instead of conducting a thorough investigations considering the charge is a capital offence which could lead to conviction of an innocent person.
28. Counsel further submit that that there is cogent evidence that the deceased suffered from epilepsy and might have gotten a seizure upon being slapped leading to his fall and or while riding the motor cycle hence falling down and injuring his neck.
29. Further that no reason has been given as to why the deceased was abandoned at a neighbor's house yet they themselves were able to proceed to their house; that the allegation that the road was impassable is unfounded and an afterthought.



30. The accused submit that the prosecution did not prove its case beyond reasonable doubt and that the burden of proof in criminal matters lies with the prosecution and the accused has no responsibility in assisting the prosecution to prove their case and referred to the case *Republic versus Geoffrey Oteba Otwane & 2 others* [2015] eKLR the accused persons were acquitted since the prosecution did not prove beyond reasonable doubt that the death of the deceased was caused by the slap of A1.
31. And further submit that the prosecution did not prove malice aforethought as no witness was able to connect the alleged slap with the death of the deceased; that the prosecution did not prove that accused had intentions of causing death, intention to cause grievous bodily harm and the accused knew there was a serious risk that death or grievous bodily harm would ensue from the alleged slap and committed the act deliberately and without lawful excuse; that the accused did not have a weapon and the postmortem report indicated that there were no external injuries yet prosecution witness said the deceased was slapped on the face.
32. In conclusion the accused submitted that having found that the prosecution did not prove its case beyond reasonable doubt as required and did not prove malice aforethought, the accused herein should be granted the benefit of doubt.

### **Analysis and Determination**

33. The issue for determination in this case is whether the prosecution have proved the case against the accused person beyond reasonable doubt to warrant a conviction.
34. The prosecution is required to prove beyond reasonable doubt ingredients for murder as specified under section 203 as read with section 204 of the *Penal Code* being
  - i. prove of death of the victim,
  - ii. caused unlawful act that led to his death, and
  - iii. that the murder was carried out with malice aforethought.
35. As to whether the deceased died, evidence by witnesses that the deceased died on 31/05/19 was corroborated by the testimony of Dr. Kibet Keitany pathologist who testified that he performed postmortem on the body of Michael Kimagal, at Moi Teaching and Referral Hospital Eldoret upon the body being identified to him. He confirmed that the deceased died as a result of severe oedema due to cervical spine fracture and spinal cord injury due to blunt force trauma and produced postmortem report as for exhibit in court.
36. The next issue to determine is, was the accused responsible for the deceased's death. Pw1 testified that at the time he found the deceased lying on the floor in the bar, he saw the accused holding a table high while saying he should be left to finish the job and pw2 prevented him from hitting the deceased.
37. Pw 2 testified that when he entered the bar after hearing loud bang, he found the deceased on the floor while the accused was holding a table aiming at hitting the deceased who was on the ground and saying that he should finish his job.
38. Pw 4 who was working in the bar testified that the deceased entered the bar and a quarrel ensued between him and the accused and that is when accused slapped the deceased causing him to fall down. He confirmed that the accused then lifted a table aiming to hit the deceased who was now at the ground and saying that he should finish him and it took the intervention of himself and Pw 1 to calmed him down; he said that the accused felt down and fainted on being slapped by the accused and on being interrogated, the accused said he was angry as the deceased had an affair with his wife.



39. From foregoing there is no doubt that the accused slapped the deceased and the impact made him fall down and lost consciousness. It is evident that the force used by accused to hit the deceased was excessive and it resulted in cervical spine fracture and spinal cord injury due to blunt force trauma. Though the accused talked of history of epilepsy on part of the deceased, there is no evidence to prove the allegation. There is no evidence to the effect that the deceased fell as a result of epilepsy neither is there any other cause of injury given. In his defence, the accused confirmed that he slapped the deceased. From the foregoing I find that the accused unlawfully caused the death of the deceased.
40. On whether the accused had the intent to kill with malice aforethought, section 206 of the [Penal Code](#) defines the circumstances that constitute malice aforethought as;
- “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) ...;
  - (d) ....”
41. In the case of *R vs Tubere S/O Ochen* (1945) 12 EACA 63 the Court set out the prerequisites for establishing malice aforethought thus;
- “To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.
42. And in the case of *Nzuki vs Republic* [1993] KLR 171 the Court of Appeal specified the basis upon which malice aforethought is established when it stated thus;
- “a) Intention to cause death;
  - b) Intention to cause grievous bodily harm;
  - c) Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It doesn’t matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is one in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”
43. From evidence adduced, the accused and deceased were drunk. the incident occurred in a bar. The two quarreled resulting in accused hitting the victim with a slap. There is no mention of any weapon in accused’s possession. From evidence, the accused seem angry with accused over alleged affair with his wife. In my view, the accused acted out of anger but there is no prove that he planned and had



intention to kill the deceased. The accused may have used excessive force at the spur of the moment and the injury may have been worsened by mode of transfer of body to the house deceased was taken to and later to hospital. In my view malice aforethought was not establish but evidence point at offence of manslaughter.

**Final Orders:**

1. Accused is hereby convicted to a lesser charge of manslaughter contrary to section 202 of *Penal Code* as read with section of 205 of the *Penal Code*.
2. Right of Appeal 14 days.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 20<sup>TH</sup> DAY OF JULY 2023.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Mr. Chebii for accused.

Accused present.

