



**Republic v Kipngeno (Criminal Case 14 of 2016)
[2023] KEHC 22427 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL CASE 14 OF 2016
JK SERGON, J
SEPTEMBER 21, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

HILLARY KIPNGENO ACCUSED

JUDGMENT

1. The Accused person herein was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that, on 5th May, 2016, at Kakibei Village in Soin-Sigowet Sub-County within Kericho County, murdered Gilbert Kipkorir alias Pastor.
2. The accused pleaded not guilty to the charge and the prosecution called eight (8) witnesses to prove its case.
3. Hillary Kipkirui Koech (PW1) stated that he lived in Kimalal and was a boda boda rider but used to run a hotel business. That on 5th May, 2016 at around 9.00pm in the company of the accused and PW6, they were waiting for a motor bike to take them home. That the deceased was coming from Kapkebur headed to Kiptere when the accused who was standing by the roadside started chasing after the deceased. That shortly after, they heard dogs barking followed by three screams uuii! Uuii! Uuii! from the deceased. That the accused came running back to where they were standing and told them to hurriedly clear the place as the police on patrol could easily arrest them. He testified that they asked the accused the reason why the deceased was screaming and the said accused responded that he was rescuing him from the dogs. That a motor-bike appeared and PW1 and Vincent boarded the said motor-bike and went home though he did not see if the accused was carrying anything when the said accused ran after the deceased as he was on the other side of the road neither did he see the accused carrying anything when the said accused went back to where they were standing.



4. He further stated that they first heard the barking of the dogs, followed by the screams from the deceased. That they went home and slept and went to work the following morning and while at work, the deceased brother arrived and asked them if they were aware of what had happened to the deceased. That the area chief also arrived and shortly a crowd gathered after which it was asked if anyone heard anything the night before. Consequently, he came forward and said that he had seen the accused chasing after the deceased but did not witness anything else. That he knew both the deceased and the accused before the fateful day and that the deceased used to look after the cows near his home. That the deceased did not talk to people so he did not know the relationship between the said deceased and the accused and that he did not see what happened between the deceased and the accused as the incident happened around a corner.
5. On cross-examination he confirmed that he had known the accused though not for a long time. That though he came from Kimalal while the accused came from Kakibei, the accused used to work at the hotel where he worked at. He stated that on the fateful day, the accused had visited the said hotel during the day, but they found him at the road side at night when they closed the hotel whereby they passed him and crossed to the other side of the road. That they did not speak to the accused as they were going to hand over the hotel keys then take a motor-bike and head back home. He further testified that they did not have a dispute with the accused over change during the day but he did not know whether the accused had a dispute with his colleague since he worked in the kitchen. That the road was a busy road where many people and motor cycles pass by and if someone was on the road, he would be found quickly. That the deceased passed near the place where the accused was standing but did not speak a word.
6. When referred to his statement, he stated that the deceased passed and the accused followed him. He further stated that the screams came from about 20 meters as the deceased had gone for about 20 meters then the accused followed him. That though he had indicated in his statement that the accused had gone to rescue the deceased from the dogs, the accused chased after the deceased and that is what caused the dogs to bark but they did not see what was happening. That the accused returned after the deceased had stopped screaming and the dogs had stopped barking. That upon inquiring from the accused why the dogs were barking, he told them that the dogs were attacking him and afterwards their motor cycle came from where the deceased was screaming from, that the said motor cycle had headlights and passed exactly where the deceased was said to be lying and that the rider would have told them if the deceased was on the road but he did not say that he saw anything. He reiterated that he did not see the accused attack the deceased neither did he see the accused with a weapon. On re-examination he confirmed that the road was a busy road and that the accused was on the opposite side of the road, that the deceased passed then the dogs barked and afterwards the accused followed.
7. Hillary Kipkorir Kigen (PW2) stated that he lived in Kipchenge and used to work with PW3 selling 'kaa ngumu', scones or mandazi. That on 5th May, 2016, he was heading home from Kapchenge at around 10.00pm in the company of PW3 and when they reached a church called Voice, they found a rider who told them that there was someone lying on the road, that the motor-bike was heading towards Kapchenge and they were on PW3's motor-bike heading in the opposite direction. That shortly, they found someone lying on the road, they alighted and attended to him and when they flashed their torches on him, they realized it was the deceased and he was bleeding from the mouth. That they took him to Sigowet Hospital since he was still breathing where he was attended to but while still at the hospital, the doctor informed them that the deceased had passed away. He reiterated that when they found the deceased he was still breathing but he did not respond when they called him. He also stated that he knew the accused person but he did not know his relationship with the deceased.



8. On cross-examination he reiterated that they found the deceased lying down face up and that he could easily be seen. That he did not know his home but knew him as a casual laborer. He stated that he did not know the motor-bike person who told them about the deceased and did not know who injured the deceased or when the said deceased was injured. That they found the deceased about 5 meters from Boda Hole at a corner. Upon being cross-examined, he stated that the deceased was lying in the middle of the tarmac where vehicles pass.
9. Kiprono Geoffrey (PW3) stated that he lived in Kakebei and was a casual worker. That on 5th May, 2016 at night, he was at Kapchanga center in the company of PW2 who used to assist him in his 'kaa ngumu' business. That at 10pm together with PW2 and Kiplangat, they left to go home but while on the way, they met another motor-bike rider who shouted to them that someone had been injured and was lying on the road. That they proceeded after which they saw the injured person, they stopped, flashed their torch at the person and recognized him as the deceased. That the deceased was lying face up on the tarmac, on the left side of the road and there was dried blood on his mouth though he was still breathing. That he asked PW2 and Kiplangat to assist him in putting the deceased on the motor-bike and afterwards they rushed him to Sigowet Hospital. He stated that at the Sigowet Hospital, the deceased was attended to by the doctor but shortly after the doctor told them that the deceased had passed away. That the following day they were asked to go and record their statements. He stated that there were no dogs at the place where they found the deceased.
10. On cross-examination he stated that there were three homesteads near the place where the deceased was lying and that though he knew that there were dogs in the said homestead, at the time they found the deceased there was no dog at the scene.
11. Richard Kipkemoi BII (PW4) testified that he stayed at Sondu and was a teacher at Kamolok Primary School. That on 6th May, 2016, he woke up early in the morning and went to school but at around 7:30am his brother Joshua Sang called him and informed him that the deceased was dead. That the deceased was his cousin hence after receiving the news he informed his colleagues of the same and left to go to Sigowet Sub-district hospital where he met his brother Joshua. That he saw the deceased and confirmed that indeed it was his cousin, the deceased herein. He stated that together with Joshua, they went to the scene where the deceased was found, around Kabibei primary school where they met two young men who assisted in taking the deceased to the hospital. That the said men led them to where the body was found and after assessing the scene, they found no stains of blood after which they went to Sondu Police Station to report the matter. That in the company of the police officers, they went back to Sigowet Hospital and back to the scene where the body was found. That they later went and transferred the deceased body to Kericho District Hospital mortuary. That he witnessed the post-mortem examination on 10th May, 2016 whereby his role was to identify the deceased body. He stated that the young men told them that the deceased was hit by the accused but he did not know the said accused person. He reiterated that PW2 and PW3 took him to the scene and that he was told that the two had testified in court the previous day. He further clarified that the deceased lived far from the scene but he was working for somebody near the scene and he had gone to collect money. That he got the information from people in the area that the accused attacked the deceased but he did not see the said accused kill the deceased. Upon being cross-examined he clarified that he was a teacher and not an investigator so he could not examine the crime scene.
12. On re-examination he reiterated that on 6th May, 2016 he received a call from his brother after which he went to the hospital with his brother but met the two young men at the scene.
13. Andrwe Kibet Kipkosgei (PW5) stated that he lived at Kipkeiyo village in Sigowet Division, Kericho County and was the chief of Kiptere location. That on 6th May, 2016 at around 6.00am PW3 called



him and informed him that he noticed somebody at the Basic area while passing by on his motor cycle while carrying a passenger and they decided to help the person. That he took the person to Sigowet Sub-County Hospital but the said person died while receiving treatment. He said that PW3 identified the person as the deceased herein and told him that the deceased body was at Sigowet Hospital. That he called the area village elder, and the said elder confirmed that he had gone to the scene and had heard that the deceased had been found by the road and had died at Sigowet Hospital. That he called the OCS Sondu Police Station and informed him of the incident then left for the scene. That he found 3 village elders and several villagers at the scene whereby they convened a meeting with the villagers gathered at the scene and inquired from them about what had happened. Consequently, two men at the meeting stood up and said that they saw the deceased being chased by the accused while they were standing at the Basic area. That the two passed them and after a while they heard the deceased screaming and also heard some dogs barking. He identified the two young men as PW6 and PW1 and that he requested the two to accompany him to Sondu Police Station whereby they recorded their statement.

14. He stated that the accused was not at the meeting and that the two young men who saw him said that they saw the accused enter a canter owned by Eliud Langat for whom he used to work for at the Centre, that upon calling the said Mr. Langat, he told him that he had sent the accused with the Canter to Bomet. That he accompanied the two young men to Judo where they recorded their statements whereby the OCS asked him to assist him in getting and bringing the accused to the Police Station. That the accused employer told then that he had sent the accused to take maize to Eldoret hence together with the OCS and some officers they went and waited for him at Kapsoit and managed to get him at 5pm. On cross-examination, he stated that he did not find PW3 at the scene and that the village elder showed him the scene, though the said village elder did not record a statement. That the police visited the scene of crime after they had left the said scene. That the deceased was a humble person who never use to drink and went to church but he did not know whether he had enemies. That Mr. Langat confirmed that the accused used to work for him and was at work on the day he was arrested, that he was not trying to run away. That the two men did not say that they saw the accused being assaulted rather they said that they saw the accused chasing the deceased hence he did not know who killed the deceased.
15. Vincent Cheruiyot (PW6) stated that he lived in Kiptere and worked in a hotel kitchen as a cook. That on 5th May, 2016 at 9.00pm they had closed their hotel, which used to be called Basic and were waiting for a motor bike home. That he was with PW1, and as they were waiting, the deceased was walking on the other side of the road, heading towards Kiptere. That the said deceased walked for about 20 minutes and that there were dogs barking in the direction in which he was going. That the accused stated running in the direction that the deceased was heading and they thought that he was going to rescue the deceased from the dogs but the deceased screamed thrice and shortly a motor bike appeared. He stated that before they boarded the said motor-bike, the accused ran to the place where they were and asked them to leave the place hurriedly.
16. That they boarded the motor-bike and when they came to the hotel the following day to work, the deceased brothers came to the said hotel and asked them if they were aware of what happened the previous night. That they told them that they had seen the accused chase the deceased. That they later proceeded to where a meeting was being held but the accused was not present in the said meeting. That while in the meeting, Edwin called the accused and asked him whether he had chased somebody and the accused said that he did not chase anybody but was just scaring him. That they were taken to Sondu Police Station to write statements. He further stated that the day they saw the accused chasing the deceased, he had nothing in his hands, that after chasing the deceased the accused took 5 minutes before coming back to where they were and that by the time he came back the screams had stopped.



17. On cross-examination he confirmed that the time was 9.00pm but they did not come with the accused from the hotel, they found him by the road side. That though they did not live in the same place, they were heading in the same direction that they were standing next to the hotel on the left side of the road to Kiptere while the accused was standing next to a shop on the same side of the road. He clarified that the deceased and the accused did not talk and that the dogs started barking 20 minutes after the deceased had passed them. That shortly after the accused started running, that he had the screams when the dogs were barking and he could tell that it was the deceased's voice. That though there were other people living there, no one else screamed, that it was a distance of about 30 meters though he could not see.
18. When referred to his statement he stated that he did not ask the accused about the person who was screaming but rather the accused came and asked him who was screaming. That he could not confirm that it was the deceased who was screaming. He confirmed that the deceased's brothers came to the hotel and asked them what happened after which they went to the meeting to say what they saw. That they were called to the meeting but the accused was not in the said meeting. Upon being cross-examined further, he stated that he did not see the accused attack the deceased neither did he know who beat the deceased. That while they were at the meeting the accused's employer, one Edwin called his driver, who intern gave the phone to the accused, though he did not hear their conversation.
19. He further confirmed that on 5th May, 2016, the motor-bike came from the direction of Kiptere where the deceased had run to but the motor-bike rider did not tell them that someone was lying on the road. That the deceased could not have been seen when the motor bike passed as the rider did not tell them if he saw a body. Upon being re-examined he confirmed that when they left the hotel, they were on the same side of the road with the accused but at a distance. That he did not write the statement, he narrated and the officer reduced it to writing. That he heard the screams and confirmed that it was indeed the deceased screaming. He also confirmed that at the meeting, Mr. Langat made a call to his driver and the said driver gave the accused the phone, that he was at the meeting and he heard the call being made.
20. IP Robert Kyalo Maingi No. 235886 (PW7) stated that he was currently attached at Sondu Police Station as deputy OCS Officer in charge of crime. That in the year 2016 it was reported that the deceased had been murdered by the accused. That the said case was investigated by Chief Inspector Munene Mwangi who was assisted by Corporal James Ogutu and that the said chief inspector left the National Police Service and the file was left with Corporal James Ogutu. That the matter was completed and the accused person was charged in court but Corporal James Ogutu was also transferred to Londiani Police Station. That he took over the file from the said Corporal Ogutu and after going through the file he found that the same was complete with a total of 8 witnesses whose witness statements were in the said file.
21. He stated that the first six witnesses had already testified and only the investigative officer was remaining. That upon perusing the file he found that the matter was reported on 6th May, 2016 at Sondu Police Station. That the investigative officer received information from Kipkeiyo location chief who said that there was a person found along the road on 5th May, 2016. That the said person was found by PW2 and PW3 and he was critically injured and was taken to Sigowet Sub-county Hospital at around 11.00pm, but the person died in the said hospital. That the Investigative officer then proceeded to the scene at Kakibei where he found a group of people and saw the spot where the deceased was lying. That there was nothing found at the scene hence the investigating officer went to Sigowet sub-county hospital where he found the body and that the said body had injuries on the head.



22. He testified that the investigative officer was informed that the chief had escorted two people who had crucial information after which the said investigating officer proceeded to the police station, found the two men and recorded their statements. That the two told the investigative officer that they had seen the accused chasing the deceased. That the said two men were standing on the roadside when the deceased passed them while heading home and that the accused was standing on the opposite side of the road. That after the deceased had walked for around 20 minutes, the accused followed him and after a few minutes they heard the deceased screaming. That the accused told them to leave the place immediately whereby they boarded a motor-cycle and went to their homes. That the following day they heard that the deceased had been found critically injured and had died in the hospital. That the two witnesses knew the accused person who was seen on 6th May, 2016 in the evening at Kapsoit area trying to run away.
23. That the investigating officer was assisted by the members of the public and consequently he arrested the accused person at Kapsoit and took him to the police station. That at the police station, the investigating officer took the witnesses statements and charged the accused person with murder but no exhibit was recovered from the scene. He stated that the body was taken to the mortuary and a post-mortem examination was performed at Kericho Referral Hospital on 10th May, 2016 by PW8 who filed the post-mortem report. That the opinion formed by the doctor was that the cause of death was injuries on the head. The post mortem report was marked as MFI 1. He identified the accused and stated that the investigating officer one Mr. Langat died in the year 2018.
24. Upon being cross-examined he stated that he had been in Sondu Police Station since the year 2016 and that he knew the road where the deceased was found critically injured. That though he had not been able to visit the scene, he knew Kakibei centre and that the deceased was injured at 10.00pm since that is when the body was found. Upon being referred to the statement of chief inspector Munene he stated that the deceased was seen at 9pm, that it was at night and the road was busy. He testified that he did not know where the boda boda came from though the two witnesses were waiting for the boda boda. That investigation was done at the scene but nothing was recovered and that the witnesses did not see the accused nor the deceased but only heard the deceased scream. That it was not true that the two witnesses committed the offence and blamed the accused person. That he did not know what the deceased or the accused person was doing. That the said accused did not explain in his statement what he was doing. That the witnesses reported that he was running away as they searched for him but he was not found.
25. Dr. Gilbert Kiprotich Langat (PW8) testified that he was a medical doctor based at Kericho but was away on leave. That he did bachelor of medicine and surgery and completed in the year 2013. That from the post-mortem on the deceased body performed on 10th May, 2016, that the body was in a body bag but was well preserved. That externally there was blood covering the face from nostrils and the right ear. That there was swelling on occipital region of the head and bruise on the left dorsal foot. That internally, the noted that there was fracture of the skull on the right occipital region extending to right temporal region and that there was epidural hematoma but all the other systems were okay. The opinion formed was that the deceased died due to severe head injury secondary to blunt trauma.
26. On cross-examination he confirmed that there were bruises on the left dorsal foot but he could not tell what caused the bruises, that it could be as a result of falling or being hit. He clarified that they could not establish the mechanism of injury during the post-mortem examination and that there was a possibility that he would have fallen. That the digestive system was normal so he did not carry out any test to tell whether the deceased was drunk or not. That during the preliminary examination, they checked if there was any suspicious content in the digestive system but could not tell whether the deceased had taken alcohol. He reiterated that the cause of death was severe head injury with a blunt object though



- he could not tell which weapon it was that caused the fracture. That there was a possibility of injury being sustained by falling down.
27. When the accused person was placed on his defence, he elected to give a sworn testimony with no witnesses to call. He testified that he was a cook in a school and that on 5th May, 2016 he went to work as a lorry conductor. That he went to take tea at 9:30pm in the company of PW1 and PW6, that they were standing along the road when the deceased passed them heading to Kiptere. That shortly after they heard screams and he followed the direction of the said screams and that some dogs were barking. He stated that he went but because it was dark, he feared and returned back without knowing what had happened. That shortly after, he saw a motor-bike coming to where he was going down the direction that the deceased had gone. That he walked home through the same route at around 9:10pm and the following morning Mr. Langat who was his employer called him and gave him the phone to talk to the area chief. That the said chief inquired from him whom he was with the previous night. That he went to Nakuru but on the way he was again called by the area chief who requested him to use the road leading to Kapsoit and on arrival he was arrested and accused of murdering the deceased.
 28. On cross-examination he confirmed that he knew the deceased, that he saw the said deceased pass though he did not know him personally. He stated that the deceased was walking alone and that they did not know the person who was screaming. That it was dark and they saw him running while crossing the road. That he did not reach where the noise emanated from and though the dogs were barking, he did not witness what happened. That the motor-bike stopped where they were and transported two of his colleagues and that he needed no transport as his home was only 200 meters away. He stated that PW6 was at home while Hillary Cheruiyot was serving a prison sentence. Upon being re-examined he explained that he met his two colleagues in the hotel, that he lived in Kipkeiyo village hence there was no need to use a motorbike.
 29. At the close of the case, the defence counsel put in Written Submissions but the prosecution did not put in any Written Submissions.
 30. The Defence Counsel summarized the particulars of the offence and the evidence adduced in court before relying on the provisions of section 203 and 206 of the *Penal Code* and the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR on the elements of the offence of murder.
 31. On whether the unlawful act or omission that caused the deceased death was committed by the accused person, the defence counsel submitted that none of the prosecution witnesses actually saw the accused person kill the deceased, that the evidence tendered by prosecution was wholly circumstantial hence the act could have been committed by any other person between 9.00pm and 10.00pm or the deceased might have accidentally fallen down and hurt himself at a different time. That the prosecution evidence being circumstantial did not clearly tie the accused to the act since there were loop holes in their evidence and reasonable doubt.
 32. Reliance was placed in the case of *Republic v Juma Kitua Mwambegu* [2014] eKLR and Supreme Court of Uganda in *Kalunde Semakula v Uganda* CR Appeal No. 11 of 1994 on how circumstantial evidence are dealt with to submit that the evidence before court did not place the accused person at the scene of the crime and that the prosecution evidence failed to establish unbroken chain of evidence that links the accused person to the murder of the deceased hence the prosecution evidence was fabricated to cause suspicion on the accused person as it was not even correctly known what time the deceased was attacked or whether it was an accident.
 33. The Defence Counsel also relied on the case of *Sawe v Republic* KLR 364 to submit that the only thread on which the prosecution case was fixed was suspicion but the law was very clear that suspicion, no matter how strong cannot form basis of a conviction of any offence hence the suspicion that the



accused person might have hit the deceased with a weapon when he ran to rescue him alone did not amount to cogent evidence clearly connecting the accused to the murder of the deceased.

34. On whether the unlawful killing was with malice aforethought the defence counsel relied on the provisions of section 206 of the *Penal Code*, decided cases of *Rex v Tubere s/o Ochen* [1945] 1Z EACA 63 and *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) on the definition of malice aforethought and how the same could be inferred to submit that the evidence tendered by the prosecution failed to satisfy the criteria to prove malice aforethought as the prosecution failed to prove that there was any bad blood or a reason for the accused to have attacked the deceased being that the accused was not holding any object in his hand and no weapon was recovered which showed that the accused had premeditated to attack the deceased and or planned to injure him.
35. On the issue of burden of proof, the defence counsel relied on the provisions of article 50(2) of *the Constitution* of Kenya 2010, section 107 of the *Evidence Act*, the decided cases of *Woolmington v DPP* [1935] AC0 in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 and *Pius Arap Maina V Republic* [2013] eKLR on the burden of proof in criminal charges being beyond reasonable doubt to submit that the prosecution case was purely based on suspicion that the accused person was responsible for the death of the deceased but the evidence was insufficient and inconsistent of the accused's guilt as there was nothing to link the accused person to the scene of crime thus there were many glaring gaps on the prosecution evidence that cast doubt as to whether the accused was responsible for the death of the deceased and that the gaps and the insufficient evidence ought to benefit the accused person hence the prosecution did not prove their case beyond reasonable doubt as the evidence before court was not sufficient to establish the element of murder.

The only issue for consideration is whether the prosecution proved its' case against the accused beyond reasonable doubt.

36. The offence of murder is provided for in section 203 of the *Penal Code* that provides:
- “ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
37. The Court of Appeal in *Joseph Githua Njuguna v Republic* [2016] eKLR outlined the ingredients of the offence of murder and stated that:

“ Under section 203 of the *Penal Code*, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See *Milton Kabulit & 4 others v Republic* [2015] eKLR.”

a. Death and Cause of Death

38. On this issue PW2 testified that they found the deceased lying on the road and bleeding from the mouth whereby they took him to Sigowet Hospital but he died while receiving treatment. PW3 testified that the deceased was lying face up on the tarmac on the left side of the road and there was dried blood on his mouth though he was still breathing, they rushed him to Sigowet Hospital where he died while receiving treatment. PW8 formed an opinion that the deceased died due to severe head injury secondary to blunt trauma but could not tell whether it was as a result of being hit or a fall. To that end, the



Prosecution did not prove beyond reasonable doubt that the deceased died due to an unlawful act of assault.

39. Assault is an offence provided for in the *Penal Code* and is therefore an unlawful act that is punishable in law. Indeed, the cause of death of a person is an unlawful act except in circumstance authorized in law as was held in *Republic –vs- Boniface Isawa Makioid* [2016] eKLR that referred to the case of *Gusambizi Wesonga –vs- Republic* [1948] 15 EACA 65 where it was held: “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self-defence of property.”

b. Whether the Accused Caused the Death of the Deceased

40. PW1 testified that That the deceased was coming from Kapkebur headed to Kiptere when the accused who was standing by the roadside started chasing after the deceased afterwards they heard screams from the deceased but on cross examination he testified that he did not see the accused attack the deceased neither did he see the accused with a weapon. PW4 testified that he got the information from people in the area that the accused attacked the deceased but he did not see the said accused kill the deceased. PW5 on the other hand testified on cross-examination that the two men who informed him about the incident did not say that they saw the accused being assaulted rather they said that they saw the accused chasing the deceased hence he did not know who killed the deceased.
41. PW8 testified on cross examination that the cause of death was severe head injury with a blunt object though he could not tell which weapon it was that caused the fracture and there was a possibility of the said injury being sustained by falling down. From the foregoing it is not certain who or what caused the deceased’s death hence the prosecution failed to prove beyond reasonable doubt that the accused caused the deceased’s death.

c. Whether the Accused Person had Malice Aforethought.

42. For the charge of murder to succeed, it must be proved that they acted with malice aforethought. Section 206 of the *Penal Code* provides circumstances from which malice aforethought may be inferred. They are:
- a. An intention to caused 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 cause; (c) An intention to commit a felony; (d) ...
43. In determining whether the accused persons had malice aforethought, the court must take the surrounding evidence into account as was held by the Court of Appeal in *N M W v Republic* [2018] eKLR when it relied on the case of *Bonaya Tutu Ipu & another vs. Republic* [2015] eKLR:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit V. Uganda*, Cr. App. No. 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of



the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

44. Since the prosecution failed to prove beyond reasonable doubt that the deceased death was as a result of unlawful assault and that it was actually the accused who caused the deceased death, the issue of malice aforethought does not arise.
45. I form the opinion that the prosecution witnesses’ testimony and the accused person’s defence have created reasonable doubt and displaced the prosecution’s case. The prosecution has not proved its case against the accused person beyond reasonable doubt by failing to prove that the death of the deceased was caused by the unlawful act on the part of the said accused person and I accordingly find the Accused not guilty for the offence of Murder. He is hereby acquitted.
46. The accused person namely Hillary Kipngeno should be set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 2ST DAY OF SEPTEMBER, 2023.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Prosecutor – Mr. Musyoki

Accused – Present in Person

Malel holding brief for Miss Chelimo for Accused

