



**Republic v Cheruiyot (Criminal Case E069 of 2021)
[2025] KEHC 12300 (KLR) (1 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E069 OF 2021
RN NYAKUNDI, J
SEPTEMBER 1, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

ELIUD KIPKOSGEI CHERUIYOT ACCUSED

JUDGMENT

1. The Accused 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 19th day of November, 2021 at Kokwobarar trading Centre in Marakwet West Sub- County, within Elgeyo Marakwet County, murdered Julius Kipserem Mengich.
2. The Accused person in this case was arraigned before this court, pleaded not guilty placing the prosecution to disapprove his innocence as provided for in Art 50(2)(a) of *the Constitution*. The lead counsel for the Prosecution was, Mr. Mark Mugun and the accused person was represented by Legal Counsel Ms. Kinyua.
3. The prosecution summoned four witnesses to discharge the burden of proof beyond reasonable doubt. Their summary of evidence is as follows:
4. PW1 Catechist Wesley Kibiwott testified to the effect that on 19th November, 2021 while he was at his farm to plant tomatoes, he was telephoned by his wife that one Adams was harvesting his maize. He decided to report the matter to the area chief and the police. He also left for the scene and on arrival found out that the alleged maize had been harvested. The police officer heeding the call to visit the scene discovered that the deceased Julius Mengich was on the ground with his head facing down while armed with his rifle. That is when PW1 and the members of the public together with police officers hired a motorcycle to take the victim to the hospital. He was able to identify the murder weapon being an arrow which was used by the accused person to inflict the injuries.



5. PW2 Betty Chebor also told the court that on 19th November, 2021 at about 2:00PM he saw PC Mengich seeking assistance seeking assistance. According to PW2 she also heard screams from the accused and being a villager he was able to recognize his voice. At the same time she saw an arrow stuck on the head of PC Mengich. The incident happened on broad day light.
6. PW3 No. 97423 PC David Nzoka who told the court that he is attached to Marakwet West sub-county and on the material day he visited the scene of murder where the police officer was attacked while on duty. He recovered an arrow which was the murder weapon and the accused was arrested following that incident as the victim herein the deceased was escorted to the hospital while the accused was taken to Kapsowar police station for further investigation. PW3 further told this court that he participated in the post mortem examination of the deceased conducted on 29th November, 2021 by Dr. Keitany. The Post mortem was produced by consent without calling the maker as there was no dispute on the fact of death.
7. PW4 was Benard Kipkorir Cheserek also a farmer in the area. His evidence was to the effect that on 19th November, 2021 he was shelling his beans when he saw police officers and at the same time he told Wesley to come and assist him in preparing the beans. PW4 alluded to a conflict between the police officers but was not aware of its source or reasons for it. He therefore called one Welsey to come and help the police officer as he continued with his duties of bean shelling but that police officer was holding his head. The person who had a scuffle with the police officer is the accused person in the dock.

The Defense

8. The accused person elected to give a sworn statement of his defense in which he told the court that he did not commit the offence. He took the court through a chronology of events pertaining to the material day of 19th November 2021 and none of it involved him assaulting the deceased persons. What was significant as he could recollect was the discussion between the deceased and his brother Wesley. The other aspect alluded to by the accused was when they had an altercation about the deceased cautioning him not to travel to the valley which is a land terrain within Elgeyo Marakwet. The accused further told the court that deceased was armed with a firearm and a sword, however in aiming at assaulting him the deceased removed a piece of wood which had nails and used it to target part of the upper limbs but he defended himself. This incident as explained by the accused turned into a full blown fight resulting in the deceased being overwhelmed and pushed him to the ground. In the same transactions the deceased suffered arrow injuries which the accused denied that he was the source of the murder weapon. Besides the evidence by the accused his brother Justin Cheruiyot testified that on the material day the accused person did not caused the death of the deceased.

- Analysis And Decision

9. In this case the accused was prosecuted for the offence of murder of killing the deceased contrary to section 203 as read with 203 of the penal code. It provides that:

Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder.

10. In order to convict the accused for murder of the deceased, the Republic which arrested and brought the accused before this court is required to prove three important things, viz:

1. Death of the deceased occurred;
2. The death was caused by the accused; and



3. Malice aforethought on part of the accused
 4. The accused person from the evidence adduce by the prosecution can be placed squarely at the scene
11. In the circumstances like in the present case it is the duty of the prosecution to discharged the legal and evidential burden without relying on the weaknesses of the defence to proof the guilt of accused person beyond reasonable doubt. Lord Denning in the case of *Miller v Minister of Pensions* (1947) 2 All ER 372 stated that:
- If the evidence is so strong against a man as to leave only remote possibility in his favor 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.
12. In *Abdu Ngobi vs Uganda S.C.Cr App. No. 10 of 1991*, the Supreme court expressed itself as follows on treatment of evidence:
- “Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weaknesses of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted; but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged.”
13. Undoubtedly the hardest and most complex decision making of a Judge in any criminal proceedings is to recite upon the facts and the evidence in order to be able to render a verdict on the criminal responsibility of an accused person(s) commonly referred to as suspect so as to pronounce himself/herself on the doctrine of facts proven beyond reasonable doubt. “Therefrom, in his seminal text *The Origins of Reasonable Doubt: Theological roots of the Criminal Trial*, contemporary Professor James Q. Whitman argues that, although the reasonable doubt standard emerged in the course of the seventeenth and eighteenth centuries (as others conclude), its origins can be traced on the Middle Ages, where it was originally conceived not for the protection of the accused, but rather to protect the “souls of the jurors”: The reasonable doubt rule ... is the last vestige of a vanished premodern Christian world. At its origins, this familiar rule was not intended to perform the function we ask it to promote today: It was not primarily intended to protect the accused. Instead, it had a significantly different purpose. Strange as it may sound, the reasonable doubt formula was originally concerned with protecting the souls of the jurors against damnation.” (See James Q. Whitman, *The Origins of “Reasonable Doubt”* 2-3 (Yale University Press 2008) (hereinafter “Whitman”) p. 3.
14. It is trite law that proof of an offence beyond reasonable doubt by the prosecution is dependent upon either circumstantial or direct evidence of a witness. That evidence is to be tested within the parameters of the principles expressed in the above case law or the provisions of Sections 107(1), 108 and 109 of the *Evidence Act*. In any criminal cases the onus or the mandate constitutionally under Article 50 2(a) is vested with the prosecution to prove the case against an accused person beyond reasonable doubt. This burden remains throughout on the prosecution and never shifts to the accused person(s) indicted of the offence under Article 157 (6) and (7) of *the Constitution*. The right to presumption of innocence unless the contrary is proved is protected and guaranteed by the drafters of our Constitution 2010. In fact at the end of the trial of the case for the prosecution the accused has a right to tender no evidence



including electing to keep silent. He or she owes no duty to say anything on the charge. This is the threshold issue upon which the evidence in this case must be tested. If the evidence as admitted by this court is so strong against the accused person as to leave only the remote possibility in his favor which can easily be dismissed by this court without much ado then the case is proved beyond reasonable doubt.

15. In the persuasive case of *Ligwa Kusanja and Other v. Republic*, Criminal Appeal No. 133 of 1999 the Court of Appeal of Tanzania made the following observations:

“We think that it is a basic principle in judgment that before reaching a decision a court has to consider, and demonstrate that it has considered, all evidences received. It will then accept or reject certain evidence as it considers appropriate”.

16. In the present case the elements of the offence tabulated above will be tested against the marshalled and summoned witnesses for the State on the events which occurred on the 19th November 2021 in which Julius Kipserem Mengich was murdered. All the witnesses brought by the prosecution side give a chronology of events which link the accused with the killing of the deceased. The circumstantial evidence as known in law is so strong to place the accused squarely at the scene of crime. The Court of Appeal in the case of *Abanga Alias Onyango vs. Republic* Cr. App. No. 32 of 1990 (UR) as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. The circumstances from which an interference of guilt is sought to be drawn must be cogently and firmly established,
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused,
- iii. The circumstance taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was committed by the accused and no one else.”

Similarly in *Sawe vs. Republic* [2003] KLR 364 this Court reiterated that in order to justify conviction of circumstantial evidence,

“the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstance weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the accused.”

17. This is what the court is confronted with: first and foremost is the fact of death of the deceased. There is no dispute that the right to life of the deceased Julius Kipserem Mengich was unlawfully terminated on the 19th day of November 2021. There is both circumstantial evidence from PW1, PW2, PW3 and PW4. That evidence has not been controverted by the defence as alluded to by the accused.
18. The second element is on causation. This is what is commonly described as Actus Reus of the offence. It is also known as the proximate cause of the offence. The Penal Code under Section 213 provides some of the elements of what the court can draw from to inform itself on causation of death. It is the wrongdoing or fault on the part of the accused in committing the offence of murder. It falls under many perspectives being acts of omission or commission on the part of the accused person. It is important



to note that every element of the actus reus must be proved beyond reasonable doubt not only must prosecution establish every element of actus reus in question like this murder against the accused person but also mens rea must be established. This part of the element amounts to a crime when it is accompanied by the appropriate mens rea. As noted in Article 26 of *the Constitution* every person has a right to life and one shall not be deprived of life intentionally except to the extent authorized by *the Constitution* of other written law. The unlawful act of committing murder which is not justified under Section 17 of the Penal Code or as of necessity under Sections 207 and 208 of the same Code is prohibited and one is culpable for the death by his or her wrongdoing. In summary there is no intervening cause or events which justify or excuse the accused's conduct in using a poisoned arrow against a police officer who was at the scene for the very purpose of protecting life and property. The view I take in this matter is that the accused's conduct remains the proximate cause of the death of the deceased. This element therefore is proved beyond reasonable doubt if the medical evidence which was admitted before this Court is anything to go by for reason that it remains unchallenged.

19. The third element of significance is on manifestation of malice aforethought which is clearly defined in Section 206 of the Penal Code as follows; that is:
 - a. "An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - c. An intent to commit a felony;
 - d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."
20. The locus classicus case of Tubere s/o Ochen vs Republic [1945] 12 EACA 63 set the jurisprudence on manifestation of malice aforethought as follows:

"The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted."
21. In Kenyan criminal law satisfying the meaning of intent as defined in Section 206 of the Penal Code to me is a bit controversial and yet intention to kill is regarded as the most obvious and list form of fault element for murder contrary to Section 203 of the Penal Code. In part, though that judgment hinges on the meaning given to intent to the criminal law scholarly works and decisions the same element has been the subject of a number of both comparative and domestic decisions and yet the definition is still not absolutely clear. A broad definition would be that a person intends to kill if it is his or her aim to kill by the act or omission charged as provided for in the evidence and particulars of the charge sheet. In the sense he or she would regard it as a failure if A was not killed by the act or omission. In our dimensional definition proof of intention includes a further possibility in addition to proof of the aim and purpose of killing that A's death is virtually certain to follow from his or her act or omission. To this extent of the meaning of intent it is sufficient for the prosecution to show that in killing A and for our purposes the deceased in this case the accused intended to cause grievous harm to the deceased



and it would be enough for the prosecution to show that the accused foresaw grievous bodily harm as virtually certain to occur.

22. In relation to this element the evidence admitted as tendered by the prosecution witnesses point directly to the accused as the one who was in possession of the arrow and without any intervening factor he shot at the deceased. This was a poisonous prepared arrow which targeted the vulnerable parts of the deceased body which was described as follows by the Pathologist: stab wound 2.5 cm on the left temporal region, 1cm (superior) above the left ear pinna. Arrow-hooked in situ, 7 cm outside and 7 cm in the scalp, linear impression (superficial) on skull 3cm. no skull fracture, no intercranial/lesion. 13x4cm parkened region around the arrow head. As a result of the pathology examination he opined that the cause of death was; asphyxia due to acute poisoning due stab with presumed poisoned arrow on the head.
23. Murder in our Penal Code as defined in Section 203 and punishable under 204 may be fairly regarded as the most serious offence in our criminal legal system. It is also in our Constitution under Article 26 that the right to life is guaranteed and protected. In defending this Constitution every citizen has a responsibility to protect the life of another human being within our borders. That life has ultimate value not derived from any higher level but those who profess creation it flows from the Creator Himself who created man in His own image. The right to life once terminated unlawfully is just not a serious offence but it is a kind of wrongdoing with consequences which cause irreparable damage to our society. The death of another human being is irreversible and that is why the elements of causation and intention should not be narrowly interpreted or construed. In assessing the evidence before this court tracing the roots of the key witnesses including PW1, PW2, PW3, PW4 there is manifestation of malice aforethought on the part of the accused. He was also positively identified and placed squarely at the scene of crime. His defence failed to controvert and rebut the essentials of the evidence presented before this court by the prosecution witnesses. This court has gone further to look at what could have been the motive of the killing only to conclude that this was senseless unlawful act targeted at an innocent police officer who was lawfully on duty to protect life and property. The loss of his life is inexcusable and unjustified in the circumstances in which it occurred.
24. For those reasons I am satisfied that all the elements of the offence of murder contrary to Section 203 of the Penal Code have been established by the prosecution beyond reasonable doubt to warrant this court to rule in favour of the State by entering a verdict of guilty and conviction as against the accused person with no reservations.

- Ruling On Sentence

1. The convict, Eliud Kipkosgei Cheruiyot, has been convicted of murder contrary to section 203 punishable under Section 204 of the Penal Code. The particulars of the offence were that on 19th day of November, 2021 at Kokwobarar trading Centre in Marakwet West Sub-County, within Elgeyo Marakwet County, he murdered Julius Kipserem Mengich. Following the Francis Muruatetu versus Republic decision of 2017, the mandatory death sentence has been outlawed and is now reserved only for the rarest of circumstances arising from aggravated homicide.
2. The court is guided by the fundamental purposes of sentencing as provided for in the sentencing policy guidelines of the Judiciary, 2023 which can be pursued by the court in applying one or more of the following eight objectives:
 - a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.



- c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
 - d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - e. Community protection: to protect the community by incapacitating the offender.
 - f. Denunciation: to communicate the community's condemnation of the criminal conduct.
 - g. Reconciliation: To mend the relationship between the offender, the victim and the community.
 - h. Reintegration: To facilitate the re-entry of the offender into the society.
3. The court has carefully considered the mitigation submitted by defense counsel on 25th July, 2025. The mitigation reveals a number of factors that ought to count in the final sentence of this court.
 4. The accused person is aged 39 years and is a family man with a wife and three children, the first born being 12 years and the last born 3 years. Significantly, the last born was born while the accused was in custody as his wife was pregnant when he was arrested, thus the last born has never enjoyed the presence of a father in his life. The accused person was the only breadwinner of the family as he was a farmer and casual laborer, and his wife has taken the mantle of both parents since the accused's arrest, which has been draining her physically and emotionally.
 5. The children of the accused person are of tender age and they need the love, presence and guidance of their father in their life and further more financial support from their father to enable them lead a normal life where all their basic needs are met. This court recognizes the profound impact that prolonged incarceration would have on these innocent children who depend entirely on their father for support and guidance.
 6. Notably, the accused person after the incident did not run away or evaded arrest. He actually presented himself to the police when he heard that he was being looked for in connection with his encounter with the deceased. This demonstrates a sense of responsibility and willingness to face the consequences of his actions, which speaks favorably to his character.
 7. The accused person has no history of violence as was testified by prosecution witnesses 1 and 2 who have known him for years. He is described as a calm and collected person who has never had any issues with anyone in the past, even when he is drunk. This unblemished character record is a significant mitigating factor that this court cannot ignore.
 8. The accused person has expressed genuine remorse that his act of self-defense cost the life of the deceased. This remorse appears genuine and demonstrates the accused's understanding of the gravity of his actions and their consequences. Such remorse is indicative of a person capable of rehabilitation and unlikely to reoffend.
 9. The court is guided by the sentencing objectives in Kenya as they have been captured in the Judiciary Sentencing Policy Guidelines, which emphasize that sentencing should achieve retribution, deterrence, rehabilitation, restorative justice, community protection, and denunciation while also considering reconciliation and reintegration.
 10. The Supreme Court in the Francis Muruatetu case highlighted the following factors that need consideration when sentencing:



- 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
11. The Constitutional Court of South Africa in *State v. Makwanyane* (1995) CCT/3/94 remarked as follows on mitigation and aggravating factors in sentencing:
- “mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negate beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person’s conduct, and these factors must then be weighed with the main objectives of punishment, which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence.”
12. In *R v Engert* (1995) 84 A Crim R 67 at 68, Gleeson CJ observed:
- “Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application of this facts and circumstances to the principles laid down by statute or established by the common law. The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment
- In a given case, facts which point in one direction to one of the consideration to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance
- It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.”
17. In determining the appropriate sentence, this court must balance the serious nature of the offense against the compelling mitigating circumstances presented. While murder is undoubtedly a grave



offense that demands society's condemnation, the particular circumstances of this case present exceptional factors warranting careful consideration.

18. Having considered all the evidence presented during trial, the mitigation submitted by both counsel, the objectives of sentencing as outlined in the Judiciary Sentencing Policy Guidelines, and the precedents established in relevant case law, I hereby sentence the accused for thirty (30) years imprisonment. The court directs that the period spent in pre-trial custody from 2021 to date shall be deducted from this sentence pursuant to Section 333(2) of the Criminal Procedure Code.
19. For purposes of the integrity of the record, and constitutional right of appeal, there was misplacement by the registry likely to impact any process preferable to the superior court by the Accused. In compliance with Section 80, 99, of the C.P.A and Order 45 Rule 1 in pari materia, the commencement date is reviewed to read the 1st of September, 2025 and the days of conviction by this court be part of the credit ordered pursuant to Section 333(2) of the C.P.C. In this respect the Accused suffers no prejudice or injustice with this amendment of the day.
20. 14 days right to appeal explained.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 1ST DAY OF SEPTEMBER 2025.

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R. NYAKUNDI

JUDGE

