

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 83 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOASH KICHWEN.....ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 29/11/2016 at Kapkures village, Kapkures sub-location in Eldoret West Sub County, within Uasin Gishu County, he murdered one **Joel Yego**.
2. I laid out the chronology of events of this case in my Ruling on case to answer which I delivered on 16/06/2023 as follows:

“The accused was first presented before Court on 30/11/2016 before a Deputy Registrar and was then taken to the Moi Teaching and Referral Hospital for a mental assessment. After a series of hiccups, he was finally availed before Court on 8/03/2017 for plea taking after being certified fit to plead. The plea was taken before Githua J. The information and ingredients of the charge were read and explained to the accused in the Kiswahili language, he denied the charge and a plea of not guilty was entered.

After further hiccups, the hearing eventually commenced on 3/03/2021 before Sewe J who took the evidence of PW1 - PW5. Upon the Judge being transferred, a new Judge, Ogola J, took over the matter on and took the evidence of PW6 and PW7. The Prosecution then closed its case. Upon Ogola J also being transferred, I took over this matter. Pursuant to my further directions, the proceedings were typed and availed.

I may just mention that in both instances of taking over the matter from previous Judges, Directions were taken under Section 200 (3) of the Criminal Procedure Code. In both instances, the Defence elected not to ask for recall for any witnesses and to therefore proceed with the hearing from where it stopped.”

3. Regarding the Prosecution evidence presented at the trial, **PW1, Isaac Chiroch Bor**, the Assistant Chief presiding over the Kapkures village area, testified that he was visited on 29/11/2016 by two sons of his neighbour **Joash Kichwen** (accused) at around 12.00

midnight, who requested him to accompany them to their home, about 400 metres away, as their father (accused) required **PW1** since a man had been found in the accused's house. He testified that he accompanied the brothers and on arrival at the home, he was shown the accused's house where he found the deceased, nicknamed "**Wanugu**" lying on the floor, writhing in pain, the wife to the accused was also seated on the floor with her back against the wall, there was light in the room from a solar gadget, and the accused was standing outside the house. He stated that he tried to talk to the deceased but he did not respond, and when he asked the deceased to get up, he told **PW1** that he was unable to do so. He stated that he then sent the two sons of the accused to go and call the village elder, and also advised them to take the deceased to hospital, they then escorted the accused to the police station to report the incident, where they reached at around 3.00 am, and left the accused in police custody. He testified that he learnt from the accused that the accused had found the deceased in the accused's bedroom with the wife of the accused. **PW1** stated that the next morning he received a report that villagers had surrounded the home of the accused threatening to beat up the family of the accused as they were angered by the death of the deceased, upon which **PW1** took the accused's family to the police station for their safety. He testified that he could not recall the clothes the accused was wearing on that night, but he was aware that the police recovered some clothing from the scene, and that he did not see any weapon on the floor where the deceased was lying down. He stated further that he had known the deceased for about 10 years before the incident, and also knew the deceased, and that he did not know of any grudge between the two.

4. In cross-examination, he stated that he lives about 400 metres from the home of the accused, but he did not hear any noises or commotion before he was woken up by the brothers. He also stated that there was sufficient light in the room where the deceased was lying down, and thus, although he had a torch, he had no reason to use it. He stated further that he also tried to talk to the wife of the accused but who, similarly, did not respond. He reiterated that although the deceased was nicknamed "**Wanugu**", the name of a criminal, he was generally of good character and he does not know why he was so named. Regarding the accused, he stated that he was a good person with no previous criminal cases as he knew him well, and one would never imagine that he could have committed a murder.
 5. **PW2, Alfayo Kuruna Tum**, testified that he woke up at around 1.00 am on 29/11/2015 as the Assistant Chief, **Isaac Chiroch Bor (PW1)**, had called him and asked him to go to the home of the accused where an incident had occurred. He testified that he went there and on arrival, he found the deceased lying on the ground outside, **PW1** was already there, he did
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not know whether the deceased was already dead or not, and there was no light other than light from mobile phones, and there were also no torches. He stated that they arranged for the deceased to be taken to hospital and thereafter, they took the accused to the police station where they left at about 5.00 am. He stated that both the accused and the deceased were well-known to him and they both live about 1 kilometre from his home, he did not know whether the two had any grudge, although the report was that the accused had found the deceased in his house at night with his wife. In cross-examination, he stated that **PW1** phoned him because he is a village-elder in the area, and that he arrived at almost the same time as **PW1** although **PW1** arrived earlier. He stated that the deceased was lying about 10-20 metres from the house, he did not see any visible injuries on his body, and that at the scene, a daughter of the accused told them that it is the accused who had beaten the deceased. He also stated that he learnt that the accused's wife had also been beaten and also suffered injuries, but they did not look for her.

6. **PW3, Titus Yego**, testified that the deceased was his elder brother, that on 29/11/2016, while he was at home sleeping, he received a report that the deceased had been assaulted at the home of the accused, about 300-400 metres away, he rushed there on a motor-cycle where he found the deceased lying outside the house. He testified that they took him to hospital, he was not speaking, and that he saw some injuries on one of the deceased's legs which was bleeding, and that he was accompanied to hospital by one of his other brothers who had arrived at the scene earlier and phoned him. He testified that upon arrival at the hospital, they were informed that the deceased had already died. He also stated that at the scene, he used the headlights of his motor-cycle to see the deceased lying down. He stated further that he attended the post mortem on 5/12/2016 together with his said brother, and they were told that the deceased had died of a head injury. He testified that he also knew the deceased and he was not aware of any grudge between the accused and the deceased, but that, shoes and a red cap belonging to the deceased were found inside the accused's house. He then identified the shoes and the red cap, and testified further that he was present at the accused's house when the police recovered the said items, together with 2 sticks, which he also identified. In cross-examination, he stated that he found the Assistant Chief (**PW1**), the village elder (**PW2**) and the accused's daughter when he arrived at the scene. He also stated that it was dark as there were no lights or torches. He stated further that his said other brother told him that a son of the accused had told him that it is the accused who had assaulted the deceased. He then described the deceased (his brother) as a drunkard. In re-examination, he however stated that the deceased was not smelling of alcohol when they took him to hospital.

7. **PW4, Philemon Biwott**, testified that on 29/11/2016 he received a phone call from one **Kiplagat**, informing him that his (**PW4's**) brother (the deceased), had been found at the home of the accused. He testified that he went with the said **Kiplagat** to the home of the accused where he found the Assistant Chief (**PW1**) standing near the door to the accused person's house, and **PW1** asked him to enter the house and confirm that his brother was inside. He stated that he so entered and inside the bedroom, he found the deceased with the accused's wife, and the accused was lying on the floor, but he did not check his condition. He testified that he then went outside and confirmed to the Chief that indeed, it was his brother inside, they all went inside and sat in the sitting room with the Chief, where the accused's wife also came, but the deceased told them that he did not have the strength to go to the sitting room, upon which he and **PW1** carried him there. He stated that it is at this point that he noted that the deceased had injuries and his condition was not good, that he then returned to his home and brought other people who assisted in taking the deceased to hospital where he was however pronounced dead, and they then went and reported the matter at the police station. He testified further that he attended the post mortem exercise conducted on the body. He then stated that his home is about 2 kilometres from the home of the accused, and they have not heard any conflicts with the accused, but he learnt that the deceased was found by the accused in his bedroom with the accused's wife. In cross-examination, he stated that, apart from **PW1**, he also found a *nyumba kumi* (community policing team) official at the scene when he arrived, and in the sitting room, he also found the accused's 5 children. He also confirmed that when he entered the bedroom, he did not speak to the deceased but when the deceased was called to the sitting room, he responded that he was unable to get up. He reiterated that the deceased was lying down on the floor while the accused's wife was sitting beside him, that he recognized the deceased by his face, and he observed that he was bleeding. He agreed that it was dark inside the bedroom but stated that there was light in the sitting room. He also agreed that the deceased used to take alcohol but stated that he did not know whether he was drunk on that night.

8. **PW5, Dr Benson Macharia**, a Pathologist at the **Moi Teaching and Referral Hospital (MTRH)**, testified that he conducted an autopsy on the body of the deceased, a 35 years old male, upon request from one **Police Constable Moses Kabutu (PW7)**, and that the report given was that the deceased had been assaulted, and was pronounced dead on arrival in hospital. He stated that the deceased's clothes had brown soil, and external examination revealed multiple defence wounds on the upper and lower limbs with extensive soft tissue blood clots, and multiple bruises on the lower and upper limbs. Internal examination, he

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stated, revealed presence of a bruise on the scalp on the front side, and there was also bleeding onto the left side of the brain, but there were no fractures. He testified further that the cause of death was “*extensive soft tissue injuries and head injury due to blunt trauma*”. He then produced the post-mortem Report, and stated that he also took a blood sample which was handed over to **PW7**, but whose results he did not know. In cross-examination, he stated that the injuries were caused by a blunt object, and that the pattern was consistent with defence wounds, and inconsistent with being a result of a fall. He was thus emphatic that this was a case of a person being hit and defending himself from the beating. He stated further that the purpose of the blood sample was to determine whether the victim had imbibed alcohol. He also stated that he could not tell the size of the blunt object used but he could tell the range in terms of distance between the victim and the deceased, and in this case, the victim was within reach of the assailant’s blunt object.

9. PW6, Richard Kimutai Langat, from Government Chemist, stated that he received a police exhibit from Moi’s Bridge Police Station, namely, a blood sample from the accused, which he subjected to a machine by the name Gas Chromatography which determines alcohol samples in a liquid. He stated testified that he found blood alcohol concentration (BAC) of 42.56 mg of alcohol (ethanol) per 100 ml of sample, which is equivalent to ½ litre bottle of beer or 2.0 tots of whisky. He then produced the Report dated 20/02/2017, and stated that the amount of alcohol found in the blood sample was not sufficient to make a person drunk.

10. PW7, Police Constable Moses Kabutu, testified that on 29/11/2016 at about 7.30 am he was directed by his superior at the Moi’s Bride Police Station, to investigate a case that had been reported by the Kapkures Assistant Chief, who had brought in a suspect on an accusation of assault. **PW7** stated that the Report was that the accused had assaulted the deceased whom he found at his home engaged in a love affair with the wife of the accused. He then testified that at around 8.00 am, they received information that the deceased had died at Ziwa Hospital, he visited the crime scene, the home of the accused, where he recovered one a pair of sports shoes and a red cap which, according to the area residents, belonged to the deceased, and the area Chief and village elders were also present. He testified that they also recovered from the bedroom, two pieces of a broken stick that had blood stains. He then produced the items as exhibits and also stated that he also took statements from witnesses. He stated further that he later attended the post mortem exercise during which he noted that the deceased had injuries on the head and legs. In cross-examination, he agreed that no witness stated that he/she witnessed the accused beating the deceased, and that there is nothing that linked the sticks to the accused.

11. As aforesaid, upon close of the Prosecution case, by my Ruling dated 16/06/2023, I 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. In his defence, the accused denied killing the deceased. He testified that he had been away in Kaptum for about 2 weeks where had gone to operate a **boda boda** (motor-cycle taxi) business but he made an unplanned return home in Ziwa on 29/11/2016 because, while on his way to Kapsabet to assist in collecting his brother's maize and delivering it at Ziwa, their motor-vehicle had broken down and it had taken too much time to repair it, and it was therefore already night-time when they delivered the maize in Ziwa, thus, too late to return to Kaptum. He testified that he went to his home in Ziwa at around 10.30-11.00 am and knocked on the door, but as the door was not locked, he simply pushed it, opened and entered, that in the bedroom, he stumbled on two people on the bed who were covered with a net so he could not identify them, but he wondered as only his wife lived there. He testified that he went outside and screamed loudly, his daughter, who was also in the compound but in another house, also joined in the screaming, and that it was during circumcision time so there were celebrations outside. He stated that the Assistant Chief (**PW1**) and the village elder (**PW2**) then came and they all entered the bedroom together, he heard **PW1** then calling out "**Wanugu**", (the deceased) whom he knew from the neighbourhood but who was not a straight-forward person, and who was then brought to the sitting room.

13. He stated that two brothers of the deceased also showed up, **PW1** asked the deceased what he was doing in the accused's bedroom but he did not answer, and **PW1** then told the two brothers, who had a motor-cycle, to take the deceased away, which they did. He testified that when he (accused) complained to **PW1**, he told him that he could as well go to the police and report, and he offered to drive the accused there, which he did. He stated that at the police station, **PW1** spoke with the police and after some time, the police took him (accused) and placed him in the cells, in the morning of 30/07/2025, the police told him that he (accused) had killed someone, and he was then taken to Court. He stated that he was surprised to be so charged as the deceased was fully okay when he was taken by his two brothers as aforesaid, as they had carried him in the middle of the motor-cycle. He also described the deceased as a known drunkard in the neighbourhood, and asserted that the Government Chemist testified that the deceased had a high alcohol content in his body. He also described his own wife also as a drunkard, and stated that she left the home after the incident. He stated further that he is sick as he suffers cancer, and observed that **PW1** and **Eldoret High Court Criminal Case No. 83 of 2016**

PW2 had testified that he is a good person, and he also asserted that no witness saw him killing the deceased.

14. He added that the area was crime-prone, and he screamed because he thought there were criminals in his bedroom, and that many people, apart from **PW1** and **PW2**, showed up when he screamed. In cross-examination, he stated that he has 9 children with his said wife, the same one he found with the deceased in the bedroom, 4 of whom were living in his homestead, and that being a *boda boda* operator, he would sometimes be away for some days. He stated that he did not speak to the two people he found in his bedroom but just went outside and screamed, that he had lived with his wife since 1982 and they used to sometimes have domestic disagreements just like any other couple although his wife was wayward and used to return home late at night without explanation, and she was also adulterous, although she never used to bring men home. He contended that he could not have reacted in the manner he is alleged to have done since he only learnt of the identity of the person who was in his bedroom when **PW1** and **PW2** fished him out. Regarding the appearance of **PW1** and the 2 brothers of the deceased, he stated that he did not know how they came to the scene, whether they were called or just appeared there by coincidence. He also denied knowledge that it is the police who came to the scene and not that him who went and reported the incident to the police. Regarding the shoes and cap that the deceased is said to have left behind in his house, he denied seeing them, but regarding the sticks that are said to have been recovered from his house, he recalled seeing them when he walked into the house that night. He denied that any one was assaulted in his house that night, and insisted that it is the Chief who advised him to go and report the incident at the police station, and then took him there. He however claimed that at the police station, after he made the report, and he and **PW1** recorded statements, as he was leaving, the police spoke with **PW1** and they then called him back and put him in the cells.

15. Upon close of the defence case, and thus the whole trial, I granted the parties leave to file written Submissions. However, only the State, through **Prosecution Counsel Claire Muriithi**, supplied a copy of its Submissions dated 6/10/2025. The same is however not filed in the online **Judiciary Case Tracking System (CTS)** portal, as now required. I will nevertheless, in the interest of justice, consider the Submissions, but with the strict direction that the same be now so filed in the **CTS**.

Prosecution's Submissions

- 16. Ms. Muriithi** restated the ingredients that the Prosecution must prove to secure a conviction on the charge of murder. She cited the case of **Anthony Ndegwa Ngari vs. Republic [2014] eKLR**. On the issue of the death of the deceased, she submitted that the same is not disputed as the post-mortem form was produced. On the issue of the unlawful act by the accused which caused the death of deceased, Counsel urged that the Prosecution witnesses corroborated each other on the account that they found the deceased lying on the ground, in no good condition, that **PW3** specifically stated that the deceased was bleeding from one of his legs, and also identified the red cap and white sports shoes in Court which, he stated, were recovered from the accused person's house. She also asserted that **PW2** confirmed that the shoes and cap belonged to the deceased, and also identified two bloodstained sticks also recovered from the accused person's house. Counsel agreed that none of the witnesses saw the accused inflict injuries on the deceased, but submitted that the fact that the deceased's leg was bleeding and the 2 blood-stained sticks were recovered from the accused person's house, proves that the injuries were freshly inflicted. Regarding the testimony given by the accused claiming that the deceased was in good health when he left the scene aboard a motorcycle, Counsel observed that the same was in contrast with the testimony of the Prosecution witnesses who all stated that the deceased was in bad shape.
- 17.** Regarding the defence theory that the injuries were caused by someone else or somewhere else, for instance, and the theory of the deceased falling and knocking his head, Counsel refuted that narrative as not holding water for reasons that the deceased was with the accused person's wife and there is no way she could have assaulted the deceased as the fight would have caused a commotion attracting the accused person's children who were in the same compound and even neighbours, and also that the deceased died on his way to hospital. According to Counsel, this only proves that the deceased was in a critical state, there is no chance that he would have been injured elsewhere and then gone to the accused person's house to rest there, and the high chance is that he would have been dead before he was found. Counsel observed further that the deceased had other bodily injuries, whose pattern **PW5** described as being consistent with defence wounds, and inconsistent with a fall. She submitted that from the evidence tendered, there is no doubt that the accused is the one who inflicted the injuries on the deceased that caused the death and that the evidence by the accused person does not cast doubt or shake the clear and consistent evidence tendered by the Prosecution witnesses. On "*malice aforethought*" as recognized under **Section 206** of the **Penal Code**, Counsel cited the case of **Republic vs Tubere s/o Tubere (1945) 12 EACA 63**, and urged that the accused used the two sticks produced in evidence to assault the

deceased severally all over the body thus inflicting extensive soft and head injury, which action was very deliberate and a clear indication that grievous harm was intended.

Determination

18. 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.”

19. 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.**

20. In this case, the death of the deceased and cause thereof are not disputed. According to the testimony of the Pathologist, PW5, Dr. Benson Macharia, who conducted an autopsy on the body of the deceased, the cause of death was “*extensive soft tissue injuries and head injury due to blunt trauma*”.

21. 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

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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.”

22. On whether there is proof that the accused is the person who committed the unlawful act which resulted in the death of the deceased, it is not in dispute that there was no witness who claimed to have seen the accused inflict the injuries that resulted in the death of the deceased. The evidence can therefore be described as “*circumstantial*”.

23. As to what constitutes “*circumstantial evidence*” and in what manner it can sustain a conviction, the Court of Appeal, in the case of **Ahamad Abolfathi Mohammed & 2 others v Republic (2018) eKLR**, stated the following:

“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, CJ 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.”

24. As to the manner in which “*circumstantial evidence*” ought to be established such that it can sustain a conviction, the Court of Appeal, in the case of **Abanga alias Onyango v Republic Criminal Appeal No. 32 of 1990**, guided 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."

25. The Court of Appeal, again, in the case of **Joan Chebichii Sawe v Republic [2003] eKLR**, the Court observed that:

"..... In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."

26. It is therefore generally agreed that for "***circumstantial evidence***" to carry the day, the Prosecution must establish that there are no other co-existing circumstances which could weaken or destroy the inference of guilt. It is also agreed that in a case reliant on "***circumstantial evidence***", each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge (***see Mwangi & Another V Republic (2004) 2 KLR 32***).

27. In this case, **PW1**, the Assistant Chief, narrated how he was woken up by the 2 sons of the deceased at midnight, who informed him that their father (accused) had found a man in his house. **PW1** further stated that on arrival at the scene, he found the deceased lying on the floor writhing in pain, and unresponsive, and that he later confirmed from the accused that the accused had found the deceased in the bedroom with his wife. **PW4**, a brother of the deceased, also confirmed that when he arrived at the scene, he found the deceased lying on the floor, bleeding, and unable to speak. **PW2**, the village elder, and **PW3**, another brother of the deceased, also confirmed that on arrival at the scene, they found the deceased lying outside the house, unable to speak. **PW3** also testified that the deceased was bleeding from one of the legs. The witnesses also testified that, upon realizing the bad condition in which

the deceased was, they arranged to rush him to hospital but he was pronounced dead on arrival there. **PW3** also further confirmed that he was present when the police recovered a red cap and pair of shoes belonging to the deceased in the accused's house.

28. PW7, the Investigating Officer, on his part, testified that the Report made at the police station was that the accused had assaulted the deceased whom he found in his house engaged in an act of love-making with the wife of the accused. He testified that when he visited the crime scene, the home of the accused, he recovered a pair of sports shoes, and a red cap which, it was established, belonged to the deceased, and also recovered from the bedroom, two pieces of blood-stained broken sticks.

29. The above testimonies therefore demonstrate that the witnesses found the deceased at the home of the accused, injured and bleeding from freshly inflicted wounds, and that blood-stained sticks were also recovered from the accused's house. There is nothing to suggest the possibility that anyone else could have entered the house before the accused, or even prior to the incident, or that the deceased could have been injured elsewhere.

30. In light of all the surrounding evidence, I do not believe the accused person's defence that the area being allegedly crime-prone, he simply ran back outside screaming when he entered the bedroom and found two figures sleeping on the bed, one definitely his wife. His account of events on that fateful night does not add up at all. First, he says that he could not even identify the two people whom he found in the bed as they were covered with a mosquito net. Since he does not allege that he came across any kind of commotion or attack by thugs, or even an ongoing robbery, did it not occur to him that the second person in the bed could even have been one of his own daughters sharing the bed with her mother, or even a female visitor? What immediate danger was posed by two people soundly asleep in a bed? Did it not occur to him that by running out and screaming in the manner he did, he may have been endangering the life of an innocent relative or guest who could have been easily mistaken for an intruder and lynched by responding neighbours? What would make him just run out and start screaming loudly in the manner he did yet he had not even identified the person or encountered any kind of threat or invasion of his home? It is clear that, although he may not have identified who it was in bed with his wife, he had already established that it was another man involved in an illicit sexual affair with his wife. This is also because he testified that his wife was a drunkard and adulterous. The alleged conduct of the deceased is illogical and contrary to ordinary human conduct. People do not just come out running and screaming loudly every time they walk into their bedrooms and find a second person peacefully and

soundly sleeping on a bed ordinarily occupied by their wives, particularly where the gender of this second person has not even been established.

31. It is obvious that in this case, the accused walked into his bedroom at night, found a man in bed with his wife, and knowing his wife's alleged adulterous nature, quickly established that his wife had brought a man into his bed for sexual activities, which in fact was the true position. As any man may instinctively be prone to react when put through such level of betrayal, humiliation, and disrespect, the accused picked the weapon nearest, in this case, the sticks, and viciously attacked the accused, his wife's lover. This is clearly what happened. Under these circumstances, one would have expected the accused to have perhaps pleaded the defence of "**provocation**". He never did so, perhaps, on advice from his legal team, and it is not in my place to comment on the merits or demerits of that choice of not taking up that defence. Be that as it may, what transpired in that bedroom on that night is clear.

32. Having carefully considered the accounts given by the Prosecution witnesses, and also the account presented by the accused, I am satisfied that it is the accused person who inflicted the injuries on the deceased, which injuries led to the death of the deceased. As aforesaid, the accused has however not raised the defence of provocation.

33. 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."**

34. 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.”

35. The Court of Appeal, on its part, 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.”

36. 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 as follows:

“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.”

37. In this case, it is clear from the evidence tendered, that the deceased died from injuries inflicted on him by the accused person by use of the sticks that were produced in evidence. Although no forensic tests were conducted to link the blood-stains on the sticks to the accused and/or the deceased, the testimony given by **PW5** confirms that the injuries that led to the death of the deceased were due to “blunt trauma” which strongly suggests that the blood-stained sticks were the weapons used to inflict the injuries. **PW5** also gave cogent testimony that the pattern of the multiple injuries noted on the limbs, and bruises on the scalp, were clearly consistent with defence wounds. In other words, the injuries were inflicted when the deceased was trying to ward off repeated blows aimed at his body by use of a blunt object. The nature of the injuries therefore suggests that the attack was vicious, brutal and intended to cause maximum grievous harm to the deceased. To my mind, these facts easily establish the presence of *‘malice aforethought’*.

38. I therefore find that, apart from the accused person being the one who committed the act that resulted in the death of the deceased, there was also “*malice aforethought*” in his actions.

39. Under the above circumstances, my finding is that the Prosecution has through the facts and evidence presented, proved the charge of murder against the accused person beyond any reasonable doubt.

40. Accordingly, I find the accused person, **Joash Kichwen**, 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 13th DAY OF FEBRUARY 2026

.....
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Appellant present physically in Court

Mr. Ondieki for the State

Court Assistant: Brian Kimathi