



**Republic v Biwott alias Jitu (Criminal Case 3 of 2018)
[2025] KEHC 17054 (KLR) (21 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 3 OF 2018
JRA WANANDA, J
NOVEMBER 21, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

ELPHAS KIPROTICH BIWOTT ALIAS JITU ACCUSED

JUDGMENT

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 02/01/2018 at Merewet Trading Centre in Eldoret East Sub- County within Uasin Gishu County, he murdered one Jonah Kibet Tanui.
2. From the record, the accused took plea on 05/02/2018 before Githua J. He denied the charge and a plea of not guilty was entered. After several adjournments, the trial commenced on 18/12/2018, on which date PW1-PW4 all testified before O. Sewe J. Upon O. Sewe J's transfer, E.K Ogola J took over the matter as from 21/10/2021 and proceeded to take the testimony of PW5 and PW6 between 21/10/2021 and 25/02/2022. After close of the Prosecution case, E.K. Ogola J, by his Ruling rendered on 5/10/2022, found the accused as having a case to answer and put him to his defence. It was after E.K. Ogola J's transfer that I took over hearing of the case. The defence case was thus conducted before me on 30/07/2024 when the accused testified as DW1. Needless to state, before the change of Judges on all the above two occasions, directions under Section 200(3) of the Civil Procedure Rules were taken, whereof the defence, with the concurrence of the Prosecution, elected to proceed with the case from where it had stopped before the previous Judge.
3. The accused is represented by Mr. Mathai, Advocate, while successive Prosecution Counsels have handled the case along the way on behalf of the State. At present it is Ms. Muriithi, who took over from Mr. Okaka, who had himself succeeded Ms. Okok.
4. I will now recount the witness testimonies.



5. PW1, Kipsang Chepersgo, testified that on the 2/01/2018, he had left his house at around 9.00 pm for Merewet Centre and met the deceased on the way there and they accompanied each other. He testified that when they arrived Merewet Centre, they found the bars already closed and thus decided to go back home, on the way towards the bus stage somebody came from behind the shops and ordered them to stop claiming to be a police officer, PW1 identified the person as the accused herein whom he recognized as Jitu, who was known to him, and who was wearing a brown jacket. He stated that the accused was nicknamed “Jitu” because he was a dangerous. He stated that the accused ordered them to stop and they complied, that when the deceased asked the accused what the issue was, the accused beat up both the deceased and PW1, and that the accused beat the deceased so badly that the deceased fell down helpless. PW1 stated that he, too, was beaten and he lost consciousness, when he regained consciousness in the early hours of the morning, he found himself lying down at the stage and police officers were to the scene, and he noted that the deceased was lying next to him. He then identified the brown jacket that, according to him, the accused was wearing at the time of the accident, and the sticks the accused used to beat them with. He also testified that the incident occurred between 11.00 p.m-12.00 midnight, and stated that he was able to recognize the accused because there was sufficient light at the scene from the security lights at the stage.
6. PW2, Emmanuel Kimeli, testified that on 2/01/2018 he was at Merewet Trading Centre at a restaurant where he had booked a room and after the restaurant closed, he left for his room and the accused followed him. He stated that the accused was known to him but had introduced himself to him as “Kiprotich son of Onyango”. He stated further that when he (PW2) decided to return to the restaurant, the accused followed him insisting that he buys him beer and gives him Kshs 100/-, and when he went to his room, the accused again followed him but he pushed the accused outside and closed the door. He testified that the accused then hit the window panes with a stick before leaving, and that he heard the accused bragging that “no one could challenge him”. He then testified that in the morning, he learnt that the accused, whom he knew as “Jitu” had killed somebody. Under cross-examination by Mr. Mathai, he agreed that he did not witness the killing of the deceased.
7. PW3, Hussein Kipyego, testified that at around 11.00 pm on 2/11/2018, he received a phone-call from a lady working at Whitehouse bar informing him that Jitu was hitting window panes and sought PW3’s help. He stated that he arrived at the restaurant just as the accused was leaving, he heard screams shortly thereafter but he did not go to the scene where the screams were emanating from, and that in the morning, he learnt that the accused had committed a murder. He stated that he did not know the deceased, that he went and saw the body at the scene, and that there were two pieces of sticks thereat. He also identified the jacket that he claimed the accused was wearing on the material night as the accused was walking away from the restaurant. He stated that by the time that he arrived at the restaurant at night, the window panes had already been broken down and he was told that it is Jitu who had caused the damage, although he did himself speak to Jitu. In cross-examination, he stated that the name of the lady who phoned him is Mercy, and it is her who told him that it was Jitu who had caused the damage. Regarding the time when he heard the screams, he stated that it was about 1.00 am. He then stated that the body, which he went to see in the morning was not at the stage, but about 40-50 metres from the stage, and that he did not notice any sticks around the body, but there was blood.
8. PW4 Elijah Kiptoo Tanui, the father of the deceased. His evidence was that he received a phone-call informing him that the deceased had been murdered at Merewet Centre, upon which he went to the scene where he found a crowd, and he then saw the body of the deceased. He stated that the area Chief was also there and people said that the person who had murdered the deceased was Jitu, that there was another victim lying unconscious some distance away whom he also and saw and was speaking incoherently. He stated that the deceased was lying in a pool of blood and there were also pieces of



- broken sticks nearby. He testified that he did not know the accused and only saw him at the police station. He then stated that he witnessed the post-mortem exercise during which he noted that the body had a penetration wound on the head and when the head was opened, it revealed internal bleeding in the brain.
9. PW5 was Dr. Walter Nalianya. He testified that he performed the post-mortem on the body of the deceased and noted that there was a 4 cm laceration on the left side of the skull, another 2 cm laceration on the upper part of the left eye region, triple bruises involving the forehead and the left side of the face, fracture of the two bones of the left forearm, and multiple bruises on the forearm and hands. He stated that on dissection of the body, he noted fractures of the 3rd, 4th and 5th right ribs, haematoma in the pelvis (blood in the pelvis), and bleeding on the surface of the brain, and beneath the skin on both arms. His opinion was that the cause of death was “multiple injuries due to assault”, and he then produced the post-mortem Report. In cross-examination, he stated that he could not determine the object used in the assault, and there was no evidence of alcohol in the body. He then stated that the injuries could have been caused by a blunt object, but agreed that they could also have been caused by a fall. He also observed that the injuries were on the left side. In re-examination, he stated that from the pattern of the injuries, they were more probably a result of an assault rather than a fall.
 10. PW6, Corporal Joseph Yatich, who was attached at the Moiben Police Station, was the investigating officer in this case. He stated that on 3/01/2018, upon receipt of a report from the area Chief that a person had been killed at Merewet Trading Centre, he proceeded there with the Officer Commanding the Station (OCS) where they found the body of the deceased lying with deep injuries on the left side of the head, and there were freshly broken sticks and a pole, and there were many people. He stated that he collected the sticks and the pole, and they also photographed the scene and then removed the body to the mortuary. He stated that they established at the scene that the deceased was killed by the accused but who had run away. He stated that he later returned to the scene accompanied by the OCS, the Chief and some relatives of the deceased, with whom, led by the Chief, they went to the house of the accused, and which was not far from the Centre, where they recovered a brown jacket and a belt belonging to the accused’s belt which was so identified by a relative of the accused. He then stated that he attended the post-mortem exercise on 12/01/2018, that on 14/01/2008, the accused resurfaced and they arrested him at the Centre, and later charged him. He then produced the exhibits, identified the accused seated in the dock, and whom he stated was not known to him before the incident. In cross-examination, he stated that when they went to the house of the accused, it was open, and they did not make an inventory of what was inside. He stated further that one of the people who accompanied him was PW1, who was with the deceased at the time of the incident, and who stated that the recovered jacket was the one worn by the accused at the time material time.
 11. As aforesaid, upon close of the Prosecution case, by the Ruling dated 05/10/2022, E. K Ogola J found the accused as having a case to answer and put him to his defence. The accused then opted to give sworn testimony in his defence, which he then did on 30/07/2023 as DW1.
 12. The accused, in his defence, testified that on 2/01/2018, he was all alone in his house in Soy and he never left. He stated that on 10/01/2018 he went to Chepkanga to visit his cousin and stayed there for 4 days up to 14/01/2018 on which date he was arrested still at Chepkanga. He denied going to Merewet trading center between 12/01/2018 and 14/01/2018. He stated that he did not know the deceased but denied owning the brown jacket said to have been recovered at the scene. He stated that PW1 who claimed that the accused was at the scene was a liar and also denied beating him. He denied any knowledge of the name Jitu. He observed that the jacket that was produced was in any case, not brown as alleged, but yellow in colour. He denied any role in the death of the deceased. In cross-examination, he stated that he would not be calling any witness to corroborate his testimony. He stated that he lives



with his father and siblings but he did not have anyone who could confirm that he was in Soy on 02/01/2018.

13. Upon close of the defence case, and thus the whole trial, I granted the parties leave to file written Submissions. The State, through Prosecution Counsel Claire Muriithi, filed the Submissions dated 26/06/2025. On the part of the accused however, up to the time of concluding this Judgment, I had not come across any Submissions filed by the defence.

Prosecution's Submissions

14. Ms. Muriithi recounted the witness testimonies and restated the principle that for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients. She cited the Court of Appeal case of Anthony Ndegwa Ngari vs. Republic [2014] eKLR, in which the said ingredients were reiterated as; death of the deceased and its cause; that the accused committed the unlawful act which caused the death of the deceased; and, that the accused had malice aforethought. She submitted that in this case, death is not disputed, and that the post-mortem form revealed that the cause of death was "multiple injuries due to assault". On the unlawful act by the accused which caused the death of deceased, and on positive identification and recognition, she recounted the testimony of PW1. She further stated that it was the testimony of PW5, who conducted the autopsy, that the deceased did not die out of natural causes. She urged that the evidence of the accused is a mere denial and does not cast doubt on the evidence tendered by PW1 and PW5. On malice aforethought, Counsel cited the definition in Section 206 of the Penal Code, and also the East African Court of Appeal case of Republic vs. Tubere s/o Ochen [19451] 2 EACA 63. She submitted that PW1 having stated that the accused used a stick to assault him and the deceased, the actions of the accused were very deliberate. She urged that assaulting someone to the extent that the accused person did was a clear indication that grievous harm was intended and therefore, the accused intended to harm the deceased. In the end, she urged that the Prosecution has thus proved all the ingredients of the offence of murder as against the accused person, and prayed for a conviction.

Determination

15. Section 203 as read with 204 of the Penal Code under which the accused is charged provide for the offence of murder and the punishment therefor. The provisions are premised as follows:
 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 204. Any person who is convicted of murder shall be sentenced to death."
16. The Prosecution, to secure a conviction, therefore has the duty to prove, beyond reasonable doubt, that the accused, by an unlawful act or omission, caused the death of the deceased through "malice aforethought". For the Court to make a finding that an accused person committed the offence of murder, the Prosecution must therefore establish the following elements; (a) death of the deceased, (b) proof that the accused person committed the unlawful act which resulted in the death of the deceased: and, (c) malice aforethought.
17. In this case, the death of the deceased and cause thereof are not disputed. The deceased was found dead near the stage at Merkwet Centre alongside PW1 after they had been apparently assaulted at night. From the post-mortem Report on record, the cause of death was established to be "multiple injuries due to assault". The nature of the injuries suffered by the deceased leave little doubt that he was physically assaulted using a blunt object. That he was killed is therefore obvious. The question is



therefore, whether there is proof that it is the accused person who committed the “unlawful act” which resulted in the death of the deceased.

18. As aforesaid, being a criminal charge, the Prosecution bore the duty to prove the charge beyond any reasonable doubt. The term “beyond reasonable doubt” was described and/or explained in the leading case of *Woolmington v Republic* 1935 AC 462, as follows:

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

19. PW1 narrated how on 2/01/2018, he was on his way to Merewet Centre at around 9.00 pm for a drink and met the deceased also on the way there and thus accompanied him. He narrated how when they arrived at the Centre, they found bars already closed and thus decided to return home, and on the way back, near the bus stage somebody emerged from behind the shops and ordered them to stop while claiming to be a police officer. PW1 testified that he identified the person as the accused whom he recognized as Jitu, who was known to him, and who was wearing a brown jacket, and who had been nicknamed “Jitu” because he was known to be dangerous. He stated that the accused ordered them to stop and when the deceased protested, the accused beat them both, to the point of rendering them both unconscious. PW1 stated that when he regained consciousness in the early hours of the morning, he found himself and the deceased lying down at the stage. He testified that although the incident occurred around 11.00 p.m-12.00 midnight, he easily recognized the accused because there was sufficient light from security lights at the stage. He also identified the broken pieces of sticks that he alleged the accused beat them with.
20. PW2 also narrated how on that same night, at Merewet Trading Centre, the accused, whom he also knew, harassed him at a restaurant where he had booked a room demanding that PW1 buys him beer and gives him money, and even followed PW1 to his room after the restaurant closed. He narrated how he managed to push the accused outside and closed the door, and how even after that, the accused hit the window panes with a stick before leaving, and that the accused continued being rowdy as he left and daring people to a fight. He then stated that in the morning, he learnt that the accused, whom he knew as “Jitu” had killed somebody.
21. PW3, on his part, narrated how on the same night, around 11.00 pm, he received a phone-call from a lady (Mercy) working at a bar at the Centre seeking his help as Jitu was hitting window panes. He stated that he arrived at the restaurant just as the accused was leaving, and that the accused was wearing a jacket which he then identified at the trial. He also stated that he heard screams shortly thereafter but although he did not go to the scene where the screams were emanating from, in the morning, he learnt that the accused had committed a murder.
22. The testimony of PW2 and PW3 therefore places the accused at the scene of crime at the material time and also establishes the allegation that he was rowdy and violent on that night daring anyone and everyone to a fight. The testimony of PW4, the Investigating Officer, that the brown jacket was recovered from the accused person’s house is also relevant.



23. PW5, the doctor who conducted the post mortem on the body of the deceased, testified that the cause of death was ‘multiple injuries due to assault’. He then gave an extensive description and explanation of the injuries, which I find to be consistent with the account given by PW1 on how he and the deceased were assaulted.
24. I also find that the identification of the accused was one of recognition, rather than that of a stranger. In respect to this nature of identification and its reliability, the Court of Appeal, in the case of *Reuben Tabu Anjononi & 2 Others v Republic* [1980] eKLR, stated that:
- “..... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”
25. The accused, in his defence, testified that on the said 2/01/2018, he was in his house in Soy the whole day and night and he never left. On the allegation that he disappeared after the incident, he claimed that he went to Chepkanga to visit his cousin and stayed there for 4 days up to 14/01/2018 when he was arrested while still there. I agree with the Prosecution that this testimony by the accused was a mere denial and does not cast doubt on the clear and consistent evidence tendered by the Prosecution witnesses. I say so because this alleged alibi defence was raised for the first time at the defence hearing stage, and the accused did not also even call any witness to corroborate the claim yet he stated that he lives with his father and siblings.
26. PW1’s testimony, in my view, remained unshaken even in cross-examination and it is my finding that the evidence on record sufficiently establishes that the accused person is the one who committed the act that resulted in the death of the deceased. His testimony remained credible, cogent and irresistible to point at the accused as the culprit.
27. The prosecution having proved the actus reus, the next issue is whether “malice aforethought” can be inferred from the actions of the accused person. This is because the offence of “murder” is only complete when “malice aforethought” is established if, as prescribed in Section 206 of the Penal Code, the evidence proves 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.”
28. In the case of *Hyam v DPP* {1974} A.C. the Court held inter alia that:
- “Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”



29. In respect to the above, the Court of Appeal, in the case of *Bonaya Tutu Ipu & Another v Republic* [2015] eKLR, stated as follows:

“..... 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.”

30. Further, the Court of Appeal, in the case of *Morris Aluoch v Republic* [1997] eKLR), quoted *Rex vs Tubere S/O Ochen* (1945) 12 EACA 63 guided that:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.

31. In this case, from the evidence tendered in Court, it is clear that the accused person hit the deceased multiple times, using a stick and a pole, and the areas of the body targeted, included, inter alia, the head, and the stomach-chest area. It is evident from the witness testimonies that the accused person repeatedly hit the deceased and PW1 to the extent that they both lost consciousness. It is therefore clear that he was well aware of the impact of the injuries he was inflicting on the deceased. Anyone who uses a weapon of any nature to strike the head and/or any other vulnerable part of the body of another repeatedly, as the accused did in this case, ought to know that the injuries to be suffered out of that act are capable of causing the death of that person. The fact that the accused targeted the head of the deceased, a delicate part, which when attacked in that manner, could easily lead to death, establishes that the accused had, at least at that point, premeditated his actions. To my mind, the above facts and conduct easily establish the existence of “malice aforethought” on the part of the accused person.

32. I therefore find that the accused committed the act that resulted in the death of the deceased and further, that there was “malice aforethought” in his actions. In these circumstances, I am satisfied that the Prosecution has through the facts and evidence presented, proved the charge of murder beyond reasonable doubt.

33. For the above reasons, I find the accused person, Elphas Kiprotich Biwott alias Jitu, guilty of the charge of murder contrary to Section 203 of the Penal Code and as a consequence, convict him accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF NOVEMBER 2025

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WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

The Accused (present physically in open Court)

Mr. Mathai for the Accused

Ms. Muriithi for the State

C/A: Brian Kimathi

