



**Republic v Kirui (Criminal Case 26 of 2018)  
[2024] KEHC 6398 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6398 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL CASE 26 OF 2018**

**RL KORIR, J  
MAY 30, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GEOFFREY KIPLANGAT KIRUI ..... ACCUSED**

**JUDGMENT**

1. Geoffrey Kiplangat Kirui (Accused) was charged with the offence of murder contrary to section 203 as read with Section 204 of the *Penal Code*. The Particulars were that on the 15<sup>th</sup> day of October 2018 at Sakaltit Village in Kapkimolwa location in Bomet County within Bomet East murdered Samuel Chumo.
2. The Accused took plea and denied the charge before Muya J. on 2<sup>nd</sup> November 2018. The case proceeded to trial where Muya J heard 7 witnesses before I took over the case and heard only two prosecution witnesses and the defence case.

**The Prosecution case**

3. The Prosecution case was founded on evidence of a quarrel between the Accused and the deceased in which the Accused stabbed the deceased causing him fatal injury. At the center of the prosecution evidence was a dying declaration allegedly made by the deceased. Carolyne Chepkoech Maragoli, a relative of the Accused responded to screams by the children of the Accused and on rushing to the scene found the Accused standing outside his house and the deceased already stabbed. Geoffrey Kipngetch Ruto (PW2) found the deceased and the Accused fighting. He saw the deceased who was already injured holding his stomach with intestines protruding. Moses Kibet Maritim (PW3) found the deceased already injured. He was being held by PW2 and he noted that the intestines were protruding.
4. According to PW3 the deceased said that he had been stabbed by the Accused. PW4 learnt of the stabbing of the deceased from his uncle. He followed him to the hospital where he had been rushed and



was informed by the deceased that the Accused was the one who stabbed the deceased. Paul Kenduiwo Kiprono (PW5) identified the body of the deceased at Longisa Referral Hospital Mortuary while Leonard Kipkirui Busienei (PW6) assisted in taking the deceased to hospital.

5. Dr. Mutai Kiplangat (PW7) testified on the cause of the death while Cpl. Evans Mose (PW8) produced photographic evidence. PC Leonard Kiptoo (PW9) was the Investigating Officer. He wrapped up the prosecution evidence.

### **The Defence Case**

6. The Accused made an unsworn statement in which he denied any knowledge of the offence. He stated that he was not at home on the material night having spent the night at the Tiringaga factory where he worked. That he only learnt of a fight between Geoffrey Kipng'etich and Philip Busienei and that the two had been taken to Longisa Hospital. He said that his uncle asked him to go to his (uncle's) home the next morning and when he got there, he was arrested by the police.

### **Ingredients of the offence**

7. The offence of murder contains two elements, the actus reus encapsulated in Section 203 of the [Penal Code](#) and the mens rea provided for in Section 206 of the [Penal Code](#).

8. Section 203 of the [Penal Code](#) provides:-

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

9. Section 206 of the [Penal Code](#) provides:-

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (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.
10. For the offence to be established the prosecution must prove the above elements beyond reasonable doubt. The Court of Appeal in [Joseph Mbiti Mwanula & another v Republic](#) (1980) eKLR held:-

“The true position is that, as a general rule, facts which have to be proved to establish the guilt of an accused person in a criminal case must be proved beyond all reasonable doubt by the prosecution, on the evidence considered as a whole. There is no short cut, or “much easier” way, in criminal cases. Certainly we know of no authority for the proposition that proof beyond all reasonable doubt of any material fact can be established in the course of a criminal trial by mere silence in respect of it by an accused person. To hold otherwise would be tantamount to saying that when an accused person pleads “Not Guilty” and takes no



further part in the trial, the prosecution is relieved of the burden of proving inculpatory facts beyond all reasonable doubt.....”

### **Analysis and determination**

#### Death of the deceased

11. There is no doubt that the deceased Philip Kipsang Busienei died on 15<sup>th</sup> October 2018. The Prosecution presented no less than four witnesses who told the Court that a fight ensued between the deceased and the Accused on the material evening in which the deceased was stabbed in the stomach. Carolyne Chepkoech (PW1), Geoffrey Kipngetch Ruto (PW2), Moses Kibet Maritim (PW3), Towett Josephat Cheruiyot (PW4) who were all relatives and neighbours responded to screams from the direction of the Accused’s home and on arrival found the deceased with a stab wound and protruding intestines. Leonard Kipkirui Busienei (PW6) testified that he received information that his brother had been injured and when he rushed home he found him in a bad state and rushed him to Longisa hospital. That they were informed that he needed specialized surgery and was referred to Eldoret but died on the way to Eldoret hospital.
12. The body of the deceased was preserved at Longisa hospital mortuary from where Dr. Biegong conducted the post mortem examination.
13. It is my finding from the above evidence that the death of the deceased was established. Indeed, I hasten to add that there was no dispute that the deceased died on the material date.

#### **Cause of death**

14. Evidence on the cause of death was given by Dr. Mutai Kiplangat (PW7) who testified on behalf of Dr. Biegong. PW7 stated that the deceased had a stab wound which exposed the intestines and a deep cut wound on the left leg measuring 8cm in length. He opined that the cause of death was hemorrhagic shock or excessive loss of blood. He produced the Post Mortem report (Exhibit No 2).
15. It was clear that the death of the deceased was unlawful. He was stabbed and he died from excessive bleeding. His death was therefore a result of an unlawful act by the person who stabbed him.

#### **Whether the Accused was linked to the death of the deceased**

16. The Prosecution submitted that it had proven its case to the required legal standard on all the elements of the offence. In written submissions dated 18<sup>th</sup> October 2022, Mr. Njeru the Learned Assistant Director of Public Prosecutions stated that the identity of the Accused was proven through the evidence of PW1, PW2, PW3 and PW4. Further, he submitted that the deceased made a dying declaration which was not only admissible but was properly corroborated by the evidence of the witnesses.
17. On the other hand, the defence submitted that the prosecution had not proved their case to the required legal standard. In submissions dated 17<sup>th</sup> October 2022, the learned defence counsel Mr. Koske stated that the dying declaration made by the deceased did not meet the legal threshold and was also not corroborated by the evidence on record. It was his further submission that the evidence of the prosecution witnesses was inconsistent and contradictory.
18. As earlier stated, the Prosecution called 9 witnesses. I have already analysed the said evidence with respect to the cause of death and found that it proved beyond reasonable doubt that the deceased died of an unlawful cause. I now proceed to analyse the said evidence with respect to whether it directly or indirectly identified the Accused as the person who stabbed the deceased.



19. There was evidence that the deceased, the Accused and most of the witnesses were extended family and that the deceased was stabbed at the homestead. PW1 said that the deceased was her brother in-law while PW2 said that the deceased was married to their relative while the Accused was his brother. Their respective homes too were close by. PW1 said that her house was 200 meters away from the Accused's home.
20. It was uncontested that the offence occurred at night between 8pm and 9pm. PW1 stated in re-examination that the incident took place at 8.00pm while PW2 said that he heard dogs barking at around 9pm and when he went outside heard screams from Geoffrey Kiplangat Kirui's house. PW3 on his part testified that he heard the deceased screaming and calling for help around 9.00pm and he went to check what was happening. PW4 and PW6 respectively placed the timing between 8.30 – 9.00pm.
21. It was clear to this court therefore that the incident occurred at night. This means that the evidence of the identification must be treated with ultimate caution. The Court of Appeal in the case of *Kiarie v Republic* (1984) KLR 739 held:-

“Evidence of identification/recognition at night must be absolutely watertight to justify conviction.”
22. Further, the Court of Appeal in the case of *Shadrack Shuatani Omwaka v Republic* (2020) eKLR while discussing identification of an assailant at night cited with approval the decision of the Supreme Court of Uganda in *Abdulla Nabulere and another v Uganda* Cr. Appeal No 9 of 1978 (Unreported) where the court held as follows:-

“....Apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for.”....
23. Carolyne Chepkoech (PW1) told the court that when she arrived at the scene which was outside (PW2) Geoffrey's house, she found Geoffrey (PW2) standing outside and the deceased already stabbed in the stomach. The Accused was not at the scene then. Geoffrey Kipngetich Ruto (PW2) told the court that he heard dogs barking and he got out. Then he heard screams from Geoffrey Kirui's house and he went to check. He found Geoffrey Kirui (Accused) and the deceased (wrongly indicated in the record as Accused) quarrelling. That the deceased said that he had been hit on the stomach by Geoffrey Kiplangat (Accused). PW2 used his phone light and he saw the intestines protruding. PW2 said that the deceased was married to his (PW2's) relative while the Accused was his (PW2's) brother.
24. I find PW2's evidence that he recognized the two protagonists credible. Firstly, because he was familiar with them because they were his relatives and secondly he came close to them. It is to be recalled that the Accused was his brother while the deceased was his in-law. Thirdly, PW2 had the torch of his phone on and therefore there was sufficient light for him to identify them.
25. PW3 responded to screams around 9.00pm and arrived at the scene to find PW2 holding the deceased whose intestines were protruding. He said that the deceased told him that the Accused had injured him. He did not find the accused at the scene.
26. PW4 Towett Josephat Cheruiyot responded to screams and found the deceased having been stabbed. He said that the deceased mentioned the Accused.
27. It is clear from the testimonies of the witnesses outlined above that none of them testified to having seen the Accused stab the deceased. The first witness to arrive at the scene was PW1 Carolyne Chepkoech



Maragoli. She found the Accused Geoffrey and the deceased Philip Busienei who had been stabbed. What stands out in the testimony of PW1 is that she found the Accused still at the scene. She could recognize both because although it was dark, she conversed with them. She said that they were quarrelling and that she asked the deceased to go away but he refused. PW1 therefore placed both the Accused and deceased at the scene. Her evidence was that of recognition as she knew them. They were not strangers to her and she even conversed with them.

28. PW2, PW3 and PW4 told the court that the deceased told them that the Accused Geoffrey Kirui had stabbed him. PW2 assisted in taking the deceased to the dispensary from where the deceased's brother PW6 took him to Longisa Hospital. PW6 said that the deceased was referred to Eldoret Referral hospital but passed on the way.

29. The issue that follows is whether the deceased made a dying declaration. The law on dying declarations is found in Section 33 of the *Evidence Act* which provides:-

Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) relating to cause of death

when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;.....

30. The Court of Appeal in *Philip Nzaka Watu v Republic* (2016) eKLR held:-

“Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. ....

While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

31. Similarly in *Mwangi v Republic* (Criminal Appeal 1 of 2015) [2023] KECA 246 (KLR) (3 March 2023) (Judgment), the Court of Appeal held:-

“The learned Judge conducted a substantive analysis of the ingredients necessary for statements to be regarded as dying declarations in the face of section 33 (a) of the *Evidence Act*. The ultimate test arrived at by the judge at page 52 paragraph 1 is that for dying declarations to have full probative value, it must be supported by corroboration. The appellant and the respondent are both in agreement that the learned Judge properly



appreciated the law on admissibility of dying declarations. We agree with the learned Judge as to the applicable principles surrounding the admissibility of dying declarations.”

32. In testing the evidence of PW2, PW3, PW4 and PW6 to confirm whether or not it meets the test of a dying declaration, I have to revisit the evidence. All these witnesses testified that the deceased told them that it was Geoffrey who had stabbed him.
33. I have cautioned myself that the incident happened at night. However, in the evidence of PW1, she found the Accused and the deceased both of whom were her relatives outside the Accused’s house. She could not have mistaken them because she even conversed with them. She ran back to her house when she was overwhelmed with the sight of the deceased’s intestines.
34. Mr. Koske, Learned Counsel for the defence submitted that the deceased was in so much pain that he could not have had the capacity to speak and that it was not possible therefore for him to have uttered the words attributed to him.
35. I have critically examined the evidence of the witnesses. PW2, PW3 and PW4 all stated that the deceased said that he was hit by the Accused. PW2 said that when he was alerted by barking, he went outside and found Geoffrey Kirui and the deceased quarrelling. There was no other person quarrelling with the deceased which leads to the finding that the Accused was the one who injured him.
36. With respect to the dying declaration, PW2 said that the deceased was trying to speak but with difficulty. That he said in a low tone that he had been hit by the Accused.
37. It is salient to note that PW2 told the court that the Accused was his brother while the deceased was married to their relative. I find no reason to disbelieve the testimony of PW2 that he saw the two and that he heard the deceased say that the Accused had hit him.
38. PW4 was a neighbour to the Accused and the deceased. He heard screams in the neighbourhood and when he inquired of his uncle what was happening the uncle told him that the screams were coming from their neighbours who usually brewed changaa. Later, PW4 learnt that the deceased had been stabbed and he went to the home about a kilometer away where he found the deceased along the road being taken to hospital. He told the court that the deceased told him that he had been injured by Kiplangat the Accused. PW4 was categorical that there was no confusion as to who stabbed the deceased.
39. PW6 was the brother of the deceased. He received a call that his brother had been injured around 9pm. He went to the scene and found him with injuries on the legs and hands and with intestines protruding. He was still able to talk and told him that it was the Accused who had stabbed him. PW6 is the one who took the deceased to Longisa hospital. He said that the deceased was still talking when they took him to hospital.
40. From the evidence of PW2, PW3, PW4 and PW6 which I have restated above, I am convinced that the deceased did tell them that he had been injured by the Accused. Those witnesses were relatives of both the Accused and the deceased. They were extended family members. They had nothing to gain from being untruthful. I find their respective testimonies corroborative. Further it is my finding that they remained unshaken in cross-examination.
41. It is trite law that a court must exercise caution before convicting on the basis of a dying declaration. In this case, I have already found corroborative evidence in the testimony of PW1 who found the deceased and the Accused at the scene quarrelling.



42. Further, the conduct of the Accused immediately after the incident provides corroboration. From the evidence of the Investigating Officer No 68911 PC Learned Kiptoo (PW9), the Accused disappeared after the stabbing occurred on 15<sup>th</sup> October 2018 and was arrested on 17<sup>th</sup> October 2018 in Narok. He was booked at Malela police station in Narok before being picked by PW9 and PC Shamalla and taken to Bomet Police Station from where he was investigated and charged.
43. In considering the Prosecution's evidence, I bore in mind the Accused's defence. The Court of Appeal in *Ouma v Republic* 1986 KLR 619 stated in regard to evaluation of evidence thus:-
- “At the time of evaluating the prosecution's evidence, the court must have in the mind the Accused person's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is doubt, the benefit of that doubt always goes to the accused person.”
44. The Accused gave an unsworn statement in his defence. He stated that he was aware of the case he was facing. He told the court that he was not at home on 14<sup>th</sup> October 2018 as he was at Tirgaga factory where he worked. That he went home on 15<sup>th</sup> October 2018 around 8pm and was told that Geoffrey Kipngetch and Philip Busienei had quarreled and fought over grass and had been taken to hospital in Longisa. That upon receiving such a report he tried to reach his father on phone and on failing to reach him, called his uncle, (the younger brother of his father) who told him to go to his (uncle's) house the next morning. That he went there and was arrested.
45. The Accused's defence avoided the events of the material date. In stating that he spent the night at Tirgaga Factory, he introduced an alibi which tested against the prosecution evidence does not ring true. The Prosecution witnesses placed him at the scene. He stated that he was told that there was a fight between Geoffrey Kipngetch and Philip Busienei that these two people were taken to hospital. He does not say who these people were. However, from the Prosecution evidence, Geoffrey Kipngetch was PW2 who told the court that the Accused was his brother. The Accused also stated that he was arrested at home in his uncle's house. However, the investigation officer told the court that he was arrested in Narok after two days and brought back to Bomet. This court is of the view that the Accused's unsworn statement was aimed at deflecting the case against him. It is untruthful and does not in any way place doubt on the Prosecution case.
46. In the end, I have found the dying declaration made by the deceased admissible and credible. It clearly pointed the Accused as the person who stabbed him. This dying declaration as already shown was materially corroborated by the evidence of Prosecution's witnesses who placed the Accused at the scene. It is my finding therefore that the Accused was directly linked to the unlawful death of the deceased. He stabbed him in the stomach and left him with protruding intestines.

**Whether the Accused acted with malice aforethought.**

47. I have already set out the circumstances under which malice aforethought may be inferred under Section 206 of the *Penal Code*.
48. In this case the defence submitted that the Prosecution failed to adduce evidence to demonstrate that the Accused acted with malice aforethought. The Prosecution submitted that the act of cutting the deceased on the leg and stomach leading to perforated intestines clearly showed that the Accused intended to cause the death of the deceased.
49. There was evidence of a quarrel between the Accused and the deceased. The cause of the quarrel was stated by the Investigating Officer (PW9) was grazing land. PW9 told the court that he visited the scene



at Sakatich village, Kapkimolwa Location where they were shown where the Accused and deceased fought. He learnt from the family members that the deceased had confronted the family of the Accused because of a cow that he found grazing on the farm that the deceased had leased. That one Pauline Chepkemoi Towett (mother of the Accused) was with the deceased when he confronted the Accused's family asking why someone had untied his cow. That the Accused stabbed the deceased in the lower abdomen using a dagger which caused the intestines to ooze out.

50. I have considered the evidence of the Investigating Officer on the cause of the quarrel. The same amounted to hearsay as the Prosecution did not call the said Pauline Towett to testify. The one witness who comes close to stating the cause of the fight was the brother of the deceased Leonard Kipkirui Busienei. PW6 told the court that the dispute was over leased grazing pastures. He did not explain more. This court was therefore left with scanty evidence in respect to what had transpired before the Accused and the deceased fought. While the act of stabbing a person with a dagger easily falls under circumstances described in Section 206 (a) and (b) of the *Penal Code*, the evidence was insufficient to demonstrate that there was any prior plan to fatally injure the deceased. I find that the ingredient of malice aforethought was not proven beyond reasonable doubt. The Accused may or may not have had malicious intent to eliminate his neighbor and relative. The benefit of doubt must, as the law demands, go to the Accused.
51. In the end, I apply the provisions of Section 172 of the *Criminal Procedure Code* to substitute the charge of murder with that of the lesser charge of manslaughter.
52. The Accused is accordingly convicted of the offence of Manslaughter Contrary to Section 202 as read with Section 205 of the *Penal Code*.
53. Orders accordingly

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 30<sup>TH</sup> DAY OF MAY, 2024**

.....

**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of Mr. Njeru for the state, Mr Ondieki holding brief for Mr Koske for the accused and Siele(Court Assistant)

