



REPUBLIC OF KENYA



**Ruto v Republic (Criminal Appeal 53 of 2017)  
[2023] KECA 1520 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1520 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 53 OF 2017  
P NYAMWEYA, FA OCHIENG & WK KORIR, JJA  
DECEMBER 15, 2023**

**BETWEEN**

**NICKSON KIPCHIRCHIR RUTO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of the High Court of Kenya at Nakuru (M. Odero, J.) dated 5th June, 2017 in HCCRC No. 74 of 2013)*

**JUDGMENT**

1. The appellant, Nickson Kipchirchir Ruto 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 were that on July 31, 2013 at Banita in Rongai District within Nakuru County, the appellant murdered Ronald Kiprono Korir.
2. After the appellant pleaded “Not Guilty”, the prosecution called 6 witnesses, with a view to establishing the guilt of the appellant.
3. PW1, David Serony Korir, is a brother of the deceased. On the material day, he received a phone-call, urging him to go home. Upon arrival at the house, he found the body of the deceased lying under a bed. PW1 noted that there was a wound on the top of the deceased’s head.
4. PW2, Edwin Kiprotich testified that on the material day he was herding his cattle near Banita Centre. At about 1 pm PW2 went for lunch at a hotel run by PW3. Whilst at the hotel, PW2 met both the appellant and the deceased.
5. As PW2 was eating, the appellant received a phone-call, and PW2 heard the conversation. The brother of the appellant asked if the deceased had built the house; and the deceased shouted that he would not build the said house.



6. PW2 testified that the appellant went to the deceased, and hit him with a rungu. PW2 stated that the appellant hit the deceased on the head, causing the deceased to fall down. The appellant then picked up a chair, which he threw towards the deceased. However, the said chair did not hit the deceased. Although the deceased was treated at the Banita Health Centre, he later died.
7. PW3, Alfred Ouma, was the proprietor of the hotel where PW2 was having lunch, on the material day. He testified that the appellant and the deceased entered into the hotel, where they were served with food.
8. PW3 testified that PW2 found the appellant with the deceased, inside the hotel. After PW3 served PW2 with food, PW3 returned to the kitchen. Whilst in the kitchen, PW3 heard shouting, however, he did not understand what was being said. PW3 testified that he saw the appellant returning a rungu into his trousers.
9. PW4, Daniel Kipruto Kitur, was a boda boda operator. On the material day, PW2 phoned him, saying that someone had been injured. When PW4 rushed to the scene, he found the deceased lying down, whilst he was bleeding heavily from a wound that was on his head. PW4 rushed the deceased to the hospital.
10. It was the evidence of PW4 that the deceased talked to him, and told him that it was the appellant who had hit him.
11. After the deceased was treated, PW4 escorted him home. Later PW4 learnt that the deceased had passed away.
12. PW5, Dr Daniel Wainaina conducted the autopsy on the body of the deceased. He noted a cut on the right temporal region of the head. The said cut, which was about 5 cm, had been stitched. The scalp was swollen.
13. Upon internal examination, PW5 noted the following:

“Linear fracture of right temporal bone. Bleeding into the cranial cavity.”

The the doctor formed the opinion that the cause of death was the head injury with skull fracture, due to blunt force injury.
14. PW5 testified that the blunt trauma could have been caused by a blow to the head, if any hard or heavy object had been used.
15. During cross-examination PW5 said that a plastic chair, if wielded with a lot of force can cause the kind of injury which the deceased sustained. He also explained that the bleeding into the brain was slow.
16. In his considered view;

“It is not unusual for one to be hit on the head and to die much later, due to slow bleeding into the brain.”
17. PW6, PC Peter Muthinja was a police officer based at the Solai Police Patrol Base, at the material time. He testified that the assistant Chief of Banita Location, Mr. Joel Rotich, called him on phone, and informed him that the body of the deceased was at Kibukoi Village.
18. PW6 went to the scene, where he found the body lying on the floor, inside the house of the deceased. Whilst at the house, PW2 informed PW6 about the quarrel between the deceased and the appellant.



After PW2 informed PW6 that the appellant used a plastic chair to hit the deceased on the head, PW6 went to machine estate, where the altercation had, reportedly, taken place.

19. He interrogated the proprietor of the hotel (PW3), and then retrieved the chair which had been used to hit the deceased. The chair was produced as evidence, during the trial.
20. After giving due consideration to the evidence tendered by the prosecution, the learned trial Judge held that the appellant had a case to answer.
21. When called upon to put forward his defence, the appellant said that he had asked the deceased to help him build a house for his mother. He said that the deceased was his friend.
22. The appellant said that he was with the deceased at the hotel of PW3, where the appellant bought lunch for the 2 of them. The appellant received a phone call from his brother, whilst he and the deceased were still having lunch. When the appellant told his brother that the construction work would soon begin on their mother's house, the deceased jumped up and said that he would not build the house, as the appellant had not paid him.
23. The appellant further testified that the deceased abused him, saying that he (the appellant) had married his own mother after his father had died of AIDS.
24. When the deceased persisted on the abuses being hurled at the appellant, the latter became angry. The appellant said;

“ He continued to abuse me. I became angry. I took the plastic chair I was sitting on, and hit him. The deceased fell.”

He hit the deceased on the head.

25. The appellant told the trial court that he had known the deceased since their childhood. His explanation was that the deceased provoked him by uttering words which were insensitive and offensive.
26. After giving due consideration to the evidence tendered, as well as the submissions and the applicable law, the learned trial Judge convicted the appellant for the offence of murder. Thereafter, the appellant was sentenced to life imprisonment.
27. Aggrieved, the appellant lodged the present appeal. In his memorandum of appeal, he raised 8 grounds of appeal and 6 supplementary grounds of appeal, to wit that, the learned Judge erred in law and in fact in:

- a) Holding that the deceased was hit with a rungu, which was not produced as an exhibit.
- b. Failing to note that even though PW2 alleged to have witnessed when the deceased was being hit by the appellant, he did not identify any murder weapon.
- c. Failing to note that neither PW2 nor PW3 told the police or PW6 of the existence of the alleged rungu.
- d. Partially picking the testimony of the appellant, and using the same to build up the prosecution case.



- e. Failing to note that there could have been intervening circumstances that could have caused the injury to the deceased.
  - f. Failing to note that there were no medical notes from the health centre where the deceased was first treated.”
28. When the appeal came up for hearing on October 9, 2023, Mr. Maragia, learned counsel appeared for the appellant, whereas Ms. Kisoo, learned prosecution counsel appeared for the respondent. Counsel relied on their written submissions.
  29. When urging his appeal, the appellant’s counsel submitted that the evidence of PW2 was shaky and doubtful. He pointed out that whilst PW2 testified that the appellant hit the deceased using a rungu, PW2 did not provide that information to the police.
  30. The basis for that submission was that the Investigating Officer (PW6) was only aware of the fact that the deceased was hit using a plastic chair. Yet again, the witness (PW2) said that although the chair was aimed at the deceased, it did not hit him.
  31. According to the appellant, there was a possibility that when the deceased ducked to avoid the chair, he incidentally hit his head on another hard object which caused the injury.
  32. It is not lost on us that the theory which the appellant is currently advancing, was never placed before the trial court. In effect, it is clearly an afterthought. If anything, the said theory is at variance with the appellant’s own defence, in which he made it abundantly clear that he did hit the deceased.
  33. As PW2 expressly stated that the plastic chair which the appellant aimed at the deceased, missed the said deceased; and because the appellant did not cross-examine PW2 concerning the testimony in which he said that the appellant hit the deceased with a rungu, we hold the considered view that the learned trial Judge cannot be faulted for holding that the injury to the deceased was occasioned by the rungu which the appellant used to hit him.
  34. Not only did the witness testify that the appellant hit the deceased with a rungu, he also made it clear that the appellant hit the deceased on the head.
  35. The doctor who conducted the post-mortem examination on the body of the deceased corroborated the testimony of PW2. We so find because his examination revealed that the deceased died due to a head injury with a skull fracture due to blunt force injury. The doctor stated that the blunt trauma could have been caused by a blow to the head using any hard or heavy object.
  36. During cross-examination, the doctor explained that a plastic chair, if wielded with a lot of force can cause the kind of injury which the deceased sustained.
  37. The fact that the rungu which was used to hit the deceased was not recovered, did not weaken the prosecution case in any manner.
  38. In our re-evaluation of the evidence on record, we note that PW3 testified thus;  

“Nixon (accused) came in with Ronald (deceased). I served them their food and returned to the kitchen. Later Edwin (PW2) came in and I served him. I returned to the kitchen. I heard shouting. I could not understand what they were saying.

Then I heard a loud bang. I rushed out of the kitchen. I found a broken chair lying next to the deceased. I saw the accused returning a rungu into his trousers.”



39. In the light of the fact that the appellant put the rungu into his trouser, the said rungu was removed from the scene when the appellant rushed home, to collect money for the treatment of deceased.
40. Furthermore, it is not a requirement in law that the weapon or instrument which had been used to assault a victim, be retrieved and presented as evidence at the trial, before the accused could be convicted.
41. In our analysis, we note that there was an altercation between the appellant and the deceased. We so find because PW3 testified that he heard shouting, before he heard a loud bang. The said shouting was not by one person, as PW3 testified that he did not understand what “they” were saying.
42. Nonetheless, there was no evidence upon which we could find that the appellant had been provoked. When so holding, we have not lost sight of the appellant’s contention that the deceased had hurled insults at him.
43. Whereas the appellant talked about the insults when he was putting forward his defence, we note that he did not cross- examine PW2 about the alleged insults. In the circumstances, the assertion that the deceased insulted the appellant appears to be an afterthought.
44. The appellant and the deceased had been friends. They drank alcohol together; and also had lunch together. Therefore, there does not appear to have existed any premeditation to assault, leave alone kill the deceased.
45. Accordingly, although the appellant caused the death of the deceased, we find that the offence he committed was manslaughter. Our said decision is partially informed by the conduct of the appellant, immediately after he had assaulted the deceased. He rushed out and got a *boda boda* rider, who took the deceased to the hospital.
46. The appellant also paid to the *boda boda* rider, the charges for the services rendered, when ferrying the deceased to the hospital. His conduct appears to us to be a genuine expression of remorse.
47. Consequently, we set aside the conviction for murder contrary to section 203 of the [Penal Code](#) and convict the appellant for the offence of manslaughter contrary to section 202(1) of the [Penal Code](#). In the result, having substituted the conviction for murder with a conviction for manslaughter; and having taken into account the mitigation, we hereby set aside the sentence of life imprisonment and sentence the appellant to 15 years’ imprisonment.
48. For the avoidance of any doubt, we have also taken into account the provisions of section 333(2) of the [Criminal Procedure Code](#).
49. The sentence herein shall run from June 5, 2017, when the appellant was first sentenced.

**DATED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF DECEMBER, 2023.**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**W. KORIR**



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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

