



**Republic v Kitsao (Criminal Case 6 of 2017)
[2025] KEHC 3672 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 3672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 6 OF 2017
MN MWANGI, J
JANUARY 17, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

KARISA KAMBI KITSAO ALIAS MATOTO ACCUSED

JUDGMENT

1. The accused person, Karisa Kambi Kitsao alias Matoto was arraigned in Court on 14th February, 2017 for the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the charge are that on the 28th day of January, 2017 at an unknown time at Vipingo area within Kilifi County in the Republic of Kenya, jointly with others not before Court, murdered Karisa Ngonyo Mwavuo.
2. The charge was read out to the accused person on 6th April, 2027, and he pleaded not guilty to the said charge. When the hearing of the case commenced, it was at first heard by Judge Ongeri.
3. PW1 was Ngumbao Katana Kahindi, a casual labourer living at Shariani. He stated that he is also known as Ngumbao Ngonyo Magongo. His evidence was that on 25th January, 2017 (sic) at 6.00 p.m., when he was at Kilifi, he was called by his sister by the name Karichwa who informed him that something had happened to Karisa Mwavuo at Vipingo. He stated that when he went there, he found the body of Karisa Mwavuo outside his house. He saw that he had been cut with a panga on the head and his stomach had been stabbed with knives (sic). He also saw that Karisa Mwavuo's right hand had been severed.
4. PW1 stated that people called the Police who went to the scene after two (2) hours. He also stated that the deceased was his elder brother whom he used to stay with, but he (PW1) had moved. It was the evidence of PW1 that Karisa Mwavuo (deceased) had a dispute with his son Karisa "Matoto" (accused person). PW1 explained that the dispute was about witchcraft, as the accused person used to call the



- deceased a witch. PW1 recounted that he knew of a case where the accused person had called the deceased a witch.
5. PW1 explained that he did not attend the case held by the Elders. He stated that the accused person called him and told him that since he (PW1) had refused to go for the case, he should not blame him (accused person) for whatever happened. PW1 stated that the accused person then disconnected the phone and he could not get him on phone thereafter. PW1 indicated that the accused person used to call him with a private number.
 6. On being cross-examined, PW1 stated that the accused person was his neighbour for six (6) months. He knew him as “Matoto” and he had heard in Court that he is also known as Karisa Kambi Kitsao.
 7. PW1 indicated that the step-father of the accused person was called Karisa Magongo but PW1 did not know the accused person’s real father. He stated that the deceased had taken in the accused person as his son, and that the accused person used to say in the year 2015 that the deceased was a witch. PW1 further stated that when “Matoto” called him, he did not think he could do anything. He indicated that he did not write about witchcraft in his statement. He explained that there was no report at any Police Station about the issue of witchcraft and that the Village Elder refused to hear the case.
 8. In further cross-examination, PW1 testified that the deceased died on 30th January, 2017 (sic) and that “Matoto” went with two (2) people and that there was a lady known as “Mamake Mavu” who cooked for the two men who went to the home of the deceased. That the said woman told him that she had cooked for the two men at her home at 5.00 a.m., and that they left their luggage with her. He stated that the neighbour informed them of the two men when they went to see the deceased’s body.
 9. PW2 was Safari Kambi. He was the deceased’s son and a brother to the accused person. His evidence was that on 28th January, 2017 he went to work at 8.00 a.m., and left at 9.00 p.m. That upon reaching home, he found his cousin Mdi, his sister Amina and his brother Saidi. He stated that he then went to Kahindi Islam’s house, who is a neighbour, and they went for a disco matanga (funeral wake) until 1.00 a.m., when he went back to his house. He stated that he took a mat to sleep on. He then heard his father’s voice calling him ‘Mbaraka, Mbaraka!’. PW1 stated that while inside his house, he told his father that he was tired as he had come from disco matanga. He told his father that he would speak to him in the morning. He explained that at that time, his father then was speaking when he was outside the house.
 10. PW2 stated that his father asked for his mat, but he told him that he was sleeping on it. That his father then asked for his lantern, and he told him that his lantern was safe. He stated that his father then told then him that he was removing a mattress from his house as he was going to sleep on it outside the house. PW2 stated that his father used to do that and his (PW2’s) mother would dissuade him from sleeping outside, but he would hear none of it.
 11. PW2 testified that later, he took the lantern to go to the toilet outside the house but before he reached there, he heard his brother Karisa Kambi saying “Zima taa!” “Zima taa!”. PW2 stated that Karisa Kambi was the accused person whom he identified at the dock. He stated that he heard the accused person’s voice telling him to put off the lantern and that the voice was coming from behind his father’s house. PW2 further stated that he knew that it was the accused person’s voice because he was his younger brother.
 12. PW2 testified that he saw that it was the accused person when he moved to the verandah of his father’s house. He stated that the accused person had a reflector jacket around his head. PW2 further stated that the accused person told him to put off the lantern, and he did so. It was PW2’s evidence that he saw the accused person clearly because there was moonlight. PW2 stated that the accused person



- locked the door of his father's house from outside. He indicated that his father was by then sleeping on a mattress at the verandah.
13. PW2 testified that when the accused person told him to put off the lantern, he became scared. He went and tried to wake up his brother and cousin but they did not wake up. He testified that the accused person told him to leave the compound or he would kill him with his father. PW2 stated that he went to his neighbour to ask him for help, but he found him deep asleep. PW2 testified that by then he was shaking in fear and he slept on his kikoi beside his neighbour. PW2 testified that at 5.00 a.m., he woke up, and upon reaching home, he saw blood flowing from the mattress his father had been sleeping on, which was soaked in blood. He stated that he did not look at his father's body as he fainted. When he came to, he saw cuts all over his father's body. He indicated that neighbours and the Police went to the scene.
 14. It was PW2's evidence that the accused person did not like his father because there was a time when he used a handcart with his friend and loaded some logs on it, and in the process the accused person fell and sprained his leg but when he went home, he started saying and telling his father that he was a witch. That PW2's grandfather told the accused person to forgive his father, and the latter told the accused person that he was leaving everything to God. The accused person then moved to Majengo.
 15. PW2 said that he was not on good terms with the accused person because there was a time he was given shoes by his employer and the accused person put the said shoes in water and they became damaged. He indicated that he felt pain that his father was killed. He stated that he believed that it was the accused person who killed the deceased because he is the one who was at the scene on the night his father died, and also because he told him to put off the lantern and to leave their compound.
 16. PW3 was Zawadi Magogo a resident of Vipingo. She informed the Court that her mother's name was Bendera Kadenge. She recounted that in July 2016, her mother had an illness which looked like leprosy and that she also looked like she was not mentally sound. She stated that during that time, her father called the accused person who is her brother, and told him that her (PW3's) mother was unwell, and that the accused person told her father to leave everything to God and that he (her father), understood her mother's illness. She indicated that her father told her what the accused person had told him, which she understood to mean that he did not want to contribute money for her mother's treatment.
 17. She testified that on 29th January, 2017, someone went to her house in Vipingo and told her to go home as there was an incident that had happened. She stated that she went home and found that her father had been killed. She testified that she found her father lying on a mattress outside his house at the verandah. It was her evidence that she saw many cut wounds on his body and a lot of blood on the ground near the door to the house. She described the layout of the homestead, that there were 3 houses in their compound, one belonging to her father, and the second one was for the accused person and the third one was for PW2. She stated that at that time, the accused person was living at Majengo in Kanamai with other people. She indicated that the accused person was her step-brother as they share the same mother, but the accused person's father and her father were different.
 18. She stated that she thought that the accused person and her father were living well and that she hardly met with the accused person as she had her own home because she was married.
 19. Fanny Sada Mwachingu also known as Fanny Sada Cosmas testified as PW4. She was a resident of Vipingo. Her evidence was that on 28th January, 2017 at 7.00 p.m., she prepared food for the children and after they had eaten, she took them to sleep in one room. She indicated that she went to her room to sleep with her 4 year old child, as they used to share the same bed.



20. She stated that after a short time, her husband Kitsao Charo Mangi went home and at that time, her child wanted to urinate, and she took the child outside the house. It was PW4's evidence that while still outside their house, she saw two (2) men near the fence of their compound, about 8 metres from where she was. She described one of the men as short and the other one as tall. It was her evidence that she knew the short man as the step-mother to her husband had introduced him as Karisa Kambi, and that her step-mother had told her that he was her son. She identified the accused person as Karisa Kambi, the short man she saw that night.
21. She stated that the time when she saw the accused person was 9.15 p.m., and there was moonlight and that is how she was able to identify him. She stated that she was not able to identify the tall man who was with the accused person. She further stated that her husband's step-mother had told her that the accused person used to live at Majengo in Kanamai, which she said was about an hour's drive from their home at Vipingo. She indicated that she wondered what the accused person was doing in their compound at night but she did not tell her husband.
22. She stated that on the morning of 29th January, 2017 her brother-in-law by the name Safari called her saying "Nyanya, Nyanya toka nje!" and that when she opened the door, he pointed out to her husband's uncle's house, where she saw him lying on a mattress outside his house.
23. PW4 stated that her husband's uncle had been cut on his head several times. She also saw that his mattress was soaked with blood and his arms had cut wounds. She also saw several stab wounds on his stomach. She stated that Police Officers were called to the scene, and they collected the deceased's body and took it to Kilifi Hospital Mortuary. It was her evidence that the distance between where the deceased was killed and where she had seen the accused person at night was 10 metres. She stated that she did not know if there were family disagreements at that time.
24. On being cross cross-examined, PW4 stated that there was moonlight when she saw the accused person at night, but she did not know if he saw her. She indicated that they did not greet each other. She stated that she did not hear anything happening at night, and that she had seen the accused person before the night of the incident when his step-mother showed him to her.
25. PW5 was Kitsao Charo Mangi, a boda boda rider, and a cousin to the accused person. He knew the deceased as his Aunt's husband. He indicated that he was PW4's husband. He recounted how on the morning of 29th January, 2017 at 6.00 a.m., Safari Kambi (PW2) woke them up by knocking at their door and told them to go out and see that their "father" had been killed.
26. PW5 stated that when he went outside, he saw the body of his Aunt's husband outside the door of his (deceased's) house. PW5 saw that the deceased had a deep cut on his head and he was bleeding heavily. PW5 also saw that the deceased had several stab wounds on the right side of his stomach and that the mattress he was lying on was soaked with blood. He stated that he, his wife (PW4) and Safari (PW2) screamed and their neighbours went to the scene. That the Police were called to the scene, and they collected the deceased's body.
27. PW5 stated that he was very close to Bendera Kadenge who was the deceased's wife as she had brought him up after his mother died. He indicated that he had lived in her compound for two (2) months before the incident happened and that he used to live in a rental house before then.
28. He testified that there was a time when Bendera Kadenge became sick. He explained that she would at times collapse and say that she was seeing ghosts and it happened for the period of two (2) months when he was living in their compound. He stated that during the time he stayed in that compound he never heard of any disagreements. He further stated that the accused person who was Bendera Kadenge's son



- used to go to the deceased's homestead, and that he used to get along with his mother and the deceased. He further stated that the accused person used to live in Majengo in Kanamai.
29. On being cross-examined, PW5 stated that he did not hear any screams or a struggle at night outside the deceased's house.
 30. Kahindi Kazungu testified as PW6. He stated that in the village, they commonly refer to the accused person as "Matoto". He stated that he knew the deceased Karisa Ngonyo Mwavuo as a neighbour at Bamba, in Vipingo. It was PW6's evidence that at midnight on 28th January, 2017, the deceased's son Safari Mubarak (PW2) went to his house and called out "Babu! Babu! Babu!"
 31. PW6 stated that he opened the door to his house and Safari Mubarak told him that he wanted his daughters to accompany him to disco matanga but he declined. PW6 stated that PW2 asked for a mat and he slept on it at the verandah of his house. He stated that PW2 woke up at 5.30 a.m., and said he was going for morning prayers. PW6 further stated that during day break, they heard many people wailing and he went to the deceased's house where the noise was coming from. He recounted that on arriving there, he saw the deceased lying on a mattress at the verandah of his house with a cut wound on his neck. He also saw blood on the deceased's body but he did not look at the deceased keenly. PW6 stated that the accused person's mother was married to the deceased, but he was not his biological father.
 32. On being cross-examined, PW6 affirmed that on the night of 28th January, 2019, he did not hear any shouts coming from the deceased's homestead.
 33. Dr. Sheila Mukarye of Kilifi District Hospital testified as PW7. Her evidence was to the effect that a postmortem examination of the deceased's body was done at the said Hospital on 2nd February, 2017 at 1.30 p.m. She testified that as per the Postmortem Report, the deceased's body had several multiple stab wounds on the anterior chest and abdomen which were 2cm x 3cm, with the deepest wound on his left flank being 3 inches deep. The Doctor stated that there were deep cuts on the deceased's left wrist and left bicep being approximately 5cm by 2 cm. She stated that there were 7 cuts on the deceased's occipital parietal area, and a deep cut on the left shoulder which had exposed the bone, the humeral head.
 34. PW7 stated that the cause of the deceased's death was severe bleeding due to multiple cuts and severe head injury caused by the cuts at the back of the head. She produced the Postmortem Report dated 2nd February, 2017 as an exhibit.
 35. Hamisi Karisa Ngonyo a resident of Vipingo, gave evidence as PW8. He indicated that the accused person was his step-brother, and that they share the same mother but different fathers. He stated that on 28th January, 2017 he went home from work at 6.00 a.m., and found his father at home. He then went to Shariani where his house was. He indicated that his mother was also at Shariani at her mother's house as she had a mental condition. He stated that he was building a house at Shariani but he used to live at Vipingo. He also stated that on that day, he went to Vipingo at 11.00 a.m., and slept and left for work at 5.00 p.m., and that he left his father at home at Vipingo. His evidence was that he received a call on the morning of 29th January, 2017 from his brother Karisa Ngonyo who asked him to go home as he had been told that their father had been killed.
 36. PW8 stated that upon reaching home he found a group of people. He also found his father lying on a mattress on the verandah. PW8 saw several cuts on his father's head. He also saw a stab wound on his father's abdomen. He identified several photographs depicting what he found at the scene.
 37. PW8 indicated that his mother's name was Bendera Kadenge Menza and that she became sick in the year 2016 but on being taken to the Hospital, the Doctors could not tell what her medical problem



- was and she passed away in the year 2017. He stated that the deceased was his biological father and that their relationship as family members was good.
38. PW9 was Karichwa Ngonyo Mwavuo a resident of Shariani in Vipingo. She was a younger sister of the deceased. She indicated that the accused person was the son of the deceased's wife who had been sired by a different man. She testified that on 28th January, 2017 the deceased went to Shariani where his wife was staying because she was sick and as he was leaving for Vipingo at 2.00 p.m., his wife told him to tell Jumaa to take to her clean clothes, which he did at 8.00 p.m.
39. PW9 stated that Jumaa stayed up to 10.00 p.m., and when he wanted to leave, his mother told him not to leave as his father was at home and it was on a Saturday. She stated that Jumaa called his father (the deceased) and told him to keep for him his clothes inside the house.
40. She testified that the following morning she was called by a neighbour and she heard people crying calling out Karisa Ngonyo's name. She stated that she went to Vipingo where she found her brother (deceased) lying on a mattress at the veranda. She saw that he had several cut wounds on his head and on the palm of his hand and the hand had almost been severed off.
41. She also noticed several stab wounds on his left hand. She also saw stab wounds on his legs. She saw that the deceased's house was locked from outside. She testified that she saw a piece of skin on a nail on the door of the deceased's house. She indicated that the deceased's wife was mentally sick.
42. Chief Inspector Klein Kulicha, the Officer in charge of the Scenes of Crime Coast region testified as PW10. It was his evidence that on 25th November, 2019 he received a CD in a sealed packet from the DCI Kilifi West who asked him to process the same. He stated that he prepared photographic prints therefrom, which he produced as exhibits. He also produced the certificate he prepared and the letter and packaging he received forwarding the CD to him.
43. PW11 was PC Ian Nahashon Mlamba attached to Safaricom PLC Law Enforcement Liaison Office, Mombasa. He indicated that his work includes receiving requests for call data records, Mpesa statements, production of call data records and Mpesa records and giving evidence.
44. He testified that on 1st February, 2017, he received a request from the DCIO Kilifi Mary Mbai requesting for -
- a. Incoming and outgoing call data records from 25th January, 2017 to 1st February, 2017;
 - b. The MSISDN paired to the above (IMEI) (as per the request);
 - c. The current location of the user (then), and
 - d. Any other information that could assist the investigations.
45. PW11 stated that he generated the call data records and forwarded them to the DCIO Kilifi through Crime Research and Intelligence Bureau Kilifi.
46. He testified that the information required was for mobile numbers 071508XXXX, 070844XXXX, 070120XXXX and 071568XXXX out of which he was called to testify on cell phone numbers 071508XXXX and 070120XXXX. It was PW11's evidence that cell phone number 071508XXXX was registered under the name of Karisa Ngonyo Mwavuo and it was switched off on 28th January, 2017 at 8.57 p.m., and switched on at 0822 hrs on 29th January, 2017 and was captured at site at Kanamai, Majengo, with the subscriber using IMEI No. 357259074662580. PW11 explained that IMEIs keep on changing depending on the slot the sim cards are put in. He testified that on 31st January, 2017 at



- 1305 hrs, the IMEI that was in use was 357259074662590. He stated that they use the mobile number of the subscriber to get the IMEI of the phones being used.
47. PW11 testified that the MMSID history can give a record of all the mobile phones used by a subscriber, and if they (Safaricom PLC Law Enforcement Officers) have the phone, they use the phone number history to get to know all the sim cards used.
 48. He produced call data records for Karisa Ngonyo Mwavuo (deceased) and one Kadzo Kambi Kitsao. He stated that the numbers could have been idle for some time and later sold by Safaricom to other subscribers and they were recharged with airtime and became active. He stated that the last event shows that Safaricom closed the mobile number.
 49. PW11 testified that phone No. 071508XXXX was registered on 17th December, 2014 in the name of Karisa Ngonyo Mwavuo and the last time the number was active was 29th May, 2021. He stated that the 2nd phone number 070120XXXX was registered under the name of Kadzo Kambi Katsao on 15th April, 2016 and the last time it was used was on 29th September, 2021.
 50. It was the evidence of PW11 that from the Report he produced, subscriber No. 071508XXXX registered under the name of Karisa Ngonyo Mwavuo was on 28th January, 2017 between 5.00 p.m and 7.30 p.m., captured on the location of Vipingo Highway and he was using a phone with IMEI No. 353486074193670, and that the subscriber was a resident of Vipingo from the location captured in the call data records. He stated that subscriber No. 070120XXXX registered under Kadzo Kambi Kitsao was using phone IMEI No. 3572590746622590, and was captured on 28th January, 2017 along Vipingo Highway and was then using IMEI No. 3572590744662580. He indicated that the subscriber was using a mobile phone with twin sims. He stated that from phone data records, the subscriber of mobile No. 07012011972 is a resident of Kanamai, Majengo.
 51. PW12 was PC Sammy Oyaro. His evidence was that on 29th January, 2017 he was on duty at Kijipwa Police Station when the area chief of Vipingo, one Kihindi, went there at around 7.30 a.m., and reported that a person had been killed at Vipingo village. PW12 stated that he and DCI Officers went to the said village to the homestead of Karisa Ngonyo Mwavuo whom they found lying outside his house on a mattress soaked with blood.
 52. PW11 stated that the deceased had several cuts on the head and shoulder and he had been stabbed in the ribs. He stated that in that homestead, there were three (3) semi-permanent houses built of mud on the sides and iron sheet roofs, which houses were 3 metres apart. He added that he noticed that the homestead was surrounded by a hedge. He testified that he saw a blood smear on the deceased's door and blood stains at the entrance of his house, and they saw as if the deceased was trying to take shelter in his house but he was overpowered by his assailants. He indicated that the deceased's body was taken to Kilifi mortuary.
 53. He testified that they interrogated witnesses who were at that homestead and that Fanny Saidi Mwachingu (PW4) and Safari Kambi Kitsao alias Safari Mubarak (PW2) alleged that they had seen the accused person at their home on 28th January, 2017. He stated that they went to Kanamai, Majengo and arrested Karisa Kambi Kitsao, the accused person. That they recorded a statement from his wife who said that on 28th January, 2017, her husband had left their home at 8.00 p.m., and he informed her that he was going for a funeral and he returned on 29th January, 2019 at 4.00 a.m.
 54. PW12 stated that on interrogating the accused person, he said that he had spent the night of 28th January, 2017 at his home and he also gave them his mobile number. It was the evidence of PW12 that they sought to find out where the accused person was on the night of 28th January, 2017. PW12's



evidence was that the Safaricom data they received showed that on 28th January, 2017 at 8.57 p.m., the accused person was at Vipingo highway and the phone was then switched off until the following morning. PW12 further gave evidence that the Safaricom data record showed that the deceased was at his home. PW12 stated that the accused person's cell phone No. 070120XXXX was registered in the name of Kadzo Kambi Kitsao, whereas the accused person is known as Karisa Kambi alias Matoto. He stated that they did not get to know who Kadzo Kambi Kitsao was. PW12 indicated that phone number was 071508XXXX was registered in the name of Karisa Ngonyo Mwavuo, the deceased.

55. PW12 testified that in the course of investigations, they found out that the accused person did not have a good relationship with his step-father as he said that he had refused to pay school fees and dowry for him. He also stated that when the accused person's mother, Bendera Kadenge, became mentally ill, the accused person would call his step-father's brother (PW1) and other people, whom he would tell that his step-father (deceased) knew what was ailing his (accused person's) mother. That he also used to say that the deceased should take her to a place where she could be healed after she had been taken to the Hospital and to witchdoctors but her condition was deteriorating. He stated that it was on the basis of investigations that they charged the accused person.
56. It was the evidence of PW12 that the fact that the accused person was seen on 28th January, 2017 at the deceased's homestead shows that he was the one who killed the deceased as he traveled to his step-father's home at night, yet he told the Police that he was at his place at Kanamai on the night of the incident. In addition, that Safari Kambi Kitsao alias Safari Mubarak (PW2) told them that he was ordered by the accused person to turn off the lamp (lantern) at the deceased's homestead and to look for a place to sleep, and he went to sleep in PW6's house after turning off the lantern.
57. PW12 testified that PW4 informed them that she had seen the accused person with a tall man hiding near the hedge at 9.00 p.m., on 28th January, 2017, and that PW2 told them that he had seen the accused person at the deceased's homestead at about 1.00 a.m., on the night of 28th January, 2017.
58. On being re-examined, PW12 stated that there was a time that the deceased called Zawadi Karisa (PW3) and told her that the accused person had told him that he knew the cause of his mother's illness and he should treat her, but PW3 told the deceased that he should leave those problems to God.
59. The accused person gave a sworn defence. He indicated that he lived at Majengo, Kanamai and worked as a stone cutter. He also indicated that the person who was killed was his step-father. He stated that on the night his father died on 28th January, 2017, he was at his house at Majengo. He stated that he saw missed calls from his brother Juma Karisa Ngonyo but he was not able to call him as he had a (mobile) debt after taking a loan.
60. He further stated that his brother-in-law Awadhi called him at 7.00 a.m., and asked him if he was at home, and that he also asked him when he had been at Vipingo and he responded by telling him that he was there two weeks before that day, and he would go back after two weeks to resolve a problem that was there. He stated that Awadhi told him that his step-father had been attacked at night and he asked him to go to Vipingo. He stated that since he was financially low, he told Awadhi to give him time to look for money from his family and employer, and that upon getting money from the latter he went to his house at Majengo where Police Officers found him at 3.00 p.m., and questioned him about the death of his step-father. He stated that the Police asked him where he was the previous night at 2.00 a.m., to the morning, and he told them that he was sleeping at night and that his wife was a witness. That the Police told him that they had information that he had killed the deceased and they asked him for the clothes he had worn the day before and he showed them the clothes which had a lot of dust but no blood stains.



61. The accused person stated that the Police then asked him for the panga he had used to kill the deceased but he told them that he only had a knife, and they handcuffed him and took him to Vipingo Police Station and the Police started interrogating him. That he told them that the deceased had told him that there were people in his neighbourhood at Vipingo saying that he was a bad person but the deceased did not tell him who those people were.
62. The accused person stated that Kazungu Magogo alias Kazungu Ngoni went to the Police Station and the accused person told the Police that his wife, the said Kazungu Magogo and the deceased did not get along. That the Police took him to his house at Majengo and called his wife and his step-brother and they asked him where he was the night before, and that Kadenge Kambi said that he (accused person) was at home on the night of the incident.
63. The accused person stated that he was taken to the Chief's office and then to Mtwapa Police Station where he was interrogated and beaten after being taken to the DCIO's office where he was tortured by having his testicles pressed with pliers. He alleged that when he tried to inform the Judge about it, he was told to leave investigators to deal with the issue of having been beaten.
64. The accused person contended that PW2 told lies that he was at Vipingo and that PW4 lied that she had seen him at the scene, as he was at his house. He stated that he did not know the person who killed the deceased.
65. On being cross-examined by Ms Nyawinda, the accused person indicated that his mother was married to the deceased, Karisa Ngonyo, but he was not his biological father. He confirmed that the deceased used to live at Vipingo. He stated that his relationship with the deceased was at first okay but later it was not, as the deceased refused to educate him and there was a time when he refused to give him money so that he could go to the Hospital.
66. He confirmed that Bendera Kadenge was his mother and she was mentally sick. He admitted that he suspected that his step-father had something to do with it. He stated that his mother and his step-father sold a piece of land and spent the money but gave him no money at all. He explained that his mother was taken to the Kilifi Hospital and the Doctors said she was okay, but whenever she would go back to Vipingo she would become mentally sick. He stated that his father had taken her to a Traditional Doctor but his step-father would not tell them what she was ailing from.
67. He disagreed with the evidence of his sister Zawadi Karisa (PW3) who said that she saw him at Vipingo on the night of the incident. He also disagreed with the evidence of Fanny Cosmas (PW4) who also said the same thing and his brother Safari Kambi (PW2) who said that he saw him at 10.00 p.m., on the same night.
68. He contended that he and Safari Kambi (PW2) were not on good terms, and that he had quarreled with Zawadi Karisa about their parents. He confirmed that he had no grudge with PW4. He indicated that his cell phone number was 0701291972. He denied that his phone number was detected at Vipingo on the night of 28th January, 2017.

SUBMISSIONS

69. In written submissions filed on 14th July, 2023 by Ms Nyawinda, Principal Prosecution Counsel, she summarized the evidence of both the prosecution witnesses and the defence case. She relied on the case of Anthony Ndegwa Ngari v Republic [2014] eKLR, to outline the ingredients of an offence of murder.



70. Ms Nyawinda submitted that the death of the deceased is not in dispute as it was proved by the evidence of PW2, PW6 and PW8 who saw the deceased's lifeless body lying in a pool of blood outside his house on the verandah. She stated that the Postmortem Report produced by PW7 concluded that the cause of death was extensive bleeding due to multiple cuts and severe head injury caused by cuts located at the back of the deceased's head. She thus submitted that the death of deceased was proved to the required standards.
71. As to whether the death of the deceased was caused by an unlawful act or omission, Ms Nyawinda submitted that the Postmortem Report prepared by PW7 revealed that the deceased's cause of death was extensive bleeding resulting from multiple cuts and severe head injury caused by cuts located at the back of the deceased's head. She stated that the death of the deceased was due to an unlawful act.
72. As for the third issue on whether the accused person was responsible for the unlawful killing of the deceased, the Prosecution Counsel submitted that while none of prosecution witnesses directly saw the accused person killing the deceased, there was circumstantial evidence pertaining to the circumstances surrounding the death of the deceased from which the Court could draw the inference that he was the murderer. She relied on the case of *Ahamad Abolfathi Mohamed & another v Republic* [2018] eKLR, where the Court of Appeal stated that circumstantial evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.
73. She also relied on the case of *R v Taylor Weaver & Donovan* [1928] Cr. Amp. R 21 on the issue of circumstantial evidence. She cited the case of *Abanga alias Onyango v Republic* Cr. Amp No. 32 of 1990, on the same issue.
74. As to the facts that point out to the unlawful acts of the accused person, Ms Nyawinda submitted that PW2 in his evidence stated that on the night of 28th January, 2017 at around 1.00 a.m., he heard the accused person telling him to switch off the lantern. He then saw the accused person go to the verandah where his father was sleeping and saw him (accused person) lock the door of the deceased's house from outside, and he told PW2 to leave the compound or else he would kill him and his father. She submitted that this led PW2 to leave the compound as he was frightened and shaken and he went to the neighbour's house where he slept until morning.
75. Ms Nyawinda submitted that other facts linking the accused person to the deceased's death is that there was moonlight which enabled PW2 to see the accused person clearly and he was well known to him as brother.
76. The Prosecution Counsel also pointed out the evidence of PW4 who testified that she went out on the night of 28th January, 2017 at 9.15 p.m., as she had accompanied her child who wanted to go for a short call outside. That when PW4 was outside the house, she saw the accused person in the company of another individual and she was able to identify the accused person since there was moonlight.
77. The Prosecution Counsel also pointed out that PW6 in his evidence stated that on the night of 28th January, 2017, PW2 went to his house and asked him for a mat and he spent the night there, which corroborated the evidence of PW2 that he did not sleep at his house that night.
78. Ms Nyawinda also pointed out the evidence of PW11, the Safaricom Liaison Officer who produced Safaricom call data for the accused person's mobile number 0701201922 which showed that on 28th January, 2017, at 8.57 p.m., the said number was located at Vipingo area.
79. In summarizing the evidence adduced, Ms Nyawinda emphasized that the accused person was seen by these independent witnesses in the deceased's homestead prior to the deceased's cold-blooded murder.



80. Further, that the accused person was seen by PW2 locking the door to the deceased's house from outside and he even threatened to kill PW2 with the deceased, and ordered PW2 to leave the compound.
81. Counsel also referred to the evidence that the accused person had blamed the deceased for bewitching his mother and he had threatened to revenge.
82. She submitted that the prosecution had proved beyond reasonable doubt that the accused person was responsible for the deceased's death.
83. Ms Nyawinda submitted that the unlawful act committed by the deceased was with malice aforethought. She referred to the provisions of Section 206 of the *Penal Code* on what constitutes malice aforethought.
84. She concluded her submissions by stating that the accused person admitted in his defence that he was angry with the deceased for having not educated him and also for allegedly bewitching his mother, which showed that he harboured an intention to revenge. She stated that from the nature of the injuries sustained by the deceased, which according to the Postmortem Report were multiple stab wounds to the anterior chest and abdomen, deep cut on the left waist and severe cuts on the back of his head, the accused person and his unknown accomplice had the intention to inflict grievous and fatal injuries on the deceased. She submitted that the prosecution had proved its case beyond reasonable doubt that the accused person murdered the deceased. She urged this Court to convict him for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
85. On her part, Ms Musyoki, learned Counsel for the accused person in submissions filed on 31st July, 2023 equally summarized the evidence adduced by prosecution witnesses and the defence made by the accused person.
86. She submitted that the fact of death was proved to the desired threshold by the evidence of PW1, PW2, PW4, PW5, PW6, PW8, PW9 and PW10, who testified to have seen the deceased's body with several cuts and stab wounds. She added that proof of death was also confirmed by the Postmortem Report produced by PW7 which established that the deceased died of severe bleeding due to multiple cuts, and severe head injury caused by the cuts at the back of his head.
87. On the issue of whether the accused person committed the unlawful act that caused the death of the deceased, she submitted that the evidence adduced by PW2 and PW3 would have placed the accused person at the scene of crime on the material date in as far as being able to positively identify him but did not actually affirm that the accused person committed the unlawful act which caused the death of the deceased. Counsel stated that PW2 alleged to have gone outside for a short call with a lantern when he heard the deceased telling him to put it off which he did, and that he was able to identify the accused by the aid of the moonlight. That PW2 testified that the accused person was in the company of other persons who were not known to PW2.
88. Further, that he also saw his father sleeping on the verandah before the accused person ordered him to leave the compound and upon returning home the following morning, he found the deceased dead.
89. Counsel stated that as at the time when PW2 left his father's compound, his father was still alive and was sleeping on the verandah. She contended that the prosecution tried to place the accused person at the scene of crime but was not able to adduce any evidence before the Court indicating that he caused the death of the deceased.



90. Ms Musyoki referred to the evidence of PW4 who testified that she took her children (sic) outside to urinate, and the said witness saw two men at the hedge of the compound about 10 metres from the deceased's house and since there was moonlight, she was able to recognize the accused person.
91. Counsel contended that the distance and poor lighting and the possibility of the state of someone who had just woken up from sleep could very well blur one's vision.
92. She contended that the fact that PW4 did not deem it necessary to inform her husband of the accused person's presence at the fence goes to show that it was not a matter of insecurity thus it was not really a matter of concern.
93. She submitted that there was no direct evidence from the prosecution linking the accused person to the death of the deceased as the prosecution relied on circumstantial evidence, and that the bad relationship between the accused person and the deceased was not sufficient evidence for the prosecution to allege that the accused person murdered the deceased.
94. Ms Musyoki stated that PW11 testified that the phone data showing that the accused person was in the deceased's town area and not at his home means that the prosecution based its evidence on assumptions and not actual evidence. She submitted that it was not in dispute that the accused person and the deceased were not on good terms, information which is well within the knowledge of family and friends. Ms Musyoki contended that the foregoing was not sufficient cause to allege murder because the accused person could as well have had work or activities in Vipingo on the night the deceased was killed.
95. She submitted that there was no direct or circumstantial evidence adduced by the prosecution that linked the accused person to the act that caused the unlawful death of the deceased.
96. On the issue of whether malice aforethought has been proved in this case, Ms Musyoki cited the case of Republic v Henry Kaithia [2022] eKLR, to illustrate instances wherein malice aforethought is established.
97. She argued that since the prosecution had failed to prove actus reus, it had as a consequence also failed to prove mens rea. She submitted that from the evidence adduced by the prosecution, there exists suspicion that the accused person was involved in the death of the deceased, but suspicion alone cannot form the basis for conviction in a murder case. She relied on the case of Roba Galma Wario v Republic [2015] eKLR, to assert the said submissions.
98. Ms Musyoki pointed out that the weapon used to cause the deceased's death was not produced. She stated that the prosecution relied on the fact that since there was bad blood between the accused and the deceased, and that on the night of the deceased's death, the accused person was allegedly at Vipingo town, which is the deceased's place of residence, proves that he caused the death of the deceased, a matter that was denied by the accused person who said that he had not been at Vipingo for weeks and was not there on the night the deceased was killed as he had slept at his home in Majengo and he was informed of the death of the deceased via a phone call the next day in the morning. Counsel stated that the accused person said that he was not able to go to Vipingo immediately because he had to look for money for transport.
99. She submitted that the prosecution had not proved beyond reasonable doubt that the accused person with malice aforethought caused the deceased's death. She prayed for a finding of not guilty to be entered in favour of the accused person.

DETERMINATION

100. In order for an offence of murder to be proved, three ingredients must be proved-



- i. The death of the deceased;
 - ii. That he died as a result of commission of an unlawful act in the hands of the accused person; and
 - iii. That the accused person had malice aforethought when he committed the unlawful act.
101. On the first issue, both the Counsel for the prosecution and the deceased submitted that the deceased's death was not contested. That is indeed the position as the deceased was found dead on the morning of 29th January, 2019, lying on a blood stained mattress on the verandah of his house. Witnesses such as PW1, PW2, PW4, PW5, PW6, PW8, PW9 and PW12 saw the deceased lying dead on the mattress outside his house. The said witnesses testified of how they saw multiple cut wounds on the deceased's arms, hands, shoulders and stab wounds on his stomach and ribs. Dr. Sheila Mukarye, who testified as PW7 produced the Postmortem Report of the deceased which corroborated the nature and extent of injuries the witnesses saw on the deceased's lifeless body on the morning of 29th January, 2017.
102. From the Postmortem Report, there were multiple stab wounds on the anterior chest and abdomen, deep cuts on the deceased's left wrist and the left bicep, 7 cuts on his occipital parietal area, and a deep cut on his left shoulder. She established the cause of death as severe bleeding due to multiple cuts and severe head injury caused by cuts at the back of the deceased's head. From the evidence adduced, I am satisfied that the cause of the deceased's death was established from the foregoing evidence, and it was occasioned by multiple extensive injuries inflicted on the deceased.
103. On the second issue as to whether it was the accused person who caused the unlawful death of the deceased, PW1's evidence brought about the issue of a dispute having been in existence between the deceased and the accused person herein. As per the evidence of PW1, the accused person used to call the deceased a witch and a case on the same had been reported to the Elders, but PW1 did not attend the meeting. According to PW1, when he failed to attend the said meeting, the accused person called him and told him that since he had refused to go for the case, whatever happened should not be blamed on him, and the accused person disconnected the phone call. PW1 could not get the accused person thereafter on phone as he had called him using a "private number".
104. PW1 affirmed during cross-examination that in the year 2015, the accused person used to call the deceased a witch. He confirmed that the deceased had taken in the accused person as his son, but he was his step-son.
105. Safari Kambi (PW2), a son of the deceased on the night of 28th January, 2017 and 29th January, 2017 returned home at 1.00 a.m., after attending a disco matanga. He spoke to his father (the deceased), who asked him for his mat so that he could sleep on it, but PW2 told him that he was sleeping on the said mat. His father then told him that he was removing a mattress from his house so that he could sleep at the verandah of his house. His father also asked PW2 for his lantern, but he told him that he had it and it was safe.
106. PW2 then took the lantern to go to the toilet outside the house but before he reached there, he heard his younger brother Karisa Kambi (the accused person) telling him to put off the lantern. According to PW2, the accused person's voice was coming from behind their father's house and he knew that it was the accused person's voice as he is his younger brother. PW2 saw the accused person when he moved to the verandah of their father's house. According to PW2, the accused person had tied a reflector jacket on his head and he was in the company of other people. Although PW2 put off the lantern after being ordered to do so, he saw the accused person clearly from the moonlight. PW2 also saw the accused person locking the door of the deceased's house from outside.



107. At that time, their father was sleeping on a mattress at the verandah. As per the evidence of PW2, he became scared after the accused person ordered him to put off the lantern and when PW2 tried to wake up his brother and their cousin, they did not wake up. The accused person shouted to PW2 to get out of the compound or else he would kill him with his father. That was when PW2 went to their neighbour's (PW6) house where he slept until 5.00 a.m., in the morning. PW6 supported the evidence of PW2 that on the night of 28th January, 2017 and 29th January, 2017 he spent the night at their homestead. When PW2 went back home in the morning, he saw blood flowing from the mattress on which his father was sleeping, which was soaked with blood.
108. From PW2's testimony, it is evident that the accused person was not on good terms with his step-father (the deceased), whom he had accused of being a witch after the accused person sprained his leg and the deceased told the accused person that he was leaving everything to God. The accused person who had been living in the deceased's homestead then moved to Majengo.
109. PW2 also adduced evidence to show that the accused person was not a person of good character and was not on good terms with PW2 after the accused person put shoes which he (PW2) had been given by his employer in water and the shoes got damaged.
110. PW2 believed that it was the accused person who killed the deceased because he is the one who was at the scene on the night his father died, and the accused person ordered PW2 to put off the lantern and leave the compound.
111. As per the evidence of PW3 the accused person did not have a good relationship with the deceased, as the accused person's mother, Bendera Kadenge had been unwell with an illness which looked like epilepsy and she also had mental illness. That when their father called the accused person and told him that their mother was unwell, he told their father to leave everything to God as their father understood their mother's illness well.
112. The deceased informed PW3 what the accused person told him, which PW3 understood to mean that the accused person did not want to contribute money for treatment of their mother.
113. Fanny Sada Mwachigu alias Fanny Sada Cosmas (PW4) was staying in the deceased's homestead. She was married to the deceased's wife's nephew. On the night of 28th January, 2017 she retired to bed with her last born child who was 4 years old. Within a short time, her husband Kitsao Charo Mangi reached home. The child wanted to urinate, and when she took her outside the house to do so, at a distance of 8 metres, she saw two men near the hedge of their compound. She noticed that one man was short and the other one was tall. She was able to recognize the short man as Karisa Kambi (the accused person), as his mother had introduced her to him. According to PW4, she saw the accused person at 9.15 p.m., with the aid of moonlight, but she was not able to identify the tall man.
114. She confirmed that her husband's step-mother had told her that the accused person used to live at Majengo in Kanamai. According to PW4, it takes about an hour to get there by car. PW4 indicated that after her child urinated, she went back to bed but she wondered what the accused person was doing in that homestead at night. The following morning, PW2 called her and pointed out to the door of her husband's uncle's house, where she saw the deceased with multiple cut wounds on his body as well as stab wounds on his stomach.
115. PW5, who was PW4's husband and a nephew to the deceased's wife used to live in the deceased's homestead. He had been given a place to build by the deceased, whose wife (Bendera Kadenge) had brought him up after his mother died when he was young. He went to their home at 9.00 p.m., on 28th January, 2017. He was given food by PW4 and slept after that. At 6.00 a.m., they were woken up



- by PW2 who informed them that Karisa Ngonyo Mwavuo had been killed. PW5 indicated that the distance between their house and the deceased's house was 10 metres.
116. PW6 who was the deceased's neighbor confirmed that the accused person used to live in Majengo in Kanamai.
 117. PW9 who was the deceased's younger sister received a call from one of the deceased's neighbours and on receiving the said call, she heard some people crying out the name of Karisa Ngonyo. She went to his home. PW9 supported the evidence of PW2 who testified that he saw the accused person locking the deceased's house from outside, because when she went to the deceased's house, she saw that it was locked from outside.
 118. From the evidence adduced by PW2 and PW4, they put the accused person at the scene of crime. PW4 saw the accused person at 9.45p.m., in the deceased's homestead on the night of 28th January, 2017, whereas PW2 saw the accused person at around 1.00 a.m., in the same homestead on the night of 28th January, 2017 and 29th January, 2017. PW2 was initially able to see the accused person with the aid of light from a lantern which he put off after the accused person ordered him to do so. He was however still able to see the accused person with the aid of moonlight when he moved to the verandah of the deceased's house. I am satisfied from the evidence of PW2 that there was sufficient light that enabled him to identify his brother, the accused person, in the deceased's homestead on the night the deceased was killed.
 119. In addition, the accused person was close to PW2 as he spoke to him when he ordered him to put off the lantern and leave the homestead or else he would kill him together with the deceased. The identification of the accused person by PW2 was therefore by way of recognition by the accused person's voice and recognition by way of sight.
 120. PW4 also knew the accused person as she had met him once before and his mother had introduced her to him. The distance between her and him on the night the deceased was unlawfully killed was about 8 metres when she saw him by the aid of moonlight. I am satisfied that the identification of the accused person by PW4 was by way of recognition.
 121. Although the evidence adduced was circumstantial in nature, it is apparent that the accused person had a grudge against the deceased whom he had accused of bewitching him when he sprained his leg, and for allegedly bewitching his mother, who was the deceased's wife, and who was suffering from mental illness. The accused person also held a grudge against his mother and step-father (deceased) for having sold a piece of land and failing to give him money. The accused person also used to complain that the deceased had refused to educate him.
 122. The evidence adduced by prosecution witnesses established that the accused person had a simmering dislike for the deceased. Due to the festering grudge, there is no other person who had good reason to unlawfully cause the death of the deceased other than the accused person.
 123. There was no eyewitness to the incident, however, apart from the accused person harbouring a grudge against the deceased, he also had the opportunity to commit the offence on the night in issue as he was seen in the deceased's homestead.
 124. In the case of *Abanga alias Anyango v Republic* CRA No. 32 of 1990 (UR), the Court stated as follows on circumstantial evidence -

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



- i. The circumstances from which an inference 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 person; and
 - iii. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person and none else.
125. Apart from the evidence of PW2 and PW4 who saw the accused person at the deceased's homestead on the night of the incident, the Safaricom record of the area where the accused person was on that night from the triangulation done by PW11 put the accused person at the scene of crime. PW11's evidence was that the accused person's mobile phone number 0701207972 IMEI No. 3572590746622590 was registered in the name of Kadzo Kambi Kitsao of ID No. 3904238, and it was captured on 28th January, 2017 on Vipingo highway and it was by then using IMEI No. 357259074662580. As per PW11's evidence, the subscriber was using a mobile phone with twin sims, and the subscriber of mobile No. 070120XXXX was a resident of Kanamai, Majengo based on the phone data records. Evidence from the call data records showed that the said phone was switched off on 28th January, 2017 at 8.57 p.m., and it was switched on at 0822hrs on 29th January, 2017. The said mobile phone was at the latter time captured at Kanamai, Majengo and the subscriber was using IMEI 357259074662580.
126. The evidence from Safaricom as adduced by PW11 who was attached to Safaricom LLC as a Law Enforcement Liaison Officer was the third independent piece of evidence that placed the accused person at the scene of crime at Vipingo.
127. Although the accused person in his defence denied having been at Vipingo on the night of 28th and 29th January, 2017, PW2, PW4 and PW11 placed him at the said scene, thereby discharging the accused person's alibi defence. Ms Musyoki's contention was that the phone data records did not show the specific place that the accused person was at, in Vipingo. The said Report however established that the accused person was in Vipingo area and not at his Majengo home in Kanamai contrary to what he told the Police at the time he was arrested and interrogated, and as he stated in his defence in Court.
128. Apart from the foregoing evidence, the accused person threatened to kill PW2 together with the deceased if he did not leave the deceased's compound on the night of the incident. From the said evidence, it is clear to me that the accused person had the opportunity to commit the offence in issue, and he unlawfully caused the death of deceased with the assistance of the person(s) who had accompanied him to the deceased's homestead.
129. On the issue of whether the accused person had malice aforethought when he caused the unlawful death of the deceased, the answer is in the affirmative. He was the step-son of the deceased. When the accused person's mother started ailing with mental illness, he accused his step-father of being a witch and the matter was reported to Elders as confirmed by PW1. The accused person also accused his step-father (deceased) of bewitching him when he sprained his leg when he was pushing a handcart. At that time he was living at Vipingo but he shifted to Majengo, Kanamai. It is apparent that the accused person had feelings of ill will towards the deceased whom he alleged had sold a piece of land but had not given him any money from the sale. He also alleged that the deceased had refused to educate him. It must however not be forgotten that the accused person was a step-son of the deceased, and as such, the deceased did not owe him the obligation to educate him as the said responsibility lay with the accused person's biological parents.



130. Moreover, when the deceased and his wife Bendera Kadenge (the accused person's mother) sold a piece of land, the proceeds of the sale belonged to them but the accused person however felt a sense of entitlement to be given some of the money.
131. It is apparent from his actions that the accused person had personality traits that made him to be bad spirited, which affected his character and relationship with his family members as he even damaged PW2's shoes by putting them in water.
132. In *Republic v Henry Kaithia* (supra), the Court stated as follows on malice aforethought –
- The offence of murder is complete when malice aforethought is established if, pursuant to Section 206 of the *Penal Code* evidence proves any one or more of the following circumstances –
- a. An intention to cause the death 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.
133. In this case, the utterances made by the accused person in making allegations that his father was a witch, put in motion his actions on the night of 28th and 29th January, 2017 in a bid to eliminate the deceased by killing him.
134. Although the accused person's place of residence was at Majengo in Kanamai, he went to the deceased's homestead at Vipingo unannounced. He ordered PW2 to put off the lantern he was carrying and locked the deceased's door from outside. At that time, the deceased was sleeping on a mattress he had placed on the verandah outside his house. When PW2 went to call his brother and cousin to seek help, they did not wake up. The accused person ordered PW2 to leave the homestead or else he would kill him and the deceased.
135. The words uttered by the accused person by threatening to kill PW4 leads to the conclusion that the accused person's mission in the homestead of the deceased was to kill him. By locking the house of the deceased from outside, he ensured that the deceased would have no place to run to, to evade the onslaught that would befall him. It is evident that the deceased indeed tried to take refuge in his house, as from the evidence of PW9, she saw a piece of skin on a nail affixed on the door of the deceased's house.
136. In addition to the above, PW12, the Investigating Officer, visited the scene of crime where he saw a smear of blood on the door of the deceased's house and blood stains at the entrance of the said house. According to PW12, they saw as if the deceased had tried to take shelter in his house but he was overpowered by his assailants.
137. All the evidence as I have analyzed it, is indicative of the fact that the accused person had a motive to kill the deceased when he went to the deceased's home on the night of 28th and 29th January, 2017.



138. Although the evidence against him is largely circumstantial, it fits the bill of what was stated in the case of *R v Donovan* (supra), wherein Lord Heward C J., way back in 1928 stated as follows –

It has been said that evidence against the applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence so to say that it is circumstantial.

139. Back home in Kenya the Court of Appeal had the following to say on circumstantial evidence in the case of *Ahamad Abolfathi Mohammed & another v Republic* (supra) –

However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a Court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.

140. Apart from the circumstantial evidence adduced by prosecution witnesses which I have highlighted here before which establishes malice aforethought on the part of the accused person to cause the death of the deceased, malice aforethought in this case has also been established by the multiplicity and severity of the injuries that the deceased sustained in the hands of the accused person.

141. The Postmortem Report produced as prosecution exhibit 1 shows that on external appearance, the deceased had multiple stab wounds to the anterior chest and abdomen approximately 2 by 3 cm with the deepest one measuring 3 inches deep on the left flank. He also had deep cuts on the left wrist, left bicep measuring approximately 5 x 2 cm. The deceased also had seven (7) cuts on the back of the head occipital and parietal region. He had a gash on the right shoulder which had exposed the humeral head. The Doctor formed the opinion that the deceased's cause of death was exsanguination due to multiple cuts with severe head injury.

142. In the case of *Republic v Samuel Ndungu Kahura* [2016] eKLR, Lesiit J (as she then was), held as follows in a case where the accused person had inflicted multiple injuries on the deceased –

In view of the multiplicity of cuts, and the deep nature of the injuries inflicted on the head of the deceased person, I am satisfied that the accused person had formed the necessary malice aforethought to commit the offence of murder, therefore taking all facts and circumstances of this case cumulatively, I find that they form a chain so complete that there is no escape from the conclusion that within all human probability the accused committed this offence and that at the time had formed an intention to cause death or grievous harm to the deceased.

143. In his defence, the accused person brought up an alibi of having been at his house at Kanamai, Majengo and not at Vipingo in the deceased's homestead on the night of the commission of the offence. The said alibi defence was however discharged by PW2 and PW4 who saw the accused person at the deceased's homestead on the night the deceased was murdered. In addition to the two witnesses, the Safaricom Liaison Officer (PW11) testified of how the accused person's mobile number, though registered in the name of Kadzo Kambi Kitsao, was captured within Vipingo highway and IMEI No. 357259074662580 was in use in a mobile phone with twin sims. The accused person upon being cross-examined by Ms Nyawinda, Principal Prosecution Counsel indicated that his cell phone number was 070120XXXX, thereby confirming that the mobile phone registered in the name of Kadzo Kambi Kitsao is the one that he was using. With the displacement of his alibi defence, it is evident that his sworn defence was far from being truthful and I dismiss it as such.



144. The impact of an accused person giving an obvious lie in answer to facts which are in his interest to offer an explanation was considered by the Court of Appeal in the case of Ernest Abanga alias Onyango v Republic (supra), where the Court stated thus-

In RAFAERI MUNYA alias RAFAERI KIBUKA V GERNAM [1953] 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based was on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that-

“The force of suspicious circumstances is augmented where the accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain, false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved then such a lie is capable of providing corroboration to other independent available evidence”.

145. In this instance it is obvious that the accused person told a deliberate lie in his defence that he was at his home in Majengo, Kanamai on the night of 28th and 29th January, 2017. His alibi defence cannot stand as it does not create any doubt in the prosecution’s case.

146. Ms Musyoki Advocate challenged the identification of the accused person at the scene of crime by PW4 and contended that since the said witness had been sleeping before she took her child to urinate outside their house, she was not wide awake to the extent that she would have been able to identify the accused person.

From the chronology of events as narrated by PW4, she took her children to bed, and took her 4 year old child with her to sleep in her bed. Shortly thereafter, her husband reached home and she put for him food to eat. He then went to sleep. That is when her child told her that she wanted to urinate and she took her outside to do so. From the flow of events, it cannot be said that PW4 was groggy from sleep at the time she saw and identified the accused person in the deceased’s homestead. I say so because she must have been awake at the time she was serving food to her husband. I therefore find the proposition made by Ms Musyoki to be unsubstantiated and without merits.

147. In conclusion, I am satisfied that the prosecution has firmly and cogently proved circumstances from which an inference of guilt is to be drawn, which inference unerringly points to the guilt of the accused person.

148. In the said circumstances, the inculpatory facts drawn from circumstantial evidence are overwhelming. I am satisfied that the prosecution proved its case beyond reasonable doubt. I also noted the demeanour of the accused person as he was giving his defence. When he was asked whether he knew who killed the deceased, he said that he did not know. He then looked downwards and started rubbing his left arm with his right hand, which according to me signified discomfort and untruthfulness when answering the said question put to him by his Counsel, Ms Musyoki.

149. In the end, I find the accused person guilty of the charge of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). I convict him for the said offence.

It is so ordered



**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JANUARY, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

The accused person

Ms Musyoki for the accused person

Ms Nyawinda, Principal Prosecution Counsel for the DPP

Ms B. Wokabi – Court Assistant.

