

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF**  
**KENYA AT KAPSABET**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. 42 OF**  
**2019**

REPUBLIC:.....  
:.....PROSECUT

**VERSUS**

**COSMASS BETT KIPKIRONG ALIAS**  
**MATANG:.....1<sup>ST</sup> ACCUSED**

**PHILIP KIPYEGO KIRWA ALIAS**  
**MCA:.....2<sup>ND</sup> ACCUSED**

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**JUDGMENT**

**1.** The two Accused, **Cosmas Bett Kipkirong alias Matang** and **Philip Kipyego Kirwa alias MCA** are charged with murder, **Contrary to Section 203** as read with **Section 204** of the **Penal Code**. It was alleged that on the night of the 11<sup>th</sup>/12<sup>th</sup> June 2019, at Simbi Village Nandi Hills within Nandi County the two murdered **Wilson Kipkurui Maina** [deceased].

2. The case for the prosecution was that on the 11<sup>th</sup> June 2019 at about 3:00pm the deceased proceeded to the home of **Vivian Chepleting [PW6]** which was a known “*changaa*” drinking den where he took the liquor and was briefly joined by the second accused who took a sip of the drink and left.

Later, the deceased left the place and returned at 5:00pm and found his girlfriend there as well as the First Accused. They were all joined by other revellers including James Mutai also known as **Bonge [PW7]** and one **Salim**.

3. The deceased’s girlfriend, **Anne Cheptum [PW8]** ordered a drink for him before she assisted **Vivian [PW6]** in her chores. She **[PW8]** left the place at about 6:00pm after the deceased had left in the company of **Bonge [PW7]** and Salim, but the deceased did not accompany the two when they proceeded to the other changaa drinking dens for more drinks.

4. After the deceased had left the home of **Vivian [PW6]**, his girl friend and the First Accused remained behind upto about 6:30pm when they left.

On the following day the dead body of the deceased was found lying down near a river with a deep injury on the back of his head. It appeared that he [deceased] had been hit on the head. There was a blood stained stone **[P. Exhibit 1]** besides the body of the deceased.

5. The area chief, **Richard Metto [PW2]** was called from his home at 7:00am on the 12<sup>th</sup> June 2019 and informed that a dead body had been found near a nearby river. The chief relayed the information to his superior officer and reported the matter to the police. Thereafter, he proceeded to the scene and confirmed the body to be that of the deceased. A large crowd of people had gathered at the scene. They included the deceased's daughter, **Abigael Jepleting [PW1]**, an employee of the Teachers Service Commission, **Felix Kimutai Mwei [PW3]**, a farmer, **Kevin Kimutai Ruto [PW4]** and a tea plucker, **Elias Kimeli [PW5]**.

6. The Chief indicated that police officers arrived at the scene and collected the stone [**P. Exhibit 1**] which was blood stained and so was the scene. Some of the villagers noticed blood stains leading to the scene. They tracked the blood stains upto a place called Kokwet. It was indicated that the deceased was drinking changaa in the house of **Vivian [PW6]** within that area.

7. At Kokwet the blood stains led the villagers to the home of the First Accused where a blood stained Khaki trouser [**P. Exhibit 2**] was found. The First Accused was among the crowd at the scene. He was immediately arrested and taken away by the police. Earlier, **Elias Kimeli** had seen wearing the same Khaki

trouser. Ag. Superintendent of Police, **Abel Onyapidi [PW11]**, of the scenes of crime section proceeded to the scene and took several photographs **[P. Exhibit 6]**.

**8.** The police investigations carried out by **Sgt. Lenny Ekidor [PW12]**, revealed that the body of the deceased had an injury on the head and that two blood stained stones were at the scene where the body was found. That, traces of blood found at the scene were tracked to some houses nearby including that of the First Accused. The house was searched and the blood stained khaki trousers **[P. Exhibit 2]** was found therein.

**9.** According to **Sgt. Ekidor [PW 12]** it appeared that there was a commotion in the house. He noted that the First Accused had an injury on his knee. He **[PW12]** indicated that there was a second house in which blood stained soil was found and that the house belonged to the Second Accused. He gathered that both Accused and the deceased were drinking the traditional liquor and that both Accused were the last persons seen with deceased when he was alive.

**10.** The officer **[PW12]** also indicated that he prepared an inventory **[P. Exhibit 7]** of the items recovered at the scenes, and an exhibit memo forms **[P. Exhibit 3[b][c][d]** and forwarded both them to the government chemist for necessary examination and analysis.

The Government Analyst, **Richard Kimutai Langat [PW9]**, confirmed receiving the exhibit memo forms and the recovered items. He then carried out his examination and compiled a report **[P. Exhibit 3[a]** dated 16<sup>th</sup> July 2019 indicating that the DNA profile generated by the blood stains from the soil and the stone matched the DNA profile of the deceased while that generated by the blood stains of the pair of trousers matched the DNA profile of the First Accused **[Cosmas]**. None of the profiles matched that of the Second Accused **[Philip]**

**11. Dr. Evans Kibiwott [PW10]**, carried out an autopsy on the body of the deceased and compiled a report **[P. Exhibit 4]** indicating that the deceased died from a high impact blunt force trauma with multiple blows in the head and chest.

On completion of the police investigations both occurred were charged with the present offence which they both denied.

**12.** The defence case was a denial by both Accused. The First Accused stated that he was at the home of **Vivian [PW6]** drinking changaa when he developed some chills and taken to a warm place where he found Anne [PW8] and continued drinking the changaa. The place was the kitchen. Other revellers including **Salim** and **Bonge [PW7]** were outside

the kitchen with the deceased.

**13.** He [First Accused] did not mix with nor meet that group of three i.e. **Salim, Bonge** and the deceased. He left the scene at 5:00pm and went home, but on the following day at about 8:00am he heard screams from a nearby village and learnt that the dead body of the deceased had been found near a river. He went there and found a big crowd. The police arrived and convened a meeting of villagers [**Baraza**]. He was later taken to the police station where he was told that his pair of trousers was found with blood stains. He was then charged with the present offence.

**14.** The First Accused contended that he had an injury and it caused the blood stains on his trousers. He produced a [**P3 form**] [**D. Exhibit 1**] to confirm that he was injured and said that the injury was as a result of being pricked by a tea shrub.

**15.** On his part, the Second Accused indicated that he was at the home of **Vivian [PW6]** drinking changaa while in the company of others including the deceased. He then left the scene at 6pm and went home for the night. On the following day at about 8:00am he was alerted about screams coming from a nearby village called Simbi. He and other proceeded to the scene and found a large crowd of people. It was then

that he learnt that the dead body of the deceased had been found. He did not move near the scene of the discovery of the body but was aware of a village baraza taking place. Later, the house of the First Accused was searched and a blood stained trouser recovered.

**16.** He [Second Accused] indicated that his unoccupied structure within his family compound was found to contain a heap of soil which he had dug a few days earlier. He never lived in that house but at the local trading centre. He contended that he was arrested because some blood stains were found near his incomplete structure and that he did not commit the offence.

**17.** From all the evidence foregoing it remained undisputed that the deceased met his death at the hands of an assailant or assailants who bashed the back of his head using a stone thereby causing him fatal injuries. In essence, the death of the deceased was as a result of a criminal act of assault committed against him. The intensity and nature of the injury occasioned to him clearly indicated that the assailant or assailants had the intention to cause his death. In that way, malice aforethought was established.

**18.** The big question and indeed the main issue for determination was whether the deceased was assaulted and

fatally injured by the Accused or any one of them.

The prosecution did not offer any direct evidence of identification against both Accused. None of the prosecution witnesses saw or found them in the act of assaulting the deceased even though most of them had earlier been drinking changaa together at the home of the “changa” seller, **Vivian [PW6]** who indicated that both Accused left the home at different times on their own.

**19. Bonge [PW7]** was among the changaa drinkers. He indicated that him and one Salim parted ways within the deceased when they proceeded to other changaa drinking dens for more drinks thereby implying that the deceased went away on his own.

**20.** There being no direct evidence of identification against both Accused Persons, the prosecution resorted to circumstantial evidence in the form of the blood stains which led the police to the house of the first Accused where a blood stained khaki trouser [**P. Exhibit 2**] was found.

Also found within the compound of that house was a blood stained portion of soil at or near a house said to belong to the Second Accused.

**21.** The First Accused explained that the blood stains on his

trouser were caused by an injury occasioned to him when he was pricked by a tea shrub or tree. There was also suggestion from the investigation officer **[PW12]** that both Accused were the last person seen with the deceased when he was alive. However, this fact which was expected to provide indirect or circumstantial evidence against the Accused was not corroborated by any of the other witnesses, hence insufficient in connecting the Accused with the death of the deceased.

**22.** Blood stains are an important and vital segment of circumstantial evidence which may lead to an offender and leave no doubt as to his identity as an assailant. It could if cogent and credible enough provide sufficient circumstantial evidence of identification against an Accused Person.

Herein, there was sufficient evidence that blood stains from the scene where the body of the deceased was found were tracked to the house of the First Accused where his blood stained trouser was found. A blood stained portion of soil was found within the same compound near a house said to belong to the Second Accused who contended that it was actually an incomplete structure in which no body lived including himself.

**23.** The forensic evidence regarding the blood stains and their

linkage to the Accused was provided by the Government Analyst **[PW9]** whose report dated 16<sup>th</sup> July 2019 **[P. Exhibit 1]** indicated that the blood stains on the stone **[P. Exhibit1]** and the soil came from the deceased while the blood stains on the khaki trouser **[P. Exhibit 2]** came from the First Accused.

**24.** The Investigations Officer **[PW12]** indicated that the blood stained soil was found near the house of the Second Accused who said that the house was actually an incomplete structure which he never occupied. This fact was never substantially disputed by the prosecution. There was however, undisputed evidence that that house or structure was within the same compound where the house of the First Accused was situated. It was also undisputed that the First Accused lived in this house within the compound.

**25.** The blood stains found in the khaki trouser **[P. Exhibit 2]** belonging to the First Accused were found to be his. His explanation for the presence of the stains on the trouser was that he suffered an injury.

The explanation was not disputed. In any event, the blood stains of the deceased were never found on the trouser as per the forensic evidence.

**26.** However, the forensic evidence showed that the blood

stains on the soil near the house or structure of the second Accused belonged to the deceased. This meant that the deceased was killed within the compound of both Accused houses and his body dumped at the river side in a manner suggesting that he was hit with a stone at the river or that the deceased was killed near the river and his blood stains were found in the said compound thereby implying that the assailant proceeded to the compound where he lived after committing the offence.

**27.** Since it was undisputed that the Second Accused never lived in the compound and the forensic evidence did not link him to the deceased's blood stains found on soil near his unoccupied structure or house then it would follow that there was no indirect evidence of identification against him. He could not therefore be said to be the person or one of the persons who assaulted the deceased and caused his death.

**28.** On the contrary, since there was undisputed evidence that the First Accused's house was within the same compound and that he actually lived there it would follow that he was clearly linked to the death of the deceased by the deceased's blood stains found on the soil within the compound. He stated that his home was about three hundred [300] meters from that of Vivian [PW6] where he was drinking changaa together with the

deceased and others. He confirmed that the Second Accused was his younger brother and that he lived outside the impugned compound.

**29.** In the case of **Mwangi Vs. Republic [1983] KLR 522,** the Court of Appeal stated that: -

**“In a case dependant on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the Accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”**

The court went further to state that: -

**“It is also necessary before drawing the inference of the Accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”**

**30.** In **PON Vs. Republic [2019] eKLR,** the Court of Appeal in regard to circumstances under which circumstantial evidence can form a basis for conviction

stated that: -

**“To have a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibly consistence with innocence it is the duty of the court to find the suspect not guilty.”**

- 31.** In this case the circumstantial evidence against the First Accused was cogent, credible and water tight as to leave no doubt that he was the person or among the persons who caused the death of the deceased by occasioning him fatal injury. The evidence that blood stains of the deceased were found in a compound he solely lived left no doubt that he was the culprit assailant. He was positively identified as such.
- 32.** Consequently, this court finds the Frist Accused guilty as charged and is hereby convicted and finds the Second Accused not guilty as charged and is hereby acquitted.

**Dated and Delivered this 18<sup>th</sup> day of March 2026**

**Hon. J. R. KARANJAH**  
**JUDGE**