



**Republic v Kirui (Criminal Case 7 of 2019)
[2024] KEHC 15374 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL CASE 7 OF 2019
RL KORIR, J
NOVEMBER 20, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

BENARD KIPKEMOI KIRUI ACCUSED

JUDGMENT

The Charge

1. Benard Kipkemoi Kirui (Accused) was charged with three counts of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars were that on 21st March 2019 at Magutek Village of Lelaitich Sub-Location in Sigor Division, Chepalungu Sub-County within Bomet County, he murdered Amos Kipngetich, Vincent Kiprotich and Emmanuel Kiprono. They were his children aged 12, 8 and 5 years respectively.
2. The Accused took plea before Muya J. on 25th April 2019 and pleaded not guilty on all three counts. I conducted the trial where the Prosecution called eight (8) witnesses and the Accused gave a sworn defence and called no witnesses.

Summary of the Prosecution Case

3. The Prosecution’s case was that on the material day, the Accused strangled his three children to death. Sharon Cheron Kirui (PW1) who was the wife of the Accused and mother of the deceased testified that on 18th March 2019, the husband sent her away after a fight and she left with her small child while the three deceased remained with their father. That the Accused later followed her to her parents’ home and left the three children as he went to drink. He later went back drunk and demanded to take the three children back home with him so that they could attend school.



4. According to PW1, the Accused was talked out of that idea with the promise that the children would be back the next day since it was late. AK (PW2), who was PW1's nephew was instructed to take the three children to their father (Accused) the following day, which he did. That after PW2 delivered the three children, he returned to his home. It was the Prosecution's case that the Accused's mother, Alice Kenduiwo (PW3) found the bodies of her grandchildren the following day and raised an alarm.
5. The Prosecution stated that the bodies were taken for post mortem examinations and through Dr. Nickson Mutai (PW5), the cause of death among the three children was asphyxia secondary to strangulation. The investigating officer (PW7) visited the scene, documented it and recovered two ropes which were produced as evidence.
6. The Accused was later arrested and charged with three counts of murder.
7. At the conclusion of the Prosecution case, this court ruled on 23rd November 2023 that the Accused had a case to answer and put him on his Defence.

The Defence Case

8. The Accused (DW1) gave sworn testimony and denied committing the offence. That on the material day, he disagreed with his wife (PW1) and she left with one child and left him with the three others. DW1 stated that the next day, he went with the three children to where his wife was and he could not talk to her as he found many people in the homestead. That he left and went back home alone.
9. The Accused told the court that the children came back home the following day alone and he remained with them. That he learnt of their demise the next day. The Accused further stated that he did not sleep at home on the material night as he had gone to Sigor to look for petrol and he did not come back. He told the court that he loved his children and could not have harmed them. That his quarrels with his wife could not have caused him to harm his children.

Ingredients of the offence

10. The offence of murder contains two elements, the actus reus encapsulated in Section 203 of the Penal Code and the mens rea provided for in Section 206 of the Penal Code.
11. Section 203 of the Penal Code provides:-

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
12. Section 206 of the Penal Code provides:-

Malice aforethought shall be deemed to be established by evidence proving anyone 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.
13. For the offence to be established, the Prosecution must prove the above elements beyond reasonable doubt. The Court of Appeal in *Chiragu & another vs Republic* (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) (17 December 2021) (Judgment) held:-

“The prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the accused and that the accused had malice aforethought as he committed the said act.”

The fact of death

14. There is no doubt that the deceased Amos Kipngetich, Vincent Kiprotich and Emmanuel Kiprono died on 21st March 2019. The Prosecution presented Alice Kenduiwo (PW3) who was the Accused’s mother who testified that she found the bodies of the three children in her son’s house lying on floor, covered, unresponsive and stiff. Elijah Kipkoech Mutai (PW6) who was the Chief of Lelaitich Location and No. 76796 PC Benard Onyango Wesonga (PW7) who was the Investigating Officer stated that when they arrived at the scene, they found three dead bodies lying on the floor who were later identified as the Accused’s children. A post-mortem was conducted on the three bodies at Longisa County Hospital and the respective reports were exhibited.
15. It is my finding from the above that the fact of death of the three deceased children was established.

Cause of death

16. Evidence on the cause of death was given by Dr. Mutai Nickson Kiplangat (PW5). He stated that he performed a post-mortem examination on Amos Kipngetich and found that he had strangulation marks, neck rotating and darkening of body, blood settled on the body, fracture of the neck and blood oozed from the nostrils and spine. He concluded that the cause of death was asphyxiation due to strangulation. He produced a Post Mortem Report for Amos Kipngetich as Prosecution’s Exhibit 1.
17. PW5 testified that he also performed a post-mortem examination on Vincent Kiprotich and found that he had conjunctival hemorrhage, blood on his nostrils and strangulation marks around the neck, He further stated that the spinal cord was dislocated and concluded that the cause of death was asphyxiation due to strangulation. He produced a Post Mortem Report for Vincent Kiprotich as Prosecution’s Exhibit 2.
18. PW5 testified that he performed a post-mortem examination on Emmanuel Kiprono and found that he had strangulation marks, dry blood from his nostrils and darkening of the fingers due to lack of oxygen. He concluded that the cause of death was lack of oxygen due to strangulation. He produced a Post Mortem Report for Emmanuel Kiprono as Prosecution’s Exhibit 3.
19. When PW5 was cross examined, he stated that the three deceased children each had a fracture on their neck and they did not suffer natural deaths.
20. I have looked at the Post Mortem Reports and I have noted that the findings contained in the Post Mortem Reports mirrored the testimony of PW5. I have found no reason not to accept the professional opinion of PW5 on the cause of death. It is my finding therefore that the cause of death of the three children was asphyxiation due to strangulation, which was undoubtedly unlawful.



Whether the Accused caused the death of the three deceased

21. From the onset and before analysing the evidence, I have noted that Sharon Cherono Kirui (PW1) was the Accused's wife and testified on behalf of the Prosecution. The law on the competency of evidence between spouses was provided for under Section 127(2) of the Evidence Act which stated that: -

In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:

Provided that—

- (i) the person charged shall not be called as a witness except upon his own application;
- (ii) save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;
- (iii) the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.

22. Section 127(3) of the Evidence Act provides exceptions where the evidence of a spouse could be admitted as follows: -

In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged—

- (a) with the offence of bigamy; or
- (b) with offences under the Sexual Offences Act (No. 3 of 2006);
- (c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise. (Emphasis mine)

23. The law above is self-explanatory. In the present case, it was not disputed that the deceased were children to the Accused and Sharon (PW1). She fell under the exceptions provided for in Section 127(3) of the Evidence Act above and in the circumstances, it is my finding that PW1's testimony was admissible in these proceedings.

24. Sharon Cherono Kirui (PW1) testified that she had run away with her youngest child after being assaulted by her husband (Accused). That the Accused then brought the other three children, left them with her and went to drink. PW1 stated that the Accused later came back for the children and was advised by her brother in whose home she had sought refuge against taking them as it was late. That her brother's son, Amos Kiprono (PW3) took the three children to their father (the Accused) the following day.

25. Amos Kiprono (PW2) testified that he took the three children to the Accused. That the Accused received them and even asked him to prepare a meal which they all ate. That he escorted him up to the river where he gave him money to buy soap and oil for PW1 and her baby. When PW2 was cross examined, he stated that they left their home at 8 a.m. and found the Accused in his home at around midday in a happy mood.

26. Alice Kenduiwo (PW3) testified that she found the three children dead on the floor in the morning. When she was cross examined, she stated that when she found them, the Accused was not there. The Area Chief, Elijah Kipkoech Mutai (PW6) responded to the distress call in the home and visited the



- scene. He found the dead bodies of the children and two ropes. He handed over the ropes to the Investigating Officer (PW7) who later produced them as Prosecution's Exhibits 4a and 4b.
27. In his sworn defence, the Accused (DW1) denied committing the offence and stated that he left the children at home on the material day at around 6 pm and went to Sigor to look for petrol. That he only came to learn of their deaths the following day. However, when he was cross examined, he admitted that he was the last person who was seen with the children and that it was Amos (PW2) who brought them. He stated that he was not remorseful as he did not commit the offence. He said that he loved his children and could not have killed them.
 28. Upon further cross examination, DW1 stated that the medical doctor (PW5) made up evidence. In re-examination, he stated that Amos (PW2) only brought the children and did not leave with them.
 29. Regarding the identity of the Accused, the Prosecution submitted that the Accused was the father of the deceased children. That the totality of the evidence was consistent and overwhelming and there was no break in the chain of events which led to the only conclusion that the Accused and no one else killed his children.
 30. The Accused submitted that the Investigating Officer fell short in his investigations as he failed to conduct proper investigations to ascertain who exactly committed the murder of the children. That he also failed to dust the ropes for fingerprints. The Accused further submitted that it was clear none of the Prosecution's witnesses witnessed the commission of the offence.
 31. Having gone through the testimonies, it is clear to this court that no one witnessed the commission of the offence and thus the evidence that the Prosecution presented before the court was circumstantial.
 32. The Court of Appeal in *Ahamad Abolfathi Mohammed & another v Republic* (2018) eKLR, held:-

“.....It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial....”
 33. Similarly in *Mwita v Republic* (Criminal Case 10 of 2020) [2022] KEHC 3265 (KLR) (19 May 2022) (Judgment), Wendoh J. held:-

“.....This is what the court stated in *Neema Mwandoro Ndunya vs. Republic* CRA 466 of 2007 where the court of Appeal cited with approval the case of *R vs. Taylor Weaver and Donovan* (1928) 21 CRC 20 the court said:-
“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”
 34. The distinction between direct and circumstantial evidence is clear. Circumstantial entails that evidence which is deduced or inferred from a set of facts. It is openly distinct from direct evidence in that, whereas direct evidence draws from credible testimonies which result in creating some sort of belief, circumstantial evidence on the other hand entails a process of inference and deduction. This



was the principle outlined in William Willis, 'An Essay on the Principles of Circumstantial Evidence', (Attorney at Law, London 1838), 171 Philadelphia, T. & J.W. Johnson, 1853) where it was stated thus: -

“Every other possible supposition by which the facts may be explained consistently with the hypothesis of innocence must be rigorously examined and successively eliminated; and only when no other supposition will reasonably account for all the conditions of the case, can the conclusion of guilt be legitimately adopted.”

35. In *R vs. Kipkering Arap Koske & Another* (1949) 16 EACA 135, it was held that: -

“In order to justify circumstantial evidence, the inference of guilt, and 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.”

36. In this case and from the evidence already set out above, the three deceased children were escorted to their father (Accused) by PW2 who after sharing a meal with them, left them and went back home. The children were subsequently found dead in the morning by their grandmother (PW3) and the Accused was nowhere to be found.

37. No. 76796 PC Bernard Onyango Wesonga, the Investigating Officer testified that when he visited the Accused's house, he found three dead bodies lying on the floor. The three dead children were Amos Kipnetich, Vincent Kiprotich and Amos Kiprono and the three children were the Accused's children.

38. It was clear to this court therefore that Amos Kiprono (PW2) left the three children with their father, the Accused. They were in good condition and there was no evidence to suggest that they were not well.

39. Jeremy Kipnetich Kirui (PW4) who was the Accused's brother stated that he met the Accused the following day at a petrol station. That soon after they had parted ways, he was informed of what had transpired and he set out to look for the Accused. PW4 stated that when he went back to the petrol station, he did not find the Accused and he set about finding him. That he was told that he had been spotted diverting into the villages and they later found him aboard a boda boda and he appeared tense. PW4's testimony remained uncontroverted upon cross examination. This evidence above depicted the Accused as someone who was on the run and it spoke more to his guilty conscience than innocence.

40. The Appellant admitted he was the last person seen with his children and thus he had a duty to explain the circumstances under which the deceased children met their deaths. Section 111 (1) of the Evidence Act provides:-

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.



41. The Court of Appeal in *Musimbi vs Republic* (Criminal Appeal 107 of 2020) [2023] KECA 287 (KLR) (17 March 2023) (Judgment) held:-

“Regarding the “last seen with” doctrine, its applicability has been explained by various courts. For instance, in the Nigerian case of *Moses Jua vs The State* (2007) LPELR-CA/IL/42/2006 it was held as follows:

“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 the inference that the accused killed the deceased.”

In another Nigerian case of *Stephen Haruna v The Attorney-General of The Federation* (2010) 1 iLAW/CA/A/86/C/2009, the Court in considering the same doctrine opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

In the case of *Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh*, JT 2006 (4) SC 16 the Court held:

“That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

42. As earlier stated, the Accused admitted to being the last person seen with his children. In his defence, he stated that he left the children home alone and went to Sigor to look for fuel and did not come back home.
43. I have paid due regard to the Accused’s defence. It was a mere denial and was very weak and amounted to a poor attempt at an alibi. He failed to produce any witness who could corroborate his defence and place him away from the scene of crime. He failed to state why he was on the run before his arrest. On the other hand, he was placed on the scene of crime by PW2 and by his own admission, the Accused escorted PW3 away after they had eaten and he remained alone with his children on the material night. According to the evidence tendered there was no other person in the Accused’s house other than himself and his three children.
44. The ropes (Prosecution’s Exhibits 4a and 4b) were recovered in his house and it was reasonable to state that they were used in strangling the three children. This was consistent with the findings of the post mortem examinations and the resultant Post Mortem Reports. (Prosecution Exhibits 1, 2 and 3).



45. I have tested the circumstantial evidence above against any other possibility as required and alongside the principles stated in *Joan Chebichii Sawe vs Republic (2003) eKLR* where the Court of Appeal held:-

“.....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 on. 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 is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

46. I have found no evidence or possibility that anyone else accessed the Accused’s children.

47. From the above, it is my finding that the circumstantial evidence against the Accused is overwhelming and cogent. It points unerringly to the guilt of the Accused and no one else. The circumstantial evidence in totality leaves no doubt that the Accused and no other, strangled his children thereby causing their deaths. He snuffed their innocent lives out in the dead of the night and at a place they called home. The multiple deaths were clearly unlawful.

Whether the Accused acted with malice aforethought.

48. I have already set out the circumstances under which malice aforethought may be inferred under section 206 of the Penal Code.

49. The Court of Appeal in *Roba Galma Wario vs Republic (2015) eKLR* held:-

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

50. Similarly, the Court of Appeal in *Waweru vs Republic (Criminal Appeal 98 of 2020) [2023] KECA 622 (KLR) (26 May 2023) (Judgment)* held:-

“In the case of *Nzuki v Republic [1993] eKLR*, this court defined malice aforethought as:

“...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of *Regina v Vickers, [1957] 2 QB 664* at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of *Conliffe v Goodman, [1950] 2 KB 237.*”



In the same case, the court went on to state:

“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 accused:

- 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 these acts, and commits those acts deliberately and without lawful excuse 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 and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

Without an intention of one of these three types, the mere fact that the accused’s conduct is done 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 the crime of murder...” (Emphasis mine)

51. The Prosecution submitted that the Accused had the intention of killing his children. That he was an abusive man who had no qualms about beating his wife, and was a substance abuser. The Prosecution further submitted that when the Accused took his children he transferred his negative energy on them and killed them.
52. The Prosecution’s submission that the fact that the Accused strangled and broke his children’s necks was clear evidence that he had the intention to kill them.
53. The Accused submitted that the Prosecution failed to prove malice aforethought as none of the Prosecution witnesses testified as to any existing disagreements or confrontation between him and his deceased children and that any confrontation between him and his wife did not amount to malice.
54. In analyzing the evidence on whether or not the Accused had intention to kill his children, I have considered his mental state at the time he committed the offence. Janet Ngeny (PW8) a mental health nurse and a registered psychiatric nurse at Longisa Hospital testified that she examined the Accused on 26th March 2019 and found that he was calm, had no delusion and was fit to stand trial. It was therefore safe for the court to conclude that he was of sound mind when he committed the offence.
55. I have looked at the evidence as a whole and the circumstances under which the deceased children met their death. The cause of death as I earlier found was asphyxia due to strangulation. Dr. Nickson Mutai (PW5) stated that all three children had strangulation marks on their necks and all of them suffered fractured necks.
56. In *Bonaya Tutu Ipu & another vs Republic* (2015) eKLR, the Court of Appeal held:-

“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 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. Earlier in *Rex v Tubere s/o Ochen* [1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”

57. The nature and severity of the injuries inflicted on his children indicated a use of force by the Accused who the ropes and possibly his hands. In my view, this clearly pointed to an intent to kill by the Accused. By choosing to strangle his children with that much force which led to fractured necks, he must have known that his actions would lead to their death. He proceeded and completed his mission. It is my finding therefore that the Accused possessed malice aforethought when he killed his children.
58. It was clear from the evidence that the Accused was given to violence. He visited violence on his wife regularly and when she went away to her maiden home and was outside his reach, he recklessly transferred the anger and malice to the hapless and helpless children.
59. As I pen off this Judgement, I must, for the umpteenth time, sound the alarm over the rising cases of extreme violence and murders in the home. All State and non-state actors including religious, organizations and leaders and all men and women of good conscience must unite and say No to this barbaric and senseless loss of life. Society must be equipped to recognize the early warning signs and put in place preventive measures.
60. In the final analysis, it is my finding that the Prosecution proved the three (3) counts of murder against the Accused to the required legal standard which is beyond reasonable doubt. The Accused person is accordingly convicted of the murder of Amos Kipngetich (count 1), Vincent Kiprotich (count 2) and Emmanuel Kiprono (count 3).

Orders accordingly

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 20TH DAY OF NOVEMBER, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of the Accused, Mr. Mugumya holding brief for Ms. Chemutai for the Accused, Mr. Njeru for the Respondent/State and Siele (Court Assistant).

