



**Republic v Ngetich (Criminal Case 38 of 2016)  
[2023] KEHC 22456 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22456 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CRIMINAL CASE 38 OF 2016  
JK SERGON, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ALLAN KIPLANGAT NGETICH ..... ACCUSED**

**JUDGMENT**

1. The Accused is 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, the accused on 22nd November, 2016 at Chepsir Village, Londiani Sub-County within Kericho County, murdered Brain Kibet.
2. The Accused pleaded not guilty to the charge and the prosecution called six (6) witnesses to prove its case.
3. Joseph Kipkurui Birir (Pw. 1) the Assistant Chief of Chepsir Sub-Location recalls that on 22nd November, 2016 he was at home at around 8:00 PM when he received a call from Beatrice Langat a member of nyumba kumi, she told him that some two girls had been found at the gate of Chepsir Primary School, he told her to take the girls to Chepseon Police Station, he stated that the girls had been seen during the day with a child. He recalls that on 22nd November, 2016 he had received a report that Allan Kiplangat Ngetich, Clara Chepkemoi and Betty Chepkemoi had been walking in the field with a child but later when the girls were seen at the gate of the school, they did not have the child and did not explain why they did not have the child. He further recalls that on 23rd November, 2016 while in the company of the assistant chief they went to raid changaa brewers, after the raid he saw Allan Kiplangat Ngetich and his mother on the school field, he questioned Allan on the events of the previous night but he did not say anything about the child, he said he had not seen the child. He and the assistant chief went with Allan and his mother to Chepseon Police Station and he booked Allan in the OB and returned to the office at Chepsir. He further recalls that at about 12:00 PM on the same day, he received a call from the OCS Chepseon who stated that the child was in a toilet in Chepsir Primary



School, since his office was near the school, he proceeded to the school and waited for the Police from Chepseon, who came with Allan who showed them the toilet where he had thrown the child, they demolished the toilet and retrieved the child from the toilet, the child was placed in a land rover and taken to the mortuary. On cross examination, Pw. 1 confirmed that the crime scene was about 100 meters from his office. On reexamination, he confirmed that he did not write his witness statement, rather it was recorded by a police officer.

4. PC Titus Muriuki Rukunga (Pw.2) police force no. 86619 stated that he was a duly gazetted crime scene support services officer vide gazette notice no. 217 dated 11th October, 2023 currently working with the DCIO-Kericho. He testified that on 23rd November, 2016 he was called upon by the DCIO Londiani to accompany them to a scene of murder at Chepsir area and upon the request of the I/O in the case he took several photos and produced the said photos as exhibits, photos marked 1-4 produced as Exh.1a and photos marked 5-8 produced as Exh.1b. Pw. 2 confirmed that he has a certificate to show that he supervised the processing and printing of the said photos, the certificate was produced as Exh. 2.
5. Beatrice Chepkurui Langat (Pw. 3) stated she lives at Chepsir Center and further that she is a member of nyumba kumi at Chepsir Center. She testified that on 22nd November 2016 she received a call from Mdm. Magdalene Chepngeno Mulwet who was informed that there were two girls at the field of Chepsir Primary near the gate, she went to the gate and found the girls there and upon questioning them, they told her that they did not know where the child was. She stated that she informed the chief who told them to report the matter at Chepseon Police Station. She further testified that on 23rd November, 2016 she recorded her statement at Chepseon Police Station and she recalls that at about 5:00 PM on the same day the chief called and informed her that the child had been found.
6. On cross examination, Pw. 3 confirmed that she is a business woman but as a nyumba kumi member they work on issues of security. She confirmed that she did not go to the crime scene.
7. Dr. Kiprono Robert Koech (Pw.4) stated that he is a medical officer at Kericho Referral Hospital, he testified that the post mortem was conducted on 28th November, 2016 by his colleague Dr. Kevin Rotich who was currently in theater, the deceased had a skull fracture and hematoma, the cause of death was severe head injury by blunt object and also suffocation, he produced the post mortem report as Exh.3. Pw.4 confirmed that he knows the handwriting and signature of Dr. Rotich. On cross examination, Pw.4 confirmed that he is Dr. Kiprono and that the post mortem report was signed by C.K. Rotich Dr. He also stated that the injuries on the deceased can be caused by accident, however, he maintained his findings on suffocation, the deceased had a vest tightly tied to the neck.
8. CIP Musyimi Kello (Pw.5) police force no 236631 stated that he is currently stationed at Wajir, and he was previously stationed at DCIO - Londiani, he recalls that on 23rd November, 2016 he was the DCIO - Londiani when CIP Amos Namasa - OCS Chepseon called him and informed him that there was a report of a missing child and requested for his assistance with the investigation. He proceeded to Chepseon Police Station where he found the OCS and two ladies one was Clara Chepkemoi and the other Betty Chepkemoi, Clara was the mother of the missing child and Betty was her friend. He interviewed them on what had transpired and they informed him that they had come to Chepsir to bring the child (a boy) to the father who is the accused person herein, they met with the father and gave him the baby and that soon thereafter he disappeared with the baby and that is why they were at the police station. Consequently the accused person had been arrested and interrogated and he said that he had thrown the baby in a pit latrine. He further recalls that the accused person led them to the pit latrine where he had thrown the baby and they were able to retrieve the baby who was already dead. He called the scenes of crime personnel who took photographs of the scene and the body was taken to the mortuary. He recalled the following sequence of events; on 25th November, 2016 he took the accused person to DCIO- Londiani where he wrote a confession statement. On 26th November,



2016 he took the accused person to Kericho District Referral Hospital for a metal assessment. On 28th November, 2016 the post mortem was done on the deceased and that on 29th November, 2016 he took the accused person for age assessment. Pw.5 identified the accused person and maintained that following his investigations the accused person was the last person who had the baby furthermore, he led them to where he had thrown the baby at the pit latrine of Chepsir Primary School. On cross examination he confirmed that on 23rd November, 2016 a body was retrieved from a pit latrine, the name of the child was Brian Langat. He further confirmed that it was a pit latrine that was not very deep and further that the public assisted in retrieving the body. He conceded to the fact that he did not indicate the depth of the pit latrine.

9. Edwin Kipkemoi Mutai (Pw.6) stated that he is a farmer, he lives in Sosiot and that he knows the accused person. He recalls that on 23rd November, 2016 at about 9:00 AM he was at Chepseon Police Station when a lady arrived with the accused person, she claimed that her child was lost, they proceeded to Chepsir Primary School where they retrieved the body of the deceased (a baby boy) in a pit latrine at the school. The child had died and the accused person was suspected to have killed the child. Pw.6 stated that he did not have any disagreement with the accused. On cross examination confirmed that he is a village elder. He confirmed that the deceased child was not known to him and that he retrieved the child from the pit latrine.
10. Section 211 of the Criminal Procedure Code was complied with, the accused opted to give an unsworn statement and did not call any witnesses.
11. Allan Kiplangat Ngetich (Dw.1) in his defence stated that he befriended Clara Chepkemoi Bore - the mother of the deceased herein, their relationship deteriorated when she started behaving badly as she became friends with other ladies who would frequent bars, the accused person expressed his displeasure on several occasions to no avail and subsequently left her. He claimed that she had threatened him that if he left her she would kill the child then commit suicide. He maintained that he did not commit the offence of murdering Brian Langat rather he accused Clara Chepkemoi Bore and Betty Chepkirui for killing the deceased and framing him for the said offence as the duo was bitter with him. He contended that despite the fact that the prosecution had summoned her to testify, she did not come to court to testify as she knew that if she came to court to testify she would be arrested for the offence.
12. The parties filed submissions which I have considered.
13. The Learned Counsel Mr. Weldon Ngetich in his submissions asserted that since the accused had terminated the relationship with Clara Chepkemoi Bore- the mother of the deceased, she and her friend Betty killed and threw the deceased into a pit latrine and therefore the duo was not excluded from being the persons that killed and threw the deceased into a pit latrine then went to report the incident at Chepseon Police Station with a view of implicating the accused person.
14. The defence asserted that there was no eye witness account of the fact that the accused person herein committed the said offence and that being the case, the evidence did not irresistibly point to the culpability of the accused person to the exclusion of all others within the meaning in the case of R v Kipkering Arap Koske & Another 16 EACA 135.
15. The Learned Defence Counsel contended that the evidence adduced by the prosecution did not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the accused person on the basis of the evidence on record and cited the Court of Appeal Case of Joan Chebichii Sawe v Republic Criminal Appeal Case No. 2 of 2002.
16. The Learned Defence Counsel maintained that the prosecution had not proven its case against the accused beyond any reasonable doubt.



17. The sole issue for consideration is whether the prosecution proved its case against the accused beyond reasonable doubt.
18. The offence of murder is provided for in section 203 of the Penal Code that provides as follows; “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” In *Republic v Andrew Omwenga* [2009] eKLR the court held: “It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) The death of the deceased and the cause of the death, (b) That the accused committed the unlawful act which caused the death of the deceased and (c) That the accused had the malice aforethought.”
19. The accused in this case was charged with the offence of murder contrary to section 203 of the penal code which defines murder as the unlawful killing of a person or persons with malice aforethought.

### **Death and Cause of Death**

20. In this case the death of the deceased is not disputed; the deceased’s body was retrieved in a pit latrine at Chepsir Primary School. Furthermore, Dr. Kiprono Robert Koech (Pw.4) a medical officer at Kericho Referral Hospital, testified that the post mortem was conducted on 28th November, 2016 by his colleague Dr. Kevin Rotich. Dr. Kevin Rotich made the following observations, the deceased had a skull fracture and hematoma and that the cause of death was severe head injury by blunt object and also suffocation. Pw. 4 confirmed that he was familiar with the handwriting and signature of his colleague Dr. Kevin Rotich and he produced the post mortem report on behalf of his colleague as PExh.3. On cross examination Pw.4 stated that the injuries on the deceased can be caused by accident, however, he maintained his findings on suffocation as the deceased had a vest tightly tied to the neck.

### **Whether the accused committed the unlawful act which caused the death of the deceased**

21. In the circumstances of this case, the accused’s defence failed to offer any plausible explanation as to how the deceased might have met his death, yet he was the last person seen with the deceased, which fact was corroborated by Pw.5 the I/O in this case during examination-in-chief confirmed that following extensive investigations on the missing child he came to the conclusion that the accused person was the last person who had the baby, furthermore, the accused person led them to where he had thrown the baby at a pit latrine in Chepsir Primary School. Pw.5 the I/O in the case during examination -in-chief confirmed that on 26th November, 2016 he accompanied the accused person to record a confessional statement at DCIO-Londiani.
22. In *R v ECK, Lessit J.* (as she then was) in analysis of the doctrine of the last seen with deceased alive stated as follows;

“Regarding the doctrine of the last seen with the deceased. I will quote from the Nigeria: Court case of *Moses Jua v the state* (2007) (PELR – CA/11 42/2006. The court while considering the last seen doctrine held: - “Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.”



23. I find that the accused person's defense amounted to a mere denial. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused who unlawfully caused the deceased's death.

**Whether the Accused Person had Malice Aforethought.**

24. 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 cause 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)..."

In Republic v Tubere S/O Ochen [1945] 12 EACA 63 the court held that :-

"an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack."

Having considered the brief facts of this case, I find that the accused herein had malice aforethought, he contacted Clara Chepkemai Bore- the deceased's mother, they agreed to meet on 22nd November, 2016, and he took physical custody of the child and left with the child. The child was reported as missing at Chepseon Police Station, following investigations and interrogation of the accused person, the accused person led law enforcement officers to the scene of crime and the body of the child was retrieved from a pit latrine at Chepsir Primary School the following day.

25. I do take cognizance of the fact that there are no eye witness accounts to the events leading to the demise of the deceased, however, I find that circumstantial evidence points to the culpability of the deceased. In Sawe v Rep [2003] KLR 364, the Court of Appeal expressed itself as follows:

"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party accused."

26. Accordingly, I find that the defence put forward by the accused person namely: Allan Kiplangat Ngetich does not displace the prosecution's case. The prosecution has proved its case against the accused beyond reasonable doubt and in the premises, I find the Accused the guilty for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He is hereby convicted.

**DATED, SIGNED AND DELIVERED THIS 21ST DAY OF SEPTEMBER, 2023.**



.....  
**J.K. SERGON**  
**JUDGE**

