



**IN THE COURT OF APPEAL  
AT NAKURU**

**(CORAM: OMOLO, GITHINJI & VISRAM, J.J.A.)**

**CRIMINAL APPEAL NO. 502 OF 2007**

**BETWEEN**

**MUSA KIPLANGAT BIEGON ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Kericho (Musinga, J.) dated 27<sup>th</sup> June, 2006  
in  
H.C.CR.C. NO. 46 OF 2003)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant was arraigned before the High Court Kericho on an Information which charged him with murder contrary to **section 203** as read with **section 204** of the Penal Code. He was alleged to have murdered **Erick Kipkurui Langat** on 9<sup>th</sup> July, 2003. He pleaded not guilty and he was tried with the aid of assessors as the law then provided. The *Criminal Procedure Code* was subsequently amended with effect from 15<sup>th</sup> October, 2007 to exclude assessors from criminal trials in the High Court. He was ultimately convicted and sentenced to death. This appeal is against the conviction and sentence.

The appellant who was aged above 49 at the material time has been married to **Leah Chepkorir (PW1)** (Leah), for 30 years. They had six children including the deceased. The deceased was a school boy aged 12 years according to Leah but 14 years according to **Dr. Stephen Koech (PW7)**. The deceased had his own house in the parent's compound. However, on the material night he disagreed with the appellant over failure by deceased to go to school and had gone to hide in a store in the neighbouring house of **Hellen Chepngetich Kibyegon (PW2)** (Hellen) who is a sister in law of the appellant as she is apparently married by the brother of the appellant. At about 7 a.m. the appellant went to the store where the deceased was hiding. Hellen heard him and told the appellant not to beat the deceased. Later, **Leah, Hellen and Zeddy Chepkirui (PW3)**, (Zeddy) who was employed at the home of deceased heard the deceased screaming. Leah and Zeddy went to find out what was happening. They found that the house (store) was locked but the appellant and the deceased were inside. The appellant had a torch and the window of the house (store) had no curtains. Zeddy had a lamp. Both Leah and Zeddy peeped through the window. They saw the appellant whipping the deceased who was seated. The legs and hands of the deceased had been tied with a rope. Both Leah and Zeddy pleaded with the appellant to stop beating the deceased but appellant told them to go away and continued beating the deceased. Leah watched the assault for one hour. By the time she left, the appellant was still beating the deceased.

At about 7 a.m. Leah noticed that the door of the house where deceased was, was still locked. She went to

milk her cows and when she came back later, she saw the appellant carrying the deceased to the main house. The deceased was not able to walk. As it was very cold, the appellant took the deceased to the kitchen to warm up. He died in the kitchen at about 1 p.m.

The appellant went to Sosiote Police Station at about 3:35 p.m. in the company of **Wesley Cheruiyot (PW4)** and reported to **P.C. Robert Mutai (PW4)** that when he was disciplining his son for absconding from school, the son accidentally slipped, ran away and was hit by a barbed wire and collapsed. But Wesley Cheruiyot, a nephew of the appellant told P.C. Robert Mutai that the appellant had killed his son. Upon going to the scene, P.C. Robert Mutai noticed that deceased had multiple injuries caused by whipping. Deceased had also a wound at the back of the head. He searched the house and recovered a whip, torch and synthetic rope under a mattress. Dr. Stephen Okech who performed the post mortem on the body of the deceased found that the deceased had multiple bruises on the trunk, upper and lower limbs; v-shaped cut wound extending to the skull on the occipital region of the head, linear skull fracture of the occipital and parietal bones, dislocated cervical spine at vertebra C4, C5. He formed the opinion that the cause of death was cardio respiratory arrest secondary to increased intracranial pressure resulting from severe head injury with fractured skull and intracranial bleeding and that the injuries were inflicted by repeated battering with blunt object.

The appellant made unsworn statement at the trial. He explained on the material day the deceased who had been away avoiding school arrived at home in the morning. The appellant told him to go to school but the deceased refused whereupon the appellant slapped him. The deceased ran away and fell down near the store. He was hit by a piece of wood on the head but he was not seriously injured. The appellant told him to go to school. The appellant went to school to find out why the deceased was not attending school and when he returned he found the deceased in a bad state.

One of the three assessors was disqualified. The remaining two assessors gave a unanimous opinion that the appellant was guilty of murder. The trial judge considered the evidence and concluded:-

***“Having carefully examined the prosecution evidence it is clear that the accused deliberately inflicted fatal injuries upon the deceased for no apparent reason. PW1 and PW3 testified as to how they saw the accused beating the deceased, having tied up his legs and hands. He was using a whip and a torch and all these items were recovered under the accused’s mattress and were produced in court. Both witnesses said that they pleaded with the accused to stop assaulting the boy but he refused to pay any attention to them. He continued to beat him up for many hours on that material night and in the morning, as the poor boy made some desperate effort to escape from his father’s custody, the accused hit him on the head with a metallic torch and when he fell down, the accused stepped on his ribs and stomach mercilessly. From the morning of 9<sup>th</sup> July, 2003 upto about 1:00 p.m. when the deceased passed on, the accused did not bother to seek medical help for him, yet he could clearly see that his condition was very bad. There is no doubt that the accused acted with malice aforethought. He intended to cause the death of the deceased or intended to cause him grievous harm. The deceased’s photographs which were produced by the prosecution showed serious injuries which had been inflicted on his back and head. In section 206 of the Penal Code, malice aforethought is also inferred where a person knows that his act or omission will probably result in death or grievous harm to a person. The accused knew or ought to have known that the kind of beating which he gave to his 12 years old boy was likely to result to his death or grievous injury. His defence is totally without any merit or iota of truth. There was clear medical evidence as to the cause of the death.*”**

Although the appellant has raised several grounds in the supplementary memorandum challenging the conviction and sentence, the appeal against conviction was not pursued. This is perhaps because in the memorandum of appeal, the appellant admits beating the deceased and using excessive force. For example he states in grounds 2 of the memorandum of appeal thus:-

***“Your Lordship, that the then sitting Judge erred in law and in fact in failing to observe that I was only trying to discipline the child for refusing to go to school after going underground for three good months but it became unfortunate that I applied excessive force but my intention was not to murder.”***

Mr. Akang'o, the learned Counsel for the appellant, submitted on two grounds firstly, that there was no malice aforethought, and, secondly that the sentence of death was unconstitutional as it is a breach of right to life. However, after confirming from the appellant that the sentence of death has been commuted to life imprisonment by the President like all sentences of death imposed on other prisoners, Mr. Akang'o abandoned the second ground.

Mr. Akang'o however submitted that malice aforethought was not proved and that the offence should be reduced to manslaughter. He submitted that the main motivation for beating the deceased was to make him go to school; that the appellant was disciplining the deceased for absconding from school on several occasions.

On the other hand, Mr. Omutelema, the learned Senior Principal State Counsel, supported conviction for manslaughter saying that the appellant by prolonged beating of the deceased intended to cause grievous harm to him and the action of the appellant went beyond mere disciplining of the deceased.

By **section 206** of the Penal Code malice aforethought is deemed to be established by evidence proving, among other things, an intention to cause death or to do grievous harm to any person or knowledge that, the act or omission causing death will probably cause death of or grievous harm to some person.

In this case, there was evidence from Leah and Zeddy that the appellant subjected the deceased to a prolonged and vicious assault when he had already locked him inside the house and tied his limbs. As the injuries that the deceased sustained indicate the appellant caused serious head injuries including a fracture of the skull and also caused serious spinal injuries to a child. No wonder that the child died a few hours after the cruel punishment. In the circumstances of this case, the appellant knew that his actions will cause grievous harm to the deceased and in fact intended to cause grievous harm to the deceased. This was an extreme case of child abuse and raises an inference of malice aforethought in law. The learned Judge commendably analysed all the relevant circumstances.

In the circumstances, the finding of the trial judge that the appellant was guilty of murder cannot be faulted. The appellant may take comfort in the fact that the death sentence has been commuted to life imprisonment by the President in exercise of Presidential Clemency.

In the result, the appeal is dismissed in its entirety.

***Dated and delivered at Nakuru this 23<sup>rd</sup> day of February, 2012.***

***R.S.C. OMOLO***

.....  
***JUDGE OF APPEAL***

***E.M. GITHINJI***

.....  
***JUDGE OF APPEAL***

***ALNASHIR VISRAM***

.....  
***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***