

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BOMET
CRIMINAL CASE NO. 14 OF 2020

REPUBLIC.....

PROSECUTOR

VERSUS

EMMANUEL KIRUI ALIAS KIMONDA ACCUSED

JUDGEMENT

The charge

1. Emmanuel 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 5th July 2020 at Nyamarenda Village, Kaptebengwet Location in Konoin Sub-County within Bomet County, he murdered Benard Biegon.

2. The Accused took plea before Korir Judge. on 22nd October 2020 and pleaded not guilty. The case proceeded to trial where the Prosecution called thirteen (13) witnesses and the Accused testified in person before he closed his case.

Summary of the Prosecution Case

3. The Prosecution's case was that on the material day, the Accused found the deceased and Anna Mutai (PW1) having sexual intercourse on their (Accused's) shamba. Kipngetich Kirui Nickson (PW3), Vincent Kipngetich Terer (PW4) and Leonard Mutai (PW5) all testified that they saw the deceased and PW1 lying on the shamba. PW3, PW4 and PW5 further testified that they met the Accused along the way and asked him to leave the deceased and PW1 be.

4. It was the Prosecution's case that the Patrick Too (PW2), Vincent Kiplangat Yegon (PW6), Wilberforce Yegon (PW8), Richard Chirchir (PW9) and No. 227703 C.I Abigael Wairimu (PW12) found the deceased's body on the floor of the Accused's house.

5. The Prosecution stated that the body was taken for post mortem examination and through Dickson Kipkorir Langat (PW11), the cause of death was determined as hemorrhage secondary to blunt force trauma. The investigating officer (PW12) visited the scene, documented it and recovered exhibits which included a wooden stick with a sharp nail attached to it.
6. The Accused was later arrested and charged with murder.
7. At the conclusion of the Prosecution case, this court ruled on 30th July 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 denied that he committed the offence. That on the material day, he went to watch a video until 7 p.m., when three people came and

informed him that there were people on his farm. DW1 further testified that he went to the farm and found the deceased.

9. The Accused told the court that he told the deceased who appeared drunk to go sleep in his (Accused's) house. The Accused further testified that when he woke up in the morning, he found the deceased had blood on his head.

10. It was the Accused's testimony that the deceased was alive when he took him to his house and that he was just linked to the deceased's death.

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 of death

15. There is no doubt that the deceased Benard Biegon died on 5th July 2020. The Prosecution presented Patrick Too (PW2), Vincent Kiplangat Yegon (PW6), Wilberforce Yegon (PW8), Richard Chirchir (PW9) and No. 227703 C.I Abigael Wairimu (PW12) who all found the deceased's body on the floor of the Accused's house. A post-mortem was conducted on the body at Kapkatet Sub County Hospital and the respective report was exhibited.

16. It is my finding from the above that the fact of death of the deceased was established.

17. The Accused accepted the facts as true and the court convicted him on his own guilty plea for the lesser offence of manslaughter contrary to **section 202 as read with section 205 of the Penal Code.**

Cause of death

18. Evidence on the cause of death was given by Dickson Kipkorir Langat (PW11) who was a Clinical Officer at Kapkatet Sub-

County Hospital. He stated that the deceased had extreme bruising on his hands and lower face, bleeding from the right ear, fractures of the 5th and 6th right ribs, respiratory accumulation of 3 litres of blood in his lungs and accumulation of the blood on the right side of the head and in the brain. He concluded that the cause of death was hemorrhage secondary to blunt force trauma. He produced a Post Mortem Report for Amos Kipngetchich as **P. Exh 2**. When PW11 was cross examined, he ruled out the possibility of a fall as the cause of the blunt force trauma.

19. I have looked at and considered the Post Mortem Report (P. Exh 1) and I have noted that the findings contained in the Post Mortem Report mirrored the testimony of PW11. I have found no reason to doubt the professional opinion of PW11 on the cause of death. It is my finding therefore that the cause of death was hemorrhage secondary to blunt force trauma which was undoubtedly unlawful.

Whether the Accused caused the death of the deceased

20. Having gone through the testimonies, it is clear to this court that no one witnessed the commission of the offence and thus the evidence that the Prosecution presented before the court was circumstantial. The Court of Appeal in **Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR)**, held: -

“.....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....”

21. Similarly, in **Mwita v Republic (Criminal Case 10 of 2020) [2022] KEHC 3265 (KLR) (19 May 2022) (Judgment)**, Wendoh J. held: -

“.....This is what the court stated in Neema Mwandoro Ndunya vs. Republic CRA 466 of 2007 where the court of Appeal cited with approval the case of R vs. Taylor Weaver and Donovan (1928) 21 CRC 20 the court said:-

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”

22. In the present case, Kipngetich Kirui Nickson (PW3), Vincent Kipngetich Terer (PW4) and Leonard Mutai (PW5) all testified that they saw the deceased and PW1 having sexual intercourse on the Accused's shamba and further testified that they met the Accused along the way. Fearing for his actions, they all asked the Accused to let deceased and PW1 be. When PW3, PW4 and PW5 were cross examined, they all reiterated that

they met the Accused on the material day and time heading towards his shamba and further asked him to let the couple enjoy themselves, Further, upon cross examination, PW3 stated that at the material time, there was no one else on the road.

23. It was clear from the Prosecution's witnesses that the deceased was found dead in the Accused's house the following morning, a fact which the Accused admitted. No. 227703 C. I Abigael Wairimu (PW12) who was the Investigating Officer testified that she visited the shamba and recovered a bloodied wooden stick which was produced as **P. Exh 1**. PW12 also testified that she confirmed that the Accused was the last person on the scene. PW12 further collected the deceased's clothes (**P. Exh 6-11**) and presented them for forensic examination.

24. Richard Kimutai (PW13) who was the Government Analyst testified that he conducted forensic examination on the items presented to him by PW12 and found that the DNA generated on the wooden stick and the deceased's clothes matched the

DNA of the blood that was extracted from the deceased. PW13 presented the Government Analyst Report as **P. Exh 13**. I have gone through the report and found that its contents mirrored the testimony of PW13.

25. From the above summation, it is my finding that the bloodied wooden stick (P. Exh 1) was the murder weapon. I say so because it corresponds to the findings in the Post Mortem Report which concluded that the deceased's hemorrhage was caused by blunt force trauma. The wooden stick was used in causing the fatal blow.

26. In his sworn defence, the Accused (DW1) denied committing the offence and testified that he took the deceased to his house when the deceased was drunk. He further testified that the deceased was alive when they slept and when he woke up, he found the deceased dead with blood oozing from his head. When the Accused was cross examined, he testified that he did not beat the deceased.

27. From the Prosecution's testimonies and the Accused's admission, the Accused was the last person seen with the deceased. This meant that the Accused had a duty to explain the circumstances under which the deceased met his death.

Section 111 (1) of the Evidence Act provides: -

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is

charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

28. The Court of Appeal in **Musimbi vs Republic (Criminal Appeal 107 of 2020) [2023] KECA 287 (KLR) (17 March 2023) (Judgment)** held: -

“Regarding the “last seen with” doctrine, its applicability has been explained by various courts. For instance, in the Nigerian case of Moses Jua vs The State (2007) LPELR-CA/IL/42/2006 it was held as follows:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused,

there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."

In another Nigerian case of Stephen Haruna v The Attorney-General of The Federation (2010) 1 iLAW/CA/A/86/C/2009, the Court in considering the same doctrine opined thus:

"The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of

the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

In the case of Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh, JT 2006 (4) SC 16 the Court held:

“That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

29.As earlier stated, the Accused admitted to being the last person seen with his deceased. In his defence, he stated that the deceased was alive when he slept and dead when he woke up. It is my finding that the Accused did not satisfactorily explain the circumstances under which the deceased met his death.

30.I have paid due regard to the Accused's defence. It was a mere denial and was very weak. Additionally, he was placed on the scene of crime by PW3, PW4 and PW5 and by his own admission, the Accused escorted the deceased to his house and that was the last time the deceased was alive. According to the evidence tendered there was no other person in the Accused's house other than the Accused himself.

31.I have tested the circumstantial evidence above against any other possibility as required and alongside the principles stated

in **Sawe v Republic [2003] KECA 182 (KLR)**, where the Court of Appeal held: -

“.....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.”

32.From the above, it is my finding that the circumstantial evidence against the Accused is overwhelming and cogent. It points unerringly to the guilt of the Accused and no one else. The circumstantial evidence in totality leaves no doubt that the Accused and no other, cause the death of the deceased.

Whether the Accused acted with malice aforethought.

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

34.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.”

35. In **Bonaya Tutu Ipu & another v Republic** [2015] KECA 335 (KLR), the Court of Appeal held: -

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. 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. Earlier in Rex v Tubere s/o Ochen [1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....” (Emphasis mine)

36. 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 mine)

37. I have looked at the evidence as a whole and the circumstances under which the deceased met his death. The cause of death as I earlier found was hemorrhage secondary to blunt force trauma. I have looked at the photographs produced as **P. Exh 12 (i) to (viii)** and I have noted that the deceased suffered a blow to the side of his head which resulted in its swelling and bleeding. It is this injury that the deceased

succumbed to. The nature and severity of the injuries indicated a use of force by the Accused who was armed with a wooden stick attached with a nail. In my view, the Accused's action of striking the deceased on his head clearly pointed to an intent to kill. By choosing to strike the head, the Accused, he must have known that his actions would lead to the deceased's death. It is my finding therefore that the Accused possessed malice aforethought when he killed the deceased.

38. In the final analysis, it is my finding that the Prosecution has proved its case against the Accused to the required legal standard. The Accused is accordingly convicted of the murder of Benard Biegon.

**Judgement delivered, dated and signed this 19th
day of March 2026.**

.....

HON. JULIUS NGARNGAR

JUDGE

Judgement delivered in the presence of:

Siele/ Susan (Court Assistants)

Ms. Koech for the state

Chirchir for Accused absent.

ORIGINAL