



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NUMBER 3 OF 2019**

**BETWEEN**

**REPUBLIC.....PROSECUTION**

**AND**

**ROBERT PLIMO PETOT .....ACCUSED**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. Robert Plimo Petot was arraigned before this court on 5<sup>th</sup> February 2019 on allegations that he had committed the offence of murder ***contrary to section 203 as read with section 204 of the Penal Code***. According to the information dated 4<sup>th</sup> February 2019 and filed in court on 5<sup>th</sup> February 2019, it is alleged that on 15<sup>th</sup> day of January 2019 at Kagagh Village in West Pokot Sub-County, West Pokot County, the accused person murdered GEORGE KIPTUM.

2. The accused took plea on 13<sup>th</sup> March 2019 and denied committing the offence. The delay in taking the plea was occasioned by the fact that the trial court was on leave between the time the accused first appeared in court and the date of the plea. The accused has been in custody since then because the pre-bail report presented to the court on 27<sup>th</sup> March clearly indicated that the accused person was a flight risk if he were to be released on bond.

**The Prosecution Case**

3. The prosecution called 11 witnesses in support of its case against the accused. PW1 was Charles Kisang Chepkut, a father to the deceased George Kiptum Kisang. He testified that the deceased who was a bodaboda rider along the Kaibos road, left for his business at around 3.00pm on 15<sup>th</sup> January 2019. At about 6.45pm, PW1 (Charles) telephoned the deceased to return home at Tuyeibei Village Siyoi Ward so that he (deceased) could take him to see one of the livestock officers in the area. The deceased who was at Makutano Township assured his father that he would be heading home soon. When Charles rang the deceased some 30 minutes later, the deceased told him he had gone very far with a client and advised Charles to look for another motor bike, and Charles did exactly that and left for his meeting which ended at 10.00pm.

4. When Charles rang the deceased at around 10.00pm the deceased was unavailable on his phone. He was also not at home. Charles' wife also informed him that she had tried to get in touch with the deceased, but he was unavailable. When Charles got home at around 1.00am, the deceased, who usually came home early unless he was watching a football match at Kaibos, the deceased had not arrived home.

5. Charles slept until the following morning when he contacted his other son who stays at Makutano to find out if he had seen the deceased, but the other son told him he had not seen his brother. It was then that Charles decided to make a report at Kapenguria Police Station between 8.30 – 9.00am. After making the report, Charles was asked to go to Makutano by another of his sons, Lang'at Erastus, to follow up a story that a man's body had been seen in the vicinity.

6. On his way to Makutano, Charles was informed by the person ferrying him on the motor bike that the body which had been found by police had been escorted to the mortuary at Kapenguria County Referral Hospital. Charles went straight to the mortuary and when he saw the body, he confirmed it was that of the deceased. The body had a big cut wound on the nape of the neck. The cut wound had penetrated the skull.

7. From the mortuary, Charles returned to Kapenguria Police Station and made a second report of what had befallen the deceased.
8. In his further testimony Charles told the court that he had bought a motor cycle for the deceased being registration number 3698 make HAOJUE. He produced the purchase receipts for the same dated 10<sup>th</sup> December 2018 – PMFI 1(b). Charles also identified the motor cycle – PMFI – 1(a). Later he went to Uganda, in an effort to trace the deceased’s motor bike and though he did not find it, PMFI – 1(a) was eventually recovered by the police and brought to Kenya.
9. On 21<sup>st</sup> January 2019, Charles attended the post-mortem examination after identifying the deceased’s body to the doctor. Charles also testified that on the 25<sup>th</sup> January 2019, the accused herein was almost lynched by boda boda riders, but he intervened and saved the situation.
10. During cross examination, Charles told the court that the accused and the deceased were friends and used to play football together until the deceased died. He also stated that his family and that of the accused live in neighbouring villages of Kaibos and Kaisakat respectively.
11. Number 70295 Police Constable Laban Kiplagat who testified as PW10 told the court that on 16<sup>th</sup> January 2019, he was instructed by the Deputy OCS, Kapenguria Police Station Inspector Vivian Musau to accompany her to Chepkichir sub-location where the body of an unidentified African had been found. On arrival at the scene, they found the body which was lying face down with a visible injury at the back of the head. According to PC Kiplagat, the villagers could not identify the body.
12. PC Kiplagat together with his team searched the vicinity of the scene for possible leads and not far from where the body lay, they found a blood-stained jembe which they suspected was the murder weapon. He also testified that he saw motor cycle tyre marks at the scene. After interrogating members of the public at the scene, the body was removed to Kapenguria County Referral Hospital to await postmortem examination. He later recorded his statement and in the course of some days, the investigating officer number 80205 Police Constable Evans Agumba Waguda (PC Waguda) who testified as PW11 informed him that a suspect had been charged.
13. During cross examination PC Kiplagat told the court that the body of the deceased was lying some 50 metres from the road while the motor cycle tyre marks were about 30 metres from the body. He further stated that there was no grass at the scene and also that it had not rained the previous day. PC Kiplagat further told the court that the body was dressed in 2 jackets. The outer one was red with some black while the inner one was dark grey. The trouser was blue jeans. He identified the jembe – PMFI (9).
14. Dr. Jotham Mukhola, PW9 (Dr. Mukhola) carried out the post mortem examination on the body of the deceased. At the material time Dr. Mukhola was the Medical Superintendent at the Kapenguria County Referral hospital. He testified that he carried out the autopsy on the deceased’s body on 21<sup>st</sup> January 2019. The body had visible injuries on the back of the head. The deceased’s clothing was mud-soiled and also soiled in blood. It was the body of a healthy 25 year old youth measuring 6 feet long. The body was in the early stages of decomposition.
15. According to Dr. Mukhola’s further testimony in examination in chief, the body had multiple facial bruises and a laceration on the occipital (back) region of the head, measuring about 4cm in diameter, with a depressed skull fracture at the same site.
16. Internally there was epidural haematoma on the outer layer of the brain about 4cm in diameter on the occipital region. There was also intracranial haemorrhage with brain oedema on the left side. On the spinal cord, there was tonsillar herniation.
17. In Dr. Mukhola’s opinion the cause of death was increased intracranial pressure due to acute and severe intracranial haemorrhage due to blunt force trauma in the occipital region of the head. The post mortem examination report was produced as Pexhibit 8. As Dr. Mukhola concluded his testimony, he told the court that when there is increased pressure in the brain, the brain cannot function properly, making breathing difficult and leading to imminent death within 5-10 minutes.
18. During cross examination, Dr. Mukhola told the court that the injuries found on the deceased’s body were consistent with use of any blunt object - a jembe being one such object. He also testified that decomposition of a body would have no effect on the findings he made in this case.
19. Aldan Korir Lochurangule testified as PW2 and told the court of his arrest on 19<sup>th</sup> January 2019 in connection with his national identity card number 3520002 which had been found at the scene of crime. He said he had not reported the loss of his ID to the authorities. He testified that sometime after his identity card got lost, the accused herein telephoned him and told him he (accused) had it, and that he could only release the same to him if he (Aldan) gave him some money. After he found the money, Aldan said he went to accused’s home twice but did not find him. From the evidence, Aldan and the accused are neighbours.
20. Aldan also testified that after he explained to the police that his national identity card had got lost in April 2018 and how he had not retrieved it from the accused who had earlier told him he had it, he was released from police custody. Aldan confirmed to the court that he had no grudge with the deceased.
21. During his evidence in cross examination, Aldan testified that he saw no need to report the loss of his identity card since the accused had told him he had it and only needed some money to release it to him. He also testified that he and the accused had been in school together.
22. Psitich Moler (Joseph) testified as PW3. He told the court that he was a resident of Chepkichir sub-location within Kapenguria Ward and trades in chickens. He recollected that on 15<sup>th</sup> January 2019 at about 9.00pm, he was going home from Chepkichir Centre within Kagagh Village when he met 2 nyumba kumi officials who were interrogating a stranger and asking for his name. Joseph advised the nyumba kumi officials to ask the stranger to produce his identity card. The stranger produced an identity card bearing the name Aldan Korir of Kaisakat Location. Joseph also testified that at the time the stranger had a HAOJOE motor bike, red in colour registration number KMEP 817Z.

23. Joseph also testified that though the night was dark one of the nyumba kumi officials by the name Stephen (not called as a witness) used his “**mulika mwizi**” phone and he (Joseph) was able to clearly see the stranger, the details of the motor bike and the details on the identity card of the stranger. Joseph was shown PMFI – 1(a) and confirmed that it was the same motorbike which he had seen at around 9.00pm on the 15<sup>th</sup> January 2019. On the morning of 16<sup>th</sup> January 2019, Joseph learnt that someone had been killed in the area, about 200 metres from where he met the nyumba kumi officials interrogating the stranger. Joseph was able to identify the accused herein as the man he found being interrogated by the nyumba kumi officials. No substantive issue arose during cross examination.

24. PW4 was Abraham Kiopo of Chepkichir village. He is a shopkeeper in his locality. He stated that on 15<sup>th</sup> January 2019 at about 8.30pm, he noticed two people walk past his shop. He did not recognize them. Shortly afterwards, the two people walked back and stood on the side of the road talking. He went to where they were and sought to know from them who they were and what they were looking for. He was informed that the two had come to look for a girl though they did not give him the name of the girl. When he asked for their names, one of them identified himself as George, but the second man did not give his name and urged George that they should move on. The two men left and PW4 (Abraham) also left. Abraham also closed shop and went home.

25. Abraham also testified that shortly after he got home, he heard two screams. He rushed to the road to see what was happening. On the road, Abraham met with another man who was a stranger. As he greeted this stranger one of the two men whom he had earlier seen walking past his shop appeared on the scene. Abraham made enquiries regarding the whereabouts of the second of the two men he had seen earlier together, but he was informed that the other man had run off with the girl the two had come looking for.

26. As Abraham was still interrogating these strangers, Joseph came by and asked the stranger to produce his identity card. The stranger produced an identity card bearing the name Aldan Korir. After identifying himself, Aldan Korir boarded a motor bike which was by the side of the road and took off. Abraham was not able to get the registration details of the motor bike.

27. On the morning of 16<sup>th</sup> January 2019, Abraham was informed of the presence of a body in the neighbourhood. He stated that when he eventually saw the body, he recognized it as being for one of the two men whom he had seen pass by his shop the previous night. Abraham also identified the accused as one of the two men who had walked by his shop the previous night and confirmed to the court that he talked to him twice on that fateful night. Abraham also identified PMFI – 1(a) as the motor bike he had seen with the accused on the fateful night. The accused with on the material night. Abraham also testified during cross examination that it was the accused who had refused to say his name after George had given his name to him (Abraham).

28. Regarding the accused’s identity card, Abraham testified that when they asked him for the same, the accused removed the card from his coat and showed it, to them.

29. Nicholas Kpar (Nicholas) testified as PW5. He told the court that he was employed as a teacher by the Parents Association at Nagwoilap Primary School. It was his testimony that on 30<sup>th</sup> January 2019 at around 11.00am, some 3 CID officers arrived at his school and asked him about a mobile phone INFINIX HOT 6, red in colour and asked whether he could identify it if he saw it. Nicholas further testified that before 30<sup>th</sup> January 2019, he had seen the phone in the staffroom with his colleague, Robert Petot with a phone which fitted that description. He also testified that as the accused proceeded to class, he gave him the password for a beautiful tune that was playing on the phone and he managed to transfer the tune to his own phone. He also used the phone to take himself a selfie before leaving the phone on the table as he also went to class. Nicholas was able to identify the Infinix Hot 6 telephone handset – PMFI -2 which he said belonged to the accused. He confirmed he had known the accused for about 5 months.

30. Peter Lomwatum, a teacher at Nagwoilap Primary School testified as PW6(Peter). He told the court that the accused was also a teacher at the same school. He recollected how on a date he could not remember he sent the accused to Uganda with 20,000 Ugandan shillings for conversion into Kenya Shillings. Though the accused left for Uganda and promised to return in the evening, he had not returned by evening, but the two met the following day. The accused did not give Peter his Kshs.600/- or 20,000 Ugandan shillings. On 21<sup>st</sup> January 2019, the accused was still not at his house at the school and Peter was informed by accused’s wife that she did not know where the accused was.

31. Peter stated further that he sought the accused on phone and he was assured by accused that he (accused) would avail the money in a week’s time but when the accused returned, he had a brand new motorcycle. Peter also testified that on the day the accused came back with a new motor cycle, he also brought with him a new phone handset similar to PMFI-2. And because the accused had not given him his money, Peter decided to keep the phone as a way of forcing the accused to pay up. That same evening the accused rang Peter and asked him why he (Peter) had taken his phone. The accused took his phone the next day. On the following Wednesday, the accused paid Peter his Kshs.660/- and also told him that he had sold his motorbike.

32. It was also Peter’s evidence that many days after the accused had paid him his money, he learnt of the accused’s arrest. On 30<sup>th</sup> January 2019, police again went to Nagwoilap Primary School and searched the accused’s house from which they recovered the number plate of a motorcycle, one side mirror for a motorbike, and a knife. The police also recovered a blood stained pair of blue jeans. In all, the items recovered from the accused’s house were –

- a. Motorbike number plate – KMEP 817Z – PMFI -3
- b. Penknife with yellow/black/stripes – PMFI – 5
- c. ID holder with Robert’s original ID and 2 copies – PMFI - 6

33. The blood stained blue pair of jeans was not shown to Peter in court. Peter also confirmed during cross examination that the accused’s wife was not in the house when the police conducted the search.

34. The next witness was Kennedy Matiba Daniel, PW7, who had been employed by the accused as a motorbike rider (bodaboda) in this case for about one year. PW7 (Kennedy) testified that on 16<sup>th</sup> January 2019 at about 2.00pm, the motor bike – PMFI-7 landed in Alale from Makutano but without its number plate. That the accused told him that though the motorbike was new, he wanted to sell it because it had a cracked engine. A few days later, Kennedy told the court, he accompanied the accused to Uganda to a place called LOPO to look for a customer for PMFI – 7. This was to be done through a broker by the name SIKAMOE JOHN (not called as a witness). Kennedy also stated that on the material day, he and the accused took two motor bikes to Uganda for sale through Sikamoe. Apparently there were no buyers for the motorbikes on that day. Having failed to find buyers for the two motor bikes on that day, Kennedy and the accused returned to Alale. On the following Monday the accused went to teach as Kennedy did business with PMFI – 7.

35. Kennedy stated further that on a day he could not remember the accused accompanied Sikamoe to Moroto, ostensibly for the purpose of selling the PMFI – 7, and thereafter on 23<sup>rd</sup> January 2019, the accused asked Kennedy to accompany him to Makutano for the purpose of buying a new motorbike. They rose early, around 4.00am on the following morning and went to the house of the accused's sister who lives at Chepareria where they took breakfast before leaving for Ortum and after what appeared like consultations between the accused and his sister, Kennedy and the accused proceeded to Chesta College in Sigor where the accused met a lady friend before returning to Chepareria. At Chepareria, the accused person joined his wife and young child.

36. Early the following morning the accused person instructed Kennedy to ride the motor bike to Makutano while he himself travelled by car, accompanied by his wife and child up to ELAM supermarket. While the accused's wife and child remained at the emporium, the accused and Kennedy went to repair the motorbike at Munene's (Munene was not called as a witness) near Makutano Pharmacy before going to Kapenguria Supermarket where they found the accused's wife.

37. Kennedy stated that before the accused took his wife back home, the accused handed him a red telephone handset – INFINIX HOT 6 – PMFI-1. For two days, the accused person remained at large. Kennedy decided to return to Alale and since he had no money on him he pledged PMFI-1 to NAKAYAN ABDI JILLO – PW8 in lieu of fare from Makutano to Alale. Kennedy was to get the phone back from PW8(Abdi) once he paid the fare of Kshs.700/-. On that same day, which Kennedy said was a Sunday, Kennedy rang the accused who sent him Kshs.330/- through Mpesa. The accused told Kennedy he was at the hospital after being beaten by his wife's people. On arrival at Alale, Kennedy learnt that the accused had killed someone. He was later interrogated by police before recording his statement.

38. During his brief evidence in cross-examination, Kennedy told the court that he did not accompany the accused to Moroto with Sikamoe to sell the motorbike. Kennedy could also not recollect the full registration number of PMFI – 7.

39. Nakayan Abdi Jilo (Abdi) was PW8, a matatu operator on the Kapenguria-Alale route. He told the court that on 27<sup>th</sup> January 2019, he ferried Kennedy from Kapenguria to Alale and because Kennedy had no money, he (Kennedy) gave him a red telephone handset - an INFINIX - which had a slight crack on the left hand side. Abdi identified the phone – PMFI – 2. He stated that Kennedy asked him to keep the phone until teacher would come and pay him the fare, but three days later, Abdi was arrested and taken to Kapenguria Police Station. He was interrogated twice by police as investigations into this matter were going on. In cross-examination, Abdi stated that he had the phone in his possession for three days before he was arrested. He could not say whose phone it was, except that the police told him the owner of the phone had died.

40. The last witness for the prosecution was number 80205 Pc Evans Agumba Waguda who testified as PW11. He was the investigating officer. PC Waguda recalled that on 16<sup>th</sup> January 2019, the DCI – West Pokot mandated him to investigate this case in which the victim was a bodaboda rider within Makutano area. PC Waguda testified that during the incident, the deceased lost his motor bike registration number KMED 817Z make HAOJUE as well as his INFINIX PHONE 16 IMEI NO. 352854105823888/352854105823896. After establishing the loss of these items PC Waguda asked for and obtained the receipts of the mobile phone from Charles, father of deceased. Charles also provided the box for the phone.

41. PC Waguda testified that he visited the scene, at which he drew the sketch plan and also interviewed potential witnesses and in particular he obtained some leads from Joseph who confirmed to him that on the fateful night, the accused was seen in the vicinity of the murder. PC Waguda was also able to trace Aldan to his home, arrested him and locked him up for interrogation. During interrogation of Aldan, PC Waguda confirmed that Aldan had lost his national identity card which was allegedly found in possession of accused on the night the deceased died. He also established why Aldan's national identity card was found in the possession of accused, namely that accused had demanded a payment before he could release the identity card after accused who had found the card said he could not release it without being paid.

42. PC Waguda further stated that Aldan gave him accused's phone number as 0701620418 while the deceased's phone number was 0707439053 as supplied to him by Charles. He also testified that on the fateful day, both accused and his girlfriend one Velma Chepkiyech (not called as a witness) but of phone number 0714200473 communicated with the deceased as per Safaricom data records. According to PC Waguda's evidence, the accused had used the accused's line to send a text message to Velma on 16<sup>th</sup> January 2019. That Velma also confirmed to him that on 16<sup>th</sup> January 2019, the accused had a brand new motorbike make HAOJUE as well as a brand new INFINIX Phone, both items being red in colour.

43. According to PC Waguda, through the leads gathered from Velma he was able to trace the accused to Nokoilan Secondary School where he taught as an untrained teacher. From the accused's house at the school PC Waguda recovered a number of items:-

- a. Pair of blue/brown canvas shoes – Pexhibit 10
- b. Side mirror of a motorcycle – Pexhibit 4
- c. A plate written HAOJUE – Pexhibit 3

d. 3 mobile phones

i. ITEL red in colour – Pexhibit 11(a)

ii. Tecno 343 – Pexhibit 11(b)

iii. ITEL black in colour – Pexhibit 11(c)

e. National ID card for one Robert Plimo Petot being card number – 36007889 in the name of ROBERT PLIMO PETOT.

f. Pen knife – silver coloured with plastic handle – Pexhibit 5

g. One jeans trousers with blood stains at the bottom on the left leg – Pexhibit 12.

44. PC Waguda further testified that on the same 19<sup>th</sup> January 2019, while at the school, he interrogated Kennedy who told him of how he accompanied the accused to Uganda to look for a market for his (accused's) new HAOJUE Motor bike through SIKAMOE JOHN. PC Waguda also testified that according to Kennedy no buyer was found on the first trip but that on 20<sup>th</sup> January 2019 the accused returned to Uganda alone to look for a market for his motorcycle.

45. PC Waguda also testified that through collaboration with the Uganda Police, SIKAMOE JOHN was eventually arrested in connection with the HAOJUE motor cycle which was recovered. The court was shown the motor cycle – PMFI -7 – which was produced as Pexhibit 7. Even the person who had bought the motor cycle, one Moses Loyoto, was arrested. A sale agreement between the said Moses Loyoto and one WILFRED KALIYA of ID NO. 36007989 was produced in court. PC Waguda testified that from his further investigations into this matter, ID number 36007989 was that of the accused whose original ID number was recovered from his house at the school. He also said that the registration number plate KMEP 817Z given in the agreement for sale is the same one that was recovered from the accused's house. The number plate and the agreement for sale of motor bike for Kshs.400,000/- or 3.15 million Uganda Shillings were produced in court as Pexhibits 3 and 13 respectively.

46. During the course of investigations PC Waguda stated he was also told about the INFINIX HOT 6 telephone handset which was alleged to have been given to Kennedy by the accused after the two had returned from Uganda first on a joint mission and the other one when the accused went to Moroto alone. The said phone was traced to Abdi. Through mobile number 0791199733 Abdi was traced to Kacheliba on 30<sup>th</sup> January 2019 and arrested. The Infinix phone – Serial number 352854105823888/352854105823896 was traced. The same was produced in court as Pexhibit 2. The receipt for purchase of the said phone as supplied by Charles was produced as Pexhibit 14, while the box for the phone was produced as Pexhibit 1.

47. PC Waguda testified further that when he operated the photos application on the phone he found photographs of the accused taken on 24<sup>th</sup> January 2019. Abdi had also taken photographs of himself on 30<sup>th</sup> January 2019, so had Kennedy. All these photographs were shown to the court. The blood-stained blue jeans trouser – Pexhibit 12 – were taken to the Government Chemist for analysis for comparison with blood found on the jembe recovered at the scene – Pexhibit 9. The report of the Government Chemist dated 2<sup>nd</sup> May 2019 confirmed that the blood stains on the jembe matched the blood of the deceased but there was no match with the blood on the jeans trouser. The Government Chemist report was produced as Pexhibit 15. The two receipts for purchase of motorcycle were produced as Pexhibit 16(a) and 16(b).

48. When asked why he decided to charge the accused with the murder of the deceased, PC Waguda stated that the deceased's mobile phone was handled by the accused who even took selfies with it. He also stated from his investigations in Uganda, he confirmed that the accused handled the deceased's motor cycle which he sold vide a sale agreement to one Moses Lotoyo and on which agreement the deceased's Kenya national identity card number appears as that of the seller whose name was given as WILFRED KALIYA. PC Waguda also testified that the fact that the number plate – KMEP 817Z for the deceased's motor cycle – was found in accused's house added weight to his conviction to charge the accused with the offence. Further that he had gathered enough evidence showing that on the evening of the fateful day, the accused person communicated with Velma using the deceased's mobile number. PC Waguda stated that from the investigations, the motive of the murder was acquisition of the deceased's new HAOJUE motorcycle registration number KMEP 817Z for sale.

49. During cross examination, PC Waguda stated that what connected the accused to the scene was Aldan's ID by which the accused is said to have introduced himself on the fateful evening. He conceded that the blood on Pexhibit 15 did not match the blood of the deceased. He also conceded that the name of the seller on Pexhibit 13 is WILFRED KALIYA, which is not accused's name. PC Waguda also conceded that the Ugandan buyer of the motor bike Moses Lotoyo was not available as a witness. PC Waguda also testified that Kennedy Matiba who gave the phone to Abdi confirmed to him that he was employed by the accused as a motor bike rider though the two did not live in the same house. PC Waguda concluded his cross examination by saying that though Velma was not willing to testify, he believed what she told him.

50. In re-examination, PC Waguda testified that though the name of the seller of the motor cycle to Moses Loyoto was Wilfred Kaliya he believed that the person who actually signed the sale agreement was the accused herein because he gave his correct identity number. He also said that from the investigations, the accused was the first person to handle the deceased's phone even before Kennedy did. It was also PC Waguda's testimony that the accused's house at Nagwoilap school had some women's clothes which was an indication that he shared that house with some lady.

### **The Defence Case**

51. The accused gave unsworn evidence and told the court that before his arrest, he worked as a Parent Association teacher at Nagwoilap Primary School. He testified of his arrest by PC Waguda on 26<sup>th</sup> January 2019 while he was at his mother in-laws home at Siyoi. He stated that before he was handcuffed he was asked by PC Waguda whether he knew Aldan and as soon as he answered in the affirmative he was

handcuffed. He also testified that PC Waguda took from him his motor cycle registration number KMEP 541X, a red HAOJUE, ITEL telephone handset, ID card and holder which had the receipt of the motorcycle. The accused denied committing the offence as alleged. The accused did not call any witnesses.

### **Issues for Determination**

52. The issues for determination in a murder case are defined by *sections 203 and 206 of the Penal Code*. *Section 203* reads as follows:-

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”***

53. Thus, for the prosecution to prove a charge of murder, it must prove

- a. Malice aforethought on the part of the accused;
- b. Death of the deceased
- c. An unlawful act or omission on the part of the accused.

54. *Section 206 of the Penal Code* provides that malice aforethought shall be deemed to be established by evidence showing any one or more of the following circumstances.

***“(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

***(c) an intent to commit a felony;***

***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

55. Under both sections, the accused person is at the centre of the action, either directly or indirectly, and the prosecution has the onerous duty of placing him at the scene either by direct or indirect evidence. The latter is what is also known as circumstantial evidence. It has been held time and again that circumstantial evidence, if properly considered by the trial court, is as good as direct evidence and is capable of proving a fact with the precision of mathematics. I will return to this later in this judgment.

### **Submissions**

56. The defence put in final written submissions dated 26<sup>th</sup> February 2020 by which it urged this court to make a finding that the prosecution has not discharged the burden of proof of beyond reasonable doubt on every element of the offence, namely the *actus reus* and the *mens rea*. In other words, the defence is saying that the prosecution has not shown to the required standard that the accused actually committed the offence and further that motive has not been proved.

57. The state on its part relied on the evidence on record.

### **Analysis and Determination**

58. At the outset, I must point out that the prosecution case against the accused herein rests entirely on circumstantial evidence, and for this reason this court must exercise extreme care and caution when assessing the said evidence, but more about that later. Now I must deal with first things first, as follows:

#### **Did the deceased die, and if so, what killed him?**

59. In his testimony, Charles told the court that on 16<sup>th</sup> January 2019, he received a report from his son Langat Erastus (not called as a witness) that according to a story doing the rounds in Makutano township, a man’s body had been seen in the locality. Before he could get to Makutano, he got another report that the body spoken of by his son Erastus, a little while earlier had already been removed by police and taken to Kapenguria County General Hospital Mortuary. He rushed to the mortuary and there lay the deceased’s body. On the 21<sup>st</sup> January 2019, he identified the body to Dr. Mukhola for postmortem examination.

60. Dr. Mukhola testified and also produced the postmortem report – Pexhibit 8- confirming that on 21<sup>st</sup> January 2019 he conducted a post mortem examination on the body of one George Kiptum which was found lying in a pool of blood some 50 metres from Kakugh Village with visible injuries on the back of the head. Dr. Mukhola further testified that on examination of the body, he found multiple facial bruises and a laceration measuring roughly 4cm in diameter with a depressed skull fracture on the occipital region of the head. He also stated that there was epidural haematoma on the outer layer of the brain about 4cm in diameter in the same occipital region of the head with intracranial

haemorrhage with brain oedema.

61. In Dr. Mukhola's opinion, the cause of death was increased intracranial pressure due to acute severe intracranial haemorrhage due to blunt force trauma. Dr. Mukhola confirmed that the injury could have been caused by a jembe which was found at the scene and produced in court. It was confirmed from the evidence of PC Waguda that according to the analysis carried out by the Government chemist, details of which are contained in the Report of Government Analyst – Pexhibit 15, the blood that was found on the jembe matched the DNA profile of the deceased. In conclusion therefore, the question as to whether the deceased died and what caused his death is thus fully settled.

#### **Was there malice aforethought on the part of whoever killed the deceased?**

62. Malice aforethought is an essential ingredient of the offence of murder, and according to the definition under **section 206 of the Penal Code**, malice aforethought is established if it is proved that the attacker intended to cause the death of or to do grievous harm to the deceased, or to any person; or if the attacker knew that his act or omission that caused the death of the deceased would probably cause the death or grievous harm to some person; or if the attacker intended to commit a felony and finally if the attacker had an intention by the act or omission to facilitate the flight or escape from custody of a person who has committed or attempted to commit a felony.

63. From the evidence on record, it is clear that the injury on the deceased's head was caused by a jembe which was dug into the occipital region of his head. The Government Analyst report shows that the jembe was heavily stained by blood. In my considered view it does not need a genius to know that if a jembe is used to dig into the head of any person, the clear intention of the attacker is either to kill or cause grievous harm to the victim. In the present case, the deceased died from what Dr. Mukhola described as increased intracranial pressure due to acute and severe intracranial haemorrhage due to blunt force trauma in the occipital region of the head. It's clear here that the deceased had no chance of survival. Perhaps if he had survived, he would have become a living nightmare to his family.

64. There is also ample evidence that whoever attacked the deceased knew that the action of cutting the deceased on the head with a jembe in the manner that he/she did would probably cause death of or grievous harm to the deceased. Jembes are implements for farm work and were never intended to be used on anybody's head.

65. I also find that the circumstances leading to the death of the deceased demonstrate that the person who caused or aided the deceased's death had the intention of committing a felony. On 10<sup>th</sup> December 2018, Charles bought two new HAOJUE motor cycles, and one of them bearing registration number KMEP 817Z was bequeathed to the deceased to enable him carry on boda boda business as a way of eking out a living. On 15<sup>th</sup> January 2019, in the evening, the deceased was at Makutano when his father Charles telephoned him and asked him to go home so he could take him (Charles) to a meeting with the local livestock officer. When the deceased was long in getting home, Charles rang him again and that is when he told him around 7.15pm that he was very far away with a client. The deceased did not return home that night.

66. Now, considering the fact that the deceased had an almost brand new motor cycle, and further considering that he had been lured by a client with whom he went very far, there is only one inference that this court can make: That the deceased's client did not have good intentions for the deceased. The deceased's client must have intended to violently rob the deceased of his motorcycle as it indeed transpired that the deceased's motor cycle was nowhere to be found at the scene where his body was found the following morning.

67. It is the above scenarios and conclusions which lead me to say without any iota of doubt that the person who attacked the deceased had the necessary malice aforethought. The prosecution has proved the same beyond any reasonable doubt.

#### **Is it the accused who murdered the deceased?**

68. As pointed out earlier in this judgment, the case for the prosecution rests entirely on circumstantial evidence. There was no eye witness to the incident. As rightly submitted by counsel for the accused, a court which seeks to convict an accused on the basis of circumstantial evidence must not only be cautious in doing so, but must also ensure that the chain of circumstances on which it seeks to rely remains unbroken throughout. In the case cited by the defence on this issue, being *Abanga alias Onyango versus Republic CRA No. 32 of 1990 (UR)*, the Court of Appeal stated as follows:

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-***

***i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***

***ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused***

***iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

69. The above principles were also enunciated in the earlier case of *Rex versus Kipkering Arap Koskei & another [1949] 16 EACA 135* where the forerunner to the Court of Appeal for Eastern Africa stated, *inter alia*, that:

***“In order to justify 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 guilt.”***

70. The prosecution case is that on the evening of 15<sup>th</sup> January 2019, the deceased who identified himself as George was in company of another, who on being pressed to identify himself gave out a Kenya National Identity Card bearing the name Aldan Korir Lochurangule, PW2 in this case. Joseph testified that he indeed saw the identity card bearing the name Aldan Korir of Kaisakat Location. He also said that the man who identified himself as Aldan Korir had a motorbike, red in colour make HAOJUE, registration number KMPE 817Z. According to Joseph, he and his colleagues among them Abraham were interested in knowing the identity of these two young men who were strangers in the area. Joseph confirmed that he saw the details in the ID and those of the motor bike with his own eyes at close range, using the light from the telephone handset of the Nyumba Kumi person Stephen. He also said there was light from the motor bike headlamps. Both Joseph and Abraham identified the accused person during the hearing as George's companion on the fateful night and as the one who gave out an identity card bearing the name Aldan Korir Lochurangule.

71. Aldan testified that in April 2016, his national identity card being number 35200021 got lost. Thereafter, the accused herein, who was a neighbor telephoned him that he (accused) had found the identity card which he could only give back if Aldan parted with some money. When Aldan got the money, he went to the accused's home twice, but did not find him as he was said to be in Ortom. Then on 19<sup>th</sup> January 2019, Aldan was arrested in connection with this case, as the person who had been with the deceased on the night the deceased died.

72. There is also evidence on record that among the items stolen from the deceased was a red telephone handset INFINIX HOT 6. Kennedy, who told the court that he was employed by the accused as a boda boda rider told the court that after he and the accused had been to Uganda in search for a buyer for a motorbike and after the accused's second and solitary visit to Moroto where he sold the motorbike, the two of them travelled from Alale to Makutano. After a number of errands, the accused handed over a phone to Kennedy and asked him to keep it until he returned to Makutano from the house of his (accused's) wife in Siyoi. For three days, the accused did not return and because Kennedy was in want, he gave the telephone handset to Abdi who then ferried him to Alale. Kennedy promised Abdi that he would be paid once the teacher (meaning accused) returned. The phone was indeed recovered in the possession of Abdi.

73. From the testimony of PC Waguda, the said phone had gone through the hands of a number of people and that from the photographs taken by accused of himself and his child, of Kennedy and also of Abdi the accused person was the first to handle the deceased's phone.

74. There is also evidence on record showing that the deceased's motor bike which was sold to one MOSES LOYOT was sold by a person whose name was given as WILFRED KALIYA of identity card number 36007889, a number that coincides with the genuine number of the accused's identity card. Further, the number plate KMPE 817Z, was recovered in the accused's house during a search carried out by PC Waguda.

75. I heard all the witnesses in this case. I observed their demeanor. I have no doubt in my mind that they told the court the truth. There was no suggestion from the defence that any of them were lying or that any of them had been compromised before coming to court. The fact that the accused was found in possession of items recently stolen from the deceased within less than 10 days of the death of the deceased puts the accused person squarely at the scene of the crime. I note that all the while the accused did not want his footprints to be noticed, first by pretending that he was Aldan Korir when he was in company of deceased, and secondly by pretending that that he was WILFRED KALIYA at the time he entered into the sale agreement for the motor bike with Moses Loyoto. As fate would have it, however, the accused gave the correct number of his national identity card and that is what gave him away. So from the night of 15<sup>th</sup> January 2019 near the murder scene to Moroto in Uganda about 10 days later, to the handling of the deceased's mobile phone with which the accused took selfies of himself and his child to handing over the phone to Kennedy to the recovery of the phone from Abdi and to the recovery of the number plate for the deceased's stolen motorbike in the accused's house at Nagwoilap School the thread running through the prosecution case has remained unbroken and the same connects the accused from the crown of his head to the soles of his feet with the death of the deceased.

76. I have considered the unsworn evidence given by the accused, and all I can say is that the same has not offered any challenge to the prosecution evidence. I do not believe the accused when he says that PC Waguda arrested him for no apparent reason on the 26<sup>th</sup> January 2019. Nor do I believe him when he says that PC Waguda took his ID card together with its holder from him while at the police station. I heard PC Waguda testify. He remained consistent and steadfast throughout his examination in chief as well as during cross examination. I must commend PC Waguda for a difficult assignment well done.

### **Conclusion**

77. In light of all the above, I am satisfied that the prosecution has proved the charge of murder contrary to **section 203 as read with section 204 of the Penal code**. I therefore find the accused ROBERT PLIMO PETOT, guilty of the murder of GEORGE KIPTUM on 15<sup>th</sup> January 2019 and accordingly convict him of the same under **section 322(1) of the Criminal Procedure code**.

78. It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 5<sup>th</sup> day of May, 2020

**RUTH N. SITATI**

**JUDGE**

### **In the Presence of**

M/S Chebet for M/S Opondo for Accused

Mr. J. Okoth for State

Mr. Juma – Court Assistant

**5.5.2020**

Before me: Hon. R. N. Sitati – Judge

Court Assistant – Mr. Juma

Mr. Okoth – present for state

M/S Chebet holding brief for accused

Accused – present in court

**COURT**

Judgment read, delivered, dated and signed in open court here at Kapenguria.

**RUTH N. SITATI**

**JUDGE**

**5.5.2020**

**MR. OKOTH**

I do not have any past records of accused. He may therefore be presumed to be a first offender.

**RUTH N. SITATI**

**JUDGE**

**5.5.2020**

**M/S CHEBET**

The accused is a first offender. He has a wife and a child who are wholly dependent on him. The accused is also remorseful and pleads for leniency from this court.

**RUTH N. SITATI**

**JUDGE**

**5.5.2020**

**SENTENCE**

Though it would have been appropriate to ask for a pre-sentence report before sentencing the accused, these are extra-ordinary circumstances of Covid-19 and accordingly I shall dispense with the same. However, there is a pre-bail report on record which gives reasonable information into the life of the accused.

I also wish to note that the accused committed a heinous crime against a fellow young man his motive being to acquire deceased's motor vehicle and sell it. For this, the accused ought to receive due punishment.

I therefore sentence the accused to 30 (thirty) years in prison from the date of this judgment. Right of Appeal within 14 days.

**RUTH N. SITATI**

**JUDGE**

**5.5.2020**

**MR. OKOTH**

I pray that the exhibits produced herein be released to complainant through the Investigating Officer.

**RUTH N. SITATI**

**JUDGE**

**5.5.2020**

**ORDER**

Same to be released accordingly.

**RUTH N. SITATI**

**JUDGE**

**5.5.2020**