

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO E043 OF 2023

REPUBLIC.....PROSECUTOR

VERSUS

KEVIN NAIBEI.....

.....ACCUSED

JUDGMENT

1. Kevin Naibei, the accused, is charged with the offence of murder contrary to section 203 read with section 204 of the Penal Code. The particulars of the offence are that, on the 21st day of September 2023, at Kapkerwa village, Emia location, in Kopsiro subcounty, within Bungoma County, the accused murdered Kevin Kibet. The accused person denied the charge. The prosecution called eight (8) witnesses to prove its case.

PROSECUTION CASE

2. Titus Kipyego (Pw1) told the court that on 12th September 2023 he was at Westgate Market with Edwin Kipturo, a neighbour. They had been hired by the accused's sister to put potatoes into sacks and were to be paid 200 shillings upon completion at 4:00 PM. When they asked Violet for their money, she began screaming. She called her brothers, who came with pangas. Rogers, Violet's brother, cut Edwin on the left hand. Edwin ran away. Rogers had a

panga, and Kevin had another. Rogers cut Edwin on the head on the left side and on the arm. He and the deceased, Kim, came where Edwin was. Rogers injured the deceased on the head and also cut four fingers on his left hand with the panga. They continued shouting, attracting attention. Rogers and Kevin ran away. Isaac took them to the hospital at the scene. They were taken to Bungoma Referral Hospital, where Edwin was admitted. He later learned that Kevin had died. During cross-examination, he told the court that the incident took place at 10.00am, that it was a fight, and that they were attacked with pangas. Rogers attacked him. Kevin did not do anything to him. He saw the accused cut Kevin in the finger. They did not have knives or ropes for the work they were doing. They did not use mbatis to attack the deceased. He did not go to Kevin's place to steal potatoes.

3. Edwin Kipruto (Pw2) testified that Kelvin Kibet, the deceased, was his brother. He knows the accused; he is a neighbour. On 12.9.2023, they were hired by Violet to pack potatoes at Westgate Market. He arrived at the market at 10:00 am. They were to be paid Kshs. 400/-. They packed from 10:00 am to 12 noon. Violet refused to pay them and began to scream. They had not attacked her. She rang her brothers, Rodgers and Kevin. The two came with pangas. Rodgers cut him on the left hand. He had no weapon. He screamed and ran away. He went to hide at the river. He did not see Kevin there. He returned and saw Titus being cut along with the deceased. The

deceased was not talking. He had injuries to the head and a finger. They were all taken to Kopsiro Hospital, and the next day they were transferred to Bungoma Referral Hospital. Kevin died after three days. The accused did not injure him. They had no dispute with the deceased. During cross-examination, Pw3 told the court that he saw the accused with a panga. They used the manila in the sacks to tie the bags. The fight happened at the market. They did not start the fight. There were many people at the market. He does not know what happened after he left. He did not witness Kevin cut the deceased.

4. Isaac Kipsang (Pw3) testified that the deceased was his neighbour and that he also knew the accused. On 12.9.2023, he went to Westgate Market and heard screams before he arrived. Titus and Edwin were screaming. On reaching the market, he found Titus with a cut on his head. Titus, Kevin, and Edwin had injuries. Titus was calling out his name, saying he was dying. The three had run in different directions. They had been seriously cut. The attackers had fled. He took them to Kopsiro. The deceased had a cut on his head and finger. Edwin was cut on the hand, and Titus on the head and shoulder. The deceased died in Bungoma. Titus told him that the accused had injured them. The deceased told him that the accused had cut him. During cross-examination, Pw3 told the court he did not witness the incident as it happened. He found that the three had been cut with pangas. The deceased was unconscious when he was found. The

deceased regained consciousness whilst in hospital, and he spoke to him.

5. Molol Kwemoi Joseph (Pw4) testified that on 21.9.2023 he was at the market with Edwin and Titus. The two were packing potatoes for a lady who refused to pay them and then called her brothers, Rodgers and Kevin. Rodgers arrived with two pangas. He saw Kevin and Rodgers cut Kelvin and Titus. He was at a place about 50 metres away, where he sold fruit. Rodgers cut Titus on the left shoulder and head. Rodgers also cut Kevin on the forehead and finger. Kevin cut Edwin Kipruto on the left hand. Kevin Kibet and Titus were seriously injured; Kevin Kibet died. He holds no grudge against the accused persons. He has known the accused since 2010. It was 6:00pm in the evening. During cross-examination, Pw4 told the court there was a fight at the marketplace. The two boys used knives, not pangas. They did not use the knives to attack the accused. It was not dark. The accused's sister called them.

6. Kennedy Meiywa (Pw5) testified that on 6.10.2023 he attended the post-mortem of his brother, Kevin Kibet, who had a panga cut to the forehead. He knows the accused.

7. P. C. 65494 Josphat Ongoki (Pw6) testified as follows: On 12.9.2023, he received a call from the OCS Kopsiro informing him that three people had been beaten and injured, and that they were being treated at Kopsiro Hospital. The next day, he went to check on the three. The accused went to the police station to report that they had

been beaten and that property had been destroyed by six people. He noted their report in the OB; from it, he identified one of them as Rodgers and the other as Kevin. He interrogated them and found that the two were among those who had beaten the three individuals he had received information about earlier. He decided to arrest them. His investigation then led him to Westgate, where the fight had taken place. The Chief told him that the two who had been assaulted were undergoing treatment. He found out that the house of the accused had been damaged after the incident. He visited Edwin and Titus, who had been injured. Kelvin had been referred to Bungoma Hospital. On 21.9.2023, the one who had been in a coma died. On 6.10.2023, he attended the post-mortem. During cross-examination, Pw6 told the court that OB Nos 4 and 5 were of the 13th. He did not complete his investigations. He did not mention any names in his statement. He did not arrest the sister of the accused persons. The investigations were taken over by the DCI's office. The case was originally an assault case until it turned out to be murder. He did not see any injuries on the accused. He did not follow up the assault case. The accused was the first to arrive with a report of assault.

8. Doctor Elly Kosgei Kiplimo (PW7) testified that on 6.10.2023 he performed a post-mortem examination on the body of the deceased, a 21-year-old male of African descent. The external examination revealed a deep cut wound on the forehead measuring 12 cm by 1 cm,

extending into the brain tissue, which was sutured. He also observed a severed fourth finger, which had fallen off and was sutured. Internally, the examination of the head showed a depressed fracture of the frontal bone and a massive intracerebral haemorrhage. Based on his findings, he concluded that the cause of death was severe head injury with excessive bleeding from the deep cut wounds.

9. No. 77098 Cpl. Geoffrey Too (Pw8) testified that he was involved in the investigation. Two people, Rodgers Munyekenye Otiba and Kevin Maibei, were charged with murder. On 23.9.2023, he received a call from the OCS Kipsogon that two people had been arrested for an offence of assault and that they had been charged in Sirisia Law Court. The three victims had been admitted to hospital. One of the persons, called Kibet, died on 21.9.2023. He took the accused person to Cheptais for a murder case. Later, he recorded statements from the witnesses and had the two accused persons charged. He learned that the two accused persons had taken themselves to the police station and reported a case of malicious prosecution vide Ob No. 4 of 2023. Rodgers reported on 12.9.2023 at 9.00 pm that he was attacked by six people, Tito, Edwin, Kipruto, Mika Rodgers and Isaac. Another report was made by Kelvin on 13.9.2023, OB No.5, by Kelvin Maibie, that people had destroyed his house on 12.9.2023. He did not investigate that aspect of that report. The accused had no injuries when he was arrested. During cross-examination, Pw8 told the court that he conducted his investigations

well. Rodgers attacked the victims, and nothing in his statement states that Kelvin attacked the said people. Kelvin was taken as a key witness. He did not record a statement from the sister of the deceased. They did not recover the pangas. As per his written statements, the accused persons had no pangas. A sharp object was used to cause the injuries. In re-examination, he stated that at one time the accused offered to be a witness, and when he declined to be a witness, he was charged.

10. Kelvin Naibei, the accused, gave a sworn statement. He testified that he did not cause anyone's death on 21.9.2023. At the time of the incident, he was at Changara. He was taking tea to his brother, Rodgers Otiba, who was at the police station. When he reached Kopsiro police station, he was asked who he was and was then placed in the cells. According to the investigating officer's statement, it was Rodgers who attacked the deceased. He was not involved in the matter. During cross-examination, he told the court that he told the police he was at Changara and that this was not a lie. He was working with many people at the farm in Changara. He is not calling any witness to testify that he was at Changara. He did not go with the police to report that people had destroyed his property. He has a sister called Violet, but he does not know what work she does. It is a lie that he had agreed to be a prosecution witness. The accused produced the statement of No.77098, Cpl Geoffrey Too.

SUBMISSIONS

11. The defence did not file any written submissions. Counsel for the accused chose to rely on the evidence on record. The prosecution submitted that it had proved its case beyond reasonable doubt through the credible evidence of the prosecution witnesses. The accused's alibi defence was never put to any of the prosecution witnesses and was raised only during the defence. It was not tested for validity and is therefore an afterthought. The accused did not produce any witnesses to support his defence that he was in Busia County. Pw6's evidence undermines the defence, as he arrested the accused on 12.9.2025 after the accused went to their police station and reported that they had been reported by six men.

ANALYSIS AND DETERMINATION

12. In a charge of murder, the prosecution has the duty to prove the following three elements to secure a conviction: that the deceased died; that the death was caused by an unlawful act of commission or omission by the person accused of the offence; and that the accused had malice aforethought when he committed the act. (see Chiragu & Another vs. Republic (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR))

13. The occurrence of a death is not disputed; Pw2 and Pw6 confirmed seeing the deceased. Pw7 conducted a post-mortem on the deceased and concluded that the cause of death was a severe head injury with excessive bleeding from deep cut wounds.

14. On whether the accused caused the death of the deceased. The prosecution's evidence is that the accused and his co-accused, Rodgers, were at Westgate Market after their sister raised an alarm. This was after the deceased and his colleagues had asked her for their pay for the work they had done. The evidence against the accused from the eyewitnesses is as follows: Pw1 testified that Rodgers cut the deceased with a panga. Pw1 told the court that Kevin, the accused, did nothing to the deceased. Pw2 testified that Kevin died three days later. The accused did nothing to him. Pw3 testified that he did not witness the incident but heard Titus call his name, saying he was dying. In cross-examination, he said that the deceased told him when he regained consciousness and spoke to him. He did not specifically state what the deceased told him about the incident, including the acts of each person who attacked them. Pw4, who was 50 metres away, told the court that he saw Kevin and Rodgers cut Kelvin and Titus. He was approximately 50 metres away, where he sold fruit. Rodgers cut Titus on the left shoulder and head. Rodgers also cut Kevin on the forehead and finger. This injury was confirmed by Pw7, the doctor who did the post-mortem. Kevin cut Edwin Kipruto on the left hand. Pw6 arrested the accused when they went to the police station. Pw8 testified that the witnesses named Rodgers and that Kevin was to be a witness; when he declined, he was charged. This evidence does not, in my view, prove beyond a reasonable doubt that the accused Kevin Naibei cut the deceased on the forehead

and finger. The evidence against him is that he caused injuries to Edwin and not the deceased. Although the accused was at the scene, I find that the prosecution has failed to show that he caused injury to the deceased. It is not the duty of the accused to prove his innocence. I find that the prosecution has failed to prove its case beyond a reasonable doubt. I give the accused the benefit of the doubt. I find the accused, **Kevin Naibei**, not guilty, and I acquit him of the offence of murder. The accused person is free to go unless lawfully held.

Dated, signed and delivered via Teams this 7th Day of April 2026.

R.E.OUGO

JUDGE

In the presence of:

Kevin Naibei/ Accused

Mr. Okaka - For the Accused

Miss Matere -For the State

Wilkister - C/A