Republic v Kirui (Criminal Case 25 of 2018)
[2025] KEHC 15831 (KLR) (6 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15831 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL CASE 25 OF 2018

JK NG'ARNG'AR, J

NOVEMBER 6, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

ROBERT KIPLANGAT KIRUI ..... ACCUSED

JUDGMENT

The Charge

1. Robert Kiplangat Kirui (Accused) was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars were that on 30th September 2018 at Chepkolon Village in Merigi Location within Bomet County, the Appellant murdered Richard Cheruiyot Ngeno.

2. The Accused took plea before this court (Muya J.) on 25th October 2018. The case proceeded to trial where the Prosecution called eight (8) witnesses before they closed their case and the Appellant testified and called one witness in aid of his defence.

3. I now proceed to summarize the Prosecution case and the Defence.

The Prosecution Case

4. The Prosecution stated that the Accused and the deceased fought on the material day and the fight led to the deceased's fatal injuries. The Prosecution further stated that Gilbert Kiprono (PW1), Wilson Kiprono Koech (PW2) and David Ngeno (PW3) found that the Accused and the deceased injured and they administered first aid before rushing the deceased to the hospital.

5. It was the Prosecution's case that the Accused was first charged with assault but was later charged with murder upon the deceased's death. It was the Prosecution's case that the Accused was arrested while wearing a bloody jacket. No. 112158 PC Allan Karanja (PW8) who was the Investigating Officer stated

that he recovered a grey jacket, a wooden stick with a bolt, grey jacket and a brown trouser and the same were presented to the Government Analyst (PW5) for forensic examination. PW5 determined that the grey jacket and the brown trouser contained the deceased's DNA.

6. Dr. Mutai Nickson Kiplangat (PW7) conducted a Post Mortem examination on the deceased and determined the cause of death as severe head injury secondary to assault.

7. After the Prosecution had wrapped up their case, this court ruled on 14th January 2025 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 testified that on the material day, he was watching a football match and when it ended, he started going home. DW1 testified that as he was walking home, he met the deceased and the deceased who was armed with a stick and a whip beat him with the stick.

9. It was the Accused's case that he defended himself and beat the deceased. It was the Accused's further case that he had no intention to kill and that he was just defending himself. The Accused testified that the deceased had gone to their home uninvited.

10. The Accused called his mother Martha Koech (DW2) as his witness. DW2 testified that on the material day, she heard noises at the field and when she went to find out what was happening, she found the Accused and the deceased had fought and injured one another. DW2 further testified that she found the Accused's father (PW2) administering first aid and she later participated in administering the first aid.

Ingredients of the offence

11. 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.

12. 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.

13. 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.

14. 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 and cause of death

15. Dr. Mutai Nickson Kiplangat (PW7) testified that he conducted a Post Mortem Examination on the deceased and produced the Post Mortem Report as P. Exh 5. I have looked at the Post Mortem Report and it mirrored PW7's conclusion that the cause of death was severe head injury secondary to assault. The production and the veracity of the Post Mortem Report was not challenged during cross-examination.

16. From the above, it is my finding that the fact of the deceased's death was established and further the cause of death was established as severe head injury secondary to assault. Indeed, the fact of death was not contested. The death was clearly unlawful.

Whether the Accused caused the death of the deceased

17. In the present case, it was an undisputed fact that the deceased and the Accused engaged in a fight that led to the deceased's death. The Accused admitted that he was in the scene of the crime and only struck the deceased because he feared for his life. In essence, the Accused raised the defence of self-defence.

18. Through their written submissions dated 5th September 2025, the Prosecution submitted that the testimonies of PW1 and PW3 showed that the Accused and the deceased had a fight and the Accused inflicted fatal injuries on the deceased's head. That the clothes retrieved from the Accused had blood stains and they matched the deceased's DNA. The Prosecution further submitted that there was a link between the offence and the Accused.

19. On the other hand, the Accused submitted that no one witnessed him cause the deceased's murder. That he was innocent and that the Prosecution did not prove any action he took to fulfilling his intention. He relied on Republic vs Joseph Nzomo Kitoo [2021] KEHC 9761 (KLR).

20. It was the Accused's submission that the Prosecution did not prove their case beyond reasonable doubt. That no connection had been established between the deceased's death and its cause. It was the Accused's further submission that the Accused's father, PW2 caved in upon cross examination and confessed that he had been intimidated to testify against his son. That murder was a serious charge and any speck of reasonable doubt should go to the Accused's benefit. He relied on Republic vs Martin Thigunku (2021) eKLR and Republic vs Nixon Kiprono Kigen & another (2016) eKLR.

21. As I have already stated, the Accused raised self-defence as his defence. Section 17 of the Penal Code provides: -

> Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law

22. The Court of Appeal in Ahmed Mohammed Omar & 5 others v Republic [2014] KECA 515 (KLR) held: -

> " What are the common law principles relating to self defence? The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in PALMER v R [1971] A.C. 814. The decision was approved and followed by the Court of Appeal in R v McINNES, 55 Cr. App. R. 551. Lord Morris, delivering the judgment of the Board, said:
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> "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. .....Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. ..... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

23. Similarly, in Victor Nthiga Kiruthu & another v Republic [2017] KECA 251 (KLR), the Court of Appeal held: -

> " The section has been ably construed in the cases of Republic versus Andrew Mueche Omwenga (supra); Roba Galma Wario versus Republic (supra) and Ahmed Mohamed Omar & 5 Others versus Republic [2014] eKLR.
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> The principles that have emerged from these and other authorities are as follows: -
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> (i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.
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> (ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.
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> (iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.

(iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

(v0 What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case. (Emphasis mine)

24. I have considered the circumstances of the case and specifically the Accused's defence. The Accused testified that the deceased was armed with a stick and whip and that the deceased struck him with a stick before he (Accused) beat him up and put him down. The Accused's father (PW2) testified that he found the Accused with a swollen head and the deceased was bleeding profusely from his head. Gilbert Rono (PW1) testified that he found both the deceased and the Accused injured but the deceased was bleeding from his head and was unconscious.

25. Kiprono Langat (PW4) who was the area Chief testified that he arrested the Accused with a bloody jacket and a blood stained stick which were presented to the Government Analyst (PW5) for forensic examination. According to the Government Analyst's Report produced as P. Exh 3, the bloody stick contained the deceased's DNA and not the Accused's.

26. From the circumstances above, I am not convinced that the Accused faced imminent danger from the deceased to justify the actions he took. From the evidence, the Accused suffered a swollen head which was less severe to the deceased's injuries. The Accused could have chosen more pacific means of dealing with the incident. Instead, he retaliated and caused the deceased fatal injuries. I therefore reject his defence of self-defence. It is my finding therefore that the Accused caused the unlawful death of the deceased.

Whether the Accused acted with malice aforethought.

27. The Prosecution submitted that they proved that the Accused acted with malice aforethought. That the wooden stick that was used to inflict the fatal injury was recovered at the scene and the Accused targeted the deceased's head. The Prosecution further submitted that the deceased's death was not accidental and the location of the said injuries pointed to the Accused's intention of causing death.

28. The Accused submitted that the Prosecution did not prove that he acted with malice aforethought.

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

30. The Court of Appeal in Roba Galma Wario v Republic [2015] KECA 521 (KLR) 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."

31. 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:
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> "...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:
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> i. The intention to cause death;
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> ii. The intention to cause grievous bodily harm;
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> 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.
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> 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.
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> 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 added)

32. The above provision of the law and authorities were self-explanatory. The Prosecution had to prove that the Accused had to prove that the Accused had malice when committing the offence. Having gone through the entire record, I find no such evidence. I therefore find that the ingredient of malice aforethought was not proven beyond reasonable doubt.

33. In the end, I apply the provisions of section 172 of the Criminal Procedure Code to substitute the charge of murder with that of the lesser charge of manslaughter.

34. The Accused is convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 6TH DAY OF NOVEMBER, 2025.

.....

HON. JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:

Siele/Susan (Court Assistants)

Koech for the state

Mugumya for the Accused