



**Republic v Kiplagat & another (Criminal Case E030 of 2022)
[2025] KEHC 12024 (KLR) (13 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E030 OF 2022
RN NYAKUNDI, J
AUGUST 13, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

HILLARY KIPLAGAT 1ST ACCUSED

SIMEON KIPNGETICH 2ND ACCUSED

JUDGMENT

1. The accused persons before court were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 3rd September, 2022 at Kipsomba village in Kipsomba location, Soy Sub-County within Uasin Gishu County jointly murdered Benjamin Kimeli Kemei.

A summary of the prosecution’s case

2. The summary involved the following witnesses:
3. PW1 Andrew Keter, a cook by profession told the court that on 2nd September, 2022 he was in the company of Joseph Korir having gone to Kipsomba village to have a social evening when they came into contact with a full blow scuffle between the customers and one of the person they recognized was the deceased who suffered personal physical injuries. He told the court that when the fight started, they decided to step out of the club.
4. PW2 Joseph Tarus on oath gave evidence that on 2nd September, 2022 he was at his house when the deceased and the accused quarrelled by calling each other’s names. According to PW2 he acknowledged that in that house there were other customers who also were taking chang’aa which was being offered for sale. As the conflict escalated, one Simon punched the deceased as one Kiplagat separated to stop the fight. This did not deter Simon from taking away the mobile of the deceased which he hit hard against



the ground. This conflict led to the deceased and Hillary to step outside the house. According to PW2, in absence of customers he locked his house only to learn in the morning that the deceased had died.

5. PW3 Wesley Cheruiyot on oath told the court that on 2nd September, 2022, he went to PW2's house which is also known for selling changaa and on arrival, he was also joined by Hillary, the deceased and Simon. In the course of taking changaa, a quarrel erupted between them which spread to the 1st accused and the deceased. the 1st accused had his cup full of changaa and as they continued the quarrel also escalated between the two into a full blown fight. The 1st accused poured down the contents of changaa to the ground and this annoyed the 2nd accused and punches and fists were flying all over amongst themselves. In the course of that fight, the 1st witness Andrew made attempts to separate them but this made it even worse as they stepped out of the house to make it easier and spacious for the infighting to get intense. According to PW3, the deceased proposed to buy changaa as a form of reconciliation with Simon whom he had earlier poured his changaa. However, Simon did not welcome the suggestion but instead took the mobile phone belonging to the deceased and hit the same. As if that was not enough, PW3 told the court that the 1st accused was annoyed, he threatened to kill the deceased, he issued threats to kill including committing the act of sodomy. According to PW3, it also happened that the owner of the house was demanding an outstanding bill of Kshs. 450 from the deceased. However, the deceased did not have the entire cash. They both agreed that he leaves his mobile phone as security. It was only the following day when he heard screams pointing towards the scene.
6. PW4 Dr. Macharia testified with regard to the post mortem report dated 26th December, 2022 and the positive findings included the following:
 - “ All ribs are fractured; the sternum is fractured.
 - There is contusion of the Pericardium and the liver has laceration
 - There is a mild subdual haemorrhage on the right parietal”
7. As a result of the examination, the doctor formed an opinion that the cause of death indicated as Hypovolemic shock due to excessive haemorrhage due to severe chest injuries consistent with blunt force trauma.
8. The Post mortem report was admitted in evidence as exhibit 1.
9. PW5 Inspector Irene Chemweno undertook the investigations of recording the witness statements and finally effecting an arrest and recommended that the two accused persons be charged for the offence of homicide against the deceased.

The defence case

10. It was the 1st accused person's defence that on the material day in company of Cheruiyot, Ezra, Kimeli, Nancy Cheptoo were at the home of PW2 taking chang'aa. According to the 1st accused person, there were some issues which arose amongst them and in the course, it escalated into a major conflict. In a short while, they left the house where they were taking chang'aa. However, he heard some screams and when he went to that scene, he saw the body of the deceased but he was totally intoxicated.
11. The 2nd accused Simon Kiprotich told the court that on 3rd of September, he was at the home of the witness taking chang'aa and other customers did join in including the deceased. As they were being served chang'aa and taking it at the same time, a conflict arose. The 2nd accused was able to recall that the deceased did take away his cup of chang'aa and poured it to the ground. That is when he decided to



leave the chang'aa house for his homestead. The 2nd accused came to learn of the death of the deceased the following day.

Analysis and determination

12. Based on the background information provided and after careful consideration of all evidence presented and submissions made by counsel, my primary responsibility is to determine whether the prosecution has successfully established their case against the defendants to the requisite standard of proof beyond reasonable doubt in connection with the death of Benjamin Kimeli Kemei.
13. The prosecution bears the continuous responsibility throughout trial proceedings to prove the accused's guilt beyond reasonable doubt, as mandated by Section 107[1] of the *Evidence Act*. The prosecution's obligation to prove all elements of the offense beyond reasonable doubt may only shift to the accused in two specific situations. The first occurs under the exceptional provisions outlined in section 111 of the *Evidence Act*. The second arises when the defense invoked falls under categories such as insanity, justification, excuse, self-defense, or other legally recognized presumptions. When a defendant asserts these defences particularly self-defense or provocation, they are not disputing the underlying facts but rather acknowledging the conduct alleged by the prosecution while seeking legal justification or excuse from criminal responsibility. Other defences, such as insanity, aim to absolve the defendant of liability due to mental incapacity, as is relevant in the present matter.
14. The Court in *Mbugwa Kariuki v The Republic* [1976-80] 1 KLR 1085 emphasized:

“That the burden of proof remains on the state throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defence, the burden of proof does not shift to the accused, instead the prosecution must negate that the defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence.”
15. In the case of *Miller –v- Ministry of pensions* [1947] 2 ALL ER 372 at 373 Denning, J buttressed the point as regards the burden of proof required when he stated as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
16. The Law on circumstantial evidence is illuminated in the following authorities:
17. In the case of *R v Hillier* [2007] 233 A.L.R 63, *Shepherd v R* [1991] LRC CRM 332 the courts observed that:

“The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual stand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built



not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence.”

18. Similarly, the Court of Appeal in *Simon Musoke v R* 1 EA 715 held that:

“In a case depending exclusively upon circumstantial evidence, he [the judge] must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt.” [See also *R V Kipkering Arap Koske* 16 EACA 135, *Musili Tulo v R* [2014] eKLR].

19. What follows is to test the evidence by the prosecution with the elements of the offence of murder as framed against the accused persons.

20. As a matter of reiteration, section 203 of the Penal Code provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder. The elements of the offence are well settled being:

- a. The death of the deceased occurred.
- b. The death was caused by unlawful acts.
- c. That the accused committed the unlawful act which caused the death of the deceased; and
- d. That the accused had malice aforethought. [see *Anthony Ndegwa Ngari v Republic* [2014] eKLR]

21. Starting with the first element, there is compelling evidence that Benjamin Kimeli Kemei died on or about 2nd September 2022. The prosecution relied on the evidence of PW4, Dr. Macharia, who testified regarding the post-mortem report dated 26th December 2022. The pathologist’s findings revealed that all ribs were fractured, the sternum was fractured, there was contusion of the pericardium and liver laceration, and a mild subdural haemorrhage on the right parietal. As a result of his examination, Dr. Macharia formed the opinion that the cause of death was hypovolemic shock due to excessive haemorrhage resulting from severe chest injuries consistent with blunt force trauma. The post-mortem report was admitted in evidence as Exhibit 1, thereby proving the fact of death beyond reasonable doubt. This element has been satisfactorily established by the prosecution.

22. The second ingredient requires establishing that the death of Benjamin Kimeli Kemei was caused by an unlawful act or omission. It is settled law that every homicide is unlawful unless excusable as stipulated in Article 26[3] of *the Constitution*. The provisions of Section 213 of the Penal Code define what constitutes causation issues in offences against the person which includes murder. The evidence demonstrates beyond reasonable doubt that the deceased met his death through unlawful acts of assault. The extensive injuries documented in the post-mortem examination, including fractured ribs, sternum fracture, liver laceration, and subdural haemorrhage, are consistent with a sustained and violent assault using blunt force. The severity and pattern of injuries exclude any possibility of accidental causation or lawful justification. There is no cogent evidence that the deceased’s death falls within the exceptions contemplated in Article 26[3] of *the Constitution* as read with Sections 17, 207 and 208 of the Penal Code.

23. The prosecution must establish beyond reasonable doubt that it was the accused persons who committed the unlawful acts that caused the death of Benjamin Kimeli Kemei. The evidence in this case is circumstantial evidence that forms a complete chain pointing inexorably to the guilt of both accused



persons. PW2, Joseph Tarus, testified that he witnessed Simon punching the deceased and observed Kiplagat attempting to separate the fight initially. However, this conflict escalated dramatically, with both accused persons and the deceased stepping outside the house where the assault intensified. PW3, Wesley Cheruiyot, provided the most damning evidence when he testified that punches and fists were flying amongst all parties, that the 1st accused poured changaa to the ground which further inflamed the situation, and most critically, that the 1st accused threatened to kill the deceased and issued specific threats of violence including acts of sodomy.

24. The circumstances surrounding the deceased's departure from PW2's premises are particularly striking. PW3 testified that after the violent altercation and explicit death threats, the fighting moved outside where it became more intense and spacious. The accused persons were the last people seen with the deceased in circumstances of escalating violence. The fact that the deceased was found dead the following morning with injuries consistent with the type of assault witnessed by the prosecution witnesses creates an irresistible inference that the accused persons carried out their threatened violence against the deceased. The systematic nature of the injuries documented in the post-mortem report, affecting multiple organ systems and causing extensive trauma, is consistent with a prolonged and deliberate assault rather than a brief altercation.
25. The testimonies of the accused persons, while attempting to distance themselves from culpability, actually serve to place them at the scene during the material time and acknowledge their involvement in conflicts with the deceased. The 1st accused's claim of total intoxication lacks credibility given the detailed nature of his recollection of other events, and appears to be a convenient excuse designed to avoid responsibility. The 2nd accused's admission that the deceased poured his changaa establishes both motive and his presence during the escalating conflict. Their attempts to minimize their involvement and claim ignorance of the deceased's fate after the altercation are inconsistent with the evidence of their active participation in the violent confrontation.
26. The final element to be established is malice aforethought, which constitutes the mens rea of the offence under Section 206 of the Penal Code. Section 206 provides that malice aforethought shall be deemed to be established by evidence proving any one or more of the circumstances including an intention to cause death or grievous harm to any person, or knowledge that the act will probably cause death or grievous harm.
27. The Court of Appeal in *Joseph Kimani Njau v R* [2014] eKLR clarified that:

“ 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 his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.”
28. The evidence of PW3 regarding the 1st accused's explicit threats to kill the deceased provides clear evidence of intent to cause death. These were not mere words spoken in anger, but specific threats made in the context of escalating violence that was subsequently carried out. The nature and extent of the injuries inflicted upon the deceased demonstrate a clear intention to cause grievous harm or death. The systematic assault targeting vital organs, particularly the chest area resulting in multiple rib fractures and organ damage, shows a deliberate intent to cause maximum harm.
29. The doctrine of common intention under Section 21 of the Penal Code is particularly relevant in this case. Both accused persons participated in the escalating violence against the deceased, with neither



attempting to restrain the other or dissociate themselves from the unlawful conduct. The evidence shows a coordinated assault where both accused persons contributed to the fatal outcome through their individual acts of violence. Their subsequent attempts to conceal their involvement and provide false accounts of the deceased's condition when last seen further demonstrates their consciousness of guilt and shared responsibility for his death.

30. Section 21 provides:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.”

31. The ingredients of common intention were enunciated in *Eunice Musenya Ndui versus Republic*, Criminal Appeal No. 534 of 2010 [2011] eKLR as follows:

- a. “There must be two or more persons;
- b. The persons must form a common intention;
- c. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
- d. An offence must be committed in the process;
- e. The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.”

32. In *Ismael Kisegerwa & Anor. v Uganda*; C.A. Crim. Appeal No. 6 of 1978, the court stated:

“In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. If it can be shown that the accused person shared with one another a common intention to pursue a specific unlawful purpose and in the prosecution of that unlawful purpose an offence was committed the doctrine of common intention would apply irrespective the offence committed was murder or manslaughter.

It is now settled that an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate themselves from the assault, it can develop in the cause of events though it might have not been present from the start, it is immaterial whether the original common intention was unlawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence. Where the doctrine of common intention applies, it is not necessary to make a finding as to who actually caused the death.”

33. Having carefully considered all the evidence presented, this court is satisfied that the prosecution has proved beyond reasonable doubt all the essential elements of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The death of Benjamin Kimeli Kemei has been established through credible medical evidence; the death was caused by unlawful acts of assault; the accused persons committed these unlawful acts either directly or through common intention; and these acts were committed with malice aforethought as evidenced by the explicit threats and the



systematic and brutal nature of the assault. The evidence forms a complete chain that leads irresistibly to the conclusion that both accused persons are guilty of the murder of Benjamin Kimeli Kemei.

34. In the circumstances, I find the accused persons guilty of the offence of murder contrary to the provisions of section 203 of the Penal Code as punishable under Section 204.

35. A sentencing hearing is hereby scheduled on 7th June, 2025.

Ruling On Sentence

36. The accused persons were charged, tried and convicted for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The mandatory nature of the death penalty has been outlawed by the Supreme Court in the now famous case of Francis Karioko Muruatetu and Another -v- Republic and Others 2015 eKLR. Before proceeding to impose an appropriate sentence, I take note of the fact that the accused person mitigated in their various written submissions summarized as hereunder:

1st Accused person's submissions

37. Learned Counsel Mr. Oyaro in mitigating for the 1st accused urged the court to consider the following:

- a. The accused is a young man with immense capabilities and if he is released, he will contribute to the societal growth.
- b. The accused person has been in custody for over three [3] years, he has learnt his lesson, has reformed and undertakes never to be involved in any criminal activities again.
- c. The accused is immensely remorseful, and if given a chance he will strive to make amends with the family of the victim and the society at large.
- d. The accused person is a first time offender with no previous records.
- e. The impugned incident arose while the accused was not in his right state of mind.

2nd accused person's submissions

38. Learned Counsel Mr. Mathai submitted on behalf of the 2nd accused person relying on the sentencing guidelines and various decisions including Thomas Mwambu Wenyi v. Republic [2017] eKLR. Counsel submitted that the sentence to be meted out on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling any given sentence.

39. Learned Counsel cited a plethora of decisions and the sentencing policy guidelines in submitting that the 2nd accused is remorseful, he regrets the events that led to the demise of the deceased, he is a first offender, he is 31 years old, a father and the soul bread winner of the family. It is submitted for the accused that he is the one who was looking after his elderly parents and as such he prayed for 15 years' custodial and sentence and the 3 years he has spent in prison be considered.

Prosecution's Position

40. The state submitted and asked the court to consider the seriousness of the offence, the level of culpability and that the offence of killing the deceased could have been avoided. In addition, the court received the Victim Statement from the family member by the name Kemei who told the court that the death of the deceased has occasioned socio-psychological trauma to the wife and children who have no



supporting father as the main breadwinner. It was also the contention by the brother to the deceased that since the death of his brother, no steps have been taken by the family of the accused person to promote victim-offender mediation in consonant with the Kalenjin culture and customs. She urged this court to impose a life sentence as appropriate to ensure justice is done to the family.

Decision

41. The Supreme Court in *Francis Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015, as a guide in sentencing held that:

“...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- a. Age of the offender.
- b. Being a first offender;
- c. Whether the offender pleaded guilty;
- d. Character and record of the offender;
- e. Commission of the offence in response to gender-based violence;
- f. Remorsefulness of the offender;
- g. The possibility of reform and social re-adaptation of the offender;
- h. Any other factor that the Court considers relevant.”

42. The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”



43. Having carefully considered all the circumstances of this case, the evidence adduced, and the submissions by both counsel, this court finds that the gravity of the offense demands a substantial custodial sentence that reflects the moral blameworthiness of both accused persons while balancing the competing objectives of sentencing. The evidence established that what began as a social drinking gathering escalated into fatal violence, with the pathologist's findings revealing the brutal nature of the assault that claimed Benjamin Kemei's life. The deceased suffered multiple severe injuries including fractured ribs, liver lacerations, and head injuries consistent with sustained blunt force trauma, indicating this was not a momentary lapse but a prolonged and vicious attack.
44. While this court acknowledges the mitigating factors presented, particularly that both accused are first-time offenders with the 1st accused being young with potential for rehabilitation and the 2nd accused bearing family responsibilities as a breadwinner, these factors cannot overshadow the aggravating circumstances. Most significantly, the 1st accused's explicit threats to "sodomize and kill" the deceased, as testified by PW3, demonstrate clear malice aforethought and premeditation. The complete absence of any attempt by either accused person or their families to engage in victim-offender mediation consistent with Kalenjin cultural practices shows some lack of genuine remorse and accountability toward the deceased's family, who continue to suffer psychological trauma and economic hardship from losing their breadwinner.
45. The court must also consider that both accused persons have already served three years in custody. However, the taking of a human life in such circumstances requires a sentence that serves as adequate deterrence to the community while providing sufficient time for genuine rehabilitation. After careful consideration of the totality of circumstances, the different levels of culpability, and the need to balance retribution with the possibility of reform, this court sentences both Hillary Kiplagat and Simeon Kipngetich to Twenty-Five [25] years imprisonment each.
46. The three years already served in custody shall be deducted from this sentence pursuant to the provisions of section 333[2] of the Criminal Procedure Code.
47. In conclusion, I wish to clarify that the matter was brought before the court solely to address typographical errors in the judgment, which did not affect the substance of the decision. Accordingly, the 14-day period within which the accused person may lodge an appeal shall commence from today

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF AUGUST 2025.

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R. NYAKUNDI
JUDGE

