

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL CASE NO. 4 OF 2020

REPUBLIC.....

PROSECUTOR

VERSUS

VICTOR KIPROTICH CHERUIYOT

ACCUSED

JUDGEMENT

1. Victor Kiprotich Cheruiyot (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 1st March 2020 at Kababai Village in Embomos Location in Konoin Sub- County within Bomet County, the Accused murdered Winnie Chepkoech.

2. The Accused took plea before this court (Korir J.) on 11th February 2021. The case proceeded to trial where the Prosecution called nine (9) witnesses before they closed their

case and the Appellant testified and did not call any 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 was the deceased's son and that on the material day, the Accused murdered the deceased using a metallic spring metal. That the Accused's father, Cheruiyot Rono Baliach (PW5) testified that the deceased had told him that the Accused had pressured her into giving him some money.

5. It was the Prosecution's case that the Investigating Officer (PW9) processed the crime scene together with the Area Chief (PW4) and recovered a spring metal and a green bloodied scarf. It was the Prosecution's further case that the items were presented for forensic examination and it was found by the

Government Analyst (PW7) that the spring metal abd scarf had the deceased's blood.

6. Dr. Mutai Nickson Kiplangat (PW8) 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 21st May 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 he was not aware of the offence or how it happened. The Accused further stated that he was accused of the murder in December 2019 and was placed in custody. It was the Accused's case that he was in custody at the time of the commission of the offence being March 2020.

Ingredients of the offence

9. 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**.

10. **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.

11. **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.**

12. 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

13. Dr. Mutai Nickson Kiplangat (PW8) 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 PW8’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.

14. In his submissions filed on 31st July 2025, the Accused submitted that the death of the deceased was not disputed as it was confirmed by the Prosecution's witnesses and the Post Mortem Report. The Accused further submitted that the deceased's death was unlawful as her death was not caused by natural causes as she died prematurely.

15. 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

16. In the present case, there was no eye witness to the commission of the offence. In the absence of direct evidence, this court has to rely on circumstantial evidence. In the case of **Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR)**, the Court of Appeal held: -

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, C.J. stated as follows on circumstantial evidence in R. v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

‘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.”

(Emphasis mine)

17. Circumstantial evidence however must be analyzed with circumspection. In the English case of **Teper v. R (1952) AC**, it was held as follows: -

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

18. The Prosecution’s witnesses i.e. Kipkeloi Boniface (PW1), Kiplangat Baliach (PW2), Cosmas Kiprotich Lelei (PW3), Julius Kiprop Rono (PW4) and Dennis Kipyegon Tonui (PW5) all

testified that they heard the deceased's screams and when they arrived at the scene, they found the Accused standing with a spring metal and the deceased lay on the ground bleeding. Kiplangat Baliach (PW2) testified that when he got to the scene of crime, there was no one present in the Accused's home as his father (PW6) was in Kapkatet. Cheruiyot Rono Baliach (PW6) corroborated this testimony as he confirmed that on the material day, he was in Kapkatet. The Prosecution's witnesses' testimonies remained uncontroverted upon cross examination.

19. The Area Chief, Julius Kipro Rono (PW4) testified that he found the Accused with a bloody spring metal which he kept and gave to the police. The Investigating Officer (PW9) produced the bloody spring metal and scarf as **P. Exh 1** and **2** respectively. The Investigating Officer presented the aforementioned exhibits for forensic examination.

20. Polycarp Lutta (PW7) who was the Government Analyst testified that upon examining the spring metal, bloody scarf and the deceased's blood, he found that the blood on the exhibits matched the blood sample of the deceased. PW7 produced a Government Analyst Report as **P. Exh 4**. I have looked at the Report and its contents mirror the testimony of PW7.

21. From the above, it is clear to this court that the Government Analyst Report (P. Exh 4) provided a link between the Accused and the death of the deceased. As I have already stated, the Prosecution's witnesses (PW1, PW2, PW3, PW4 and PW5) who were the first people to arrive at the scene, found the Accused in possession of the spring metal (P. Exh 1). This spring metal had the deceased's blood on it and it is my deduction that it was the weapon that was used to strike the deceased on her head. This is supported by the findings contained in the Post Mortem Report (P. Exh 5). It was also clear that there was no one else at home during the commission of the offence. In my view, the evidence against the Accused as the author of the offence was overwhelming. I therefore disagree with the Accused's submission that the Prosecution had failed to

establish a link linking the Accused to the commission of the offence.

22. Flowing from the above, it is my finding that the Accused caused the unlawful death of the deceased.

Whether the Accused acted with malice aforethought.

23. The Accused submitted that the Prosecution did not prove that he had acted with malice aforethought. That all the Prosecution's witnesses testified that they did not know who or what killed the deceased. He relied on **Republic vs Silas Magongo Onzere alias Fredrick Nemema (2017) eKLR.**

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

25. 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.”

26. 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 added)

27. The above provision of the law and authorities were self-explanatory. The Prosecution 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.

28. 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.

29. 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 17th day of December, 2025.

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Hon. JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:

Siele/Susan (Court Assistants).

Ms Koech for the Republic

Ms Brandy Kosgei for the Accused

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