



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Republic v Chiveli & another (Criminal Case 30 of 2017)  
[2025] KEHC 1547 (KLR) (18 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1547 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 30 OF 2017  
AC BETT, J  
FEBRUARY 18, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**CHEKATA LUKA CHIVELI ..... 1<sup>ST</sup> ACCUSED**

**JACOB MUNYASIA WEKESA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. The Accused persons, Chekata Luka Chiveli and Jacob Munyasia Wekesa are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars of the offence are that on the 14<sup>th</sup> day of August 2017 at Shivakala village, Kulumbeni Sub location. Chevaywa Location, Matete Sub-County within Kakamega County jointly with others not before court they murdered Brian Mulongo Chiveli.
3. The Accused persons denied the charges and the case proceeded wholly before Hon. P. J. Otieno J who was transferred before he could determine the same. When the matter came up before me, Mr. Mondia, who held brief for the Accused persons informed the court that the matter could proceed from where it had reached.
4. Section 200 (1) (b) of the *Criminal Procedure Code* provides:-
  - “(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—



(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.”

5. It is on the strength of the said enabling provisions of the law and with the consent of the Accused persons that this court has proceeded to write this Judgement.

### **The Prosecution’s Case**

6. The prosecution called four (4) witnesses. PW1 was the Doctor who produced the post-mortem report on behalf of the Doctor who conducted the autopsy. According to him, he said Doctor had gone into retirement. The post-mortem report indicates that an autopsy had been performed on 21<sup>st</sup> August 2017 on the body of Brian Mulongo Chiveli by Dr. Wambisi at Webuye County Hospital mortuary on the request of Matete Police Station.
7. The Doctor’s findings were that the body belonged to a 22 years old male with good nutrition who had died about 7 days before. Externally, the body had multiple bruises on the face, trunk, both upper and lower limbs. Internally, there was bleeding below the skin of the scalp. The Doctor formed the opinion that the cause of death was cardiovascular failure as a result of blunt head injury.
8. I have however, perused the post-mortem report and the cause of death is stated to be “cardiopulmonary failure due to shock as a result of pain inflicted from the beatings from the mob.”
9. On cross-examination, PW1 said that cardiopulmonary failure, which is failure of the heart and lung, can be caused by many things. He stated that cause of death was due to severe head injury due to assault but conceded that there was no mention of injury to the brain in the report.
10. PW2 was one Grace Chiveli who recounted that on 13<sup>th</sup> August 2017 at about 8 p.m., Daniel Chiveli arrived home drunk and started assaulting her grandchild Yvonne at which point she called the 1<sup>st</sup> Accused who beat the deceased with a stick till he ran away. At about 4.00 a.m., she heard noises from outside with Daniel Chiveli and her other son Brian crying that they were being beaten by Luka, the 1<sup>st</sup> Accused. The two were taken into her house and made to lie down. There was a large crowd by then. The police came and took the two injured men as well as the Accused persons away. Daniel was treated at a hospital in Lugulu while Brian who had been taken to Misikhu later died. The witness testified that she saw both Accused persons cane the deceased and that the 1<sup>st</sup> Accused is her step-son while the 2<sup>nd</sup> Accused is her nephew.
11. On cross-examination, PW2 said that whereas Daniel was a drunkard and a bhang smoker, Brian was not. She testified that Daniel used to disturb her while drunk and on the material day, he came home at about 8 p.m. and escaped to an unknown destination after she had raised alarm and many people had come. According to her she did not see Daniel until 4.00 a.m. the next day when Daniel arrived while wailing thereby attracting many people to her home.
12. On further cross-examination, PW2 said that the deceased was not her biological child. She stated that she, Daniel and the deceased used to live in one compound while the 1<sup>st</sup> Accused was in a different compound. She said that she called the 1<sup>st</sup> Accused to help her eject Daniel who was knocking the door like he would break it.
13. When challenged concerning the statement she made to the police, PW2 stated that she told the police that on 14<sup>th</sup> August 2017 at about 4 p.m., she heard Daniel knocking the door and demanding that she opens it and as he hit the door, the soil on the wall was falling and when she opened the door, Daniel



- went in and hit her on the ground and so she called the 1<sup>st</sup> Accused but found that many neighbours had come. She testified that she remembered Brian and Daniel were brought into the house by the 1<sup>st</sup> Accused and that she had called the 1<sup>st</sup> Accused to assist her. She said that she did not know where Brian and Daniel were assaulted but they were assaulted by the two Accused persons.
14. PW3 was Patrick Osobe, a police officer at Chivele Sub-County Bungoma. His testimony was that on 14<sup>th</sup> August 2017, he was at Matete when he received a call from a Mr. Wekesa who informed him that they had arrested two thieves and chastised them and locked them up in a house. Two minutes later, the said Wekesa who is the 2<sup>nd</sup> Accused herein arrived on a motor bike with two others. PW3 recounted that he and his colleague went with the said party to the scene where they found two boys in a house. Both were unconscious and he requested that the injured boys be taken to Matete hospital and it was done. PW3 then produced an axe, a slasher and a panga which they collected from the scene and which they suspected were used in the assault. He went on to say that the house where the injured were belongs to PW2 and there was a crowd of over twenty (20) people at the scene. He further recalled that when Wekesa and his group arrived at the police station, they had blood stains on their clothes.
  15. During cross-examination, PW3 confirmed that the Mr. Wekesa who called him is one and the same as the one who went to the police station and the 2<sup>nd</sup> Accused. He said that he knew the 2<sup>nd</sup> Accused before the incident as he is a boda boda rider at the area. He asserted that when the 2<sup>nd</sup> Accused arrived at the police station, he confirmed that he was the Mr. Wekesa who had called earlier. He further stated that he did not take any blood samples from the body of the Accused to connect him to the deceased. He said that he learnt that the two injured people had been assaulted.
  16. PW4 was Daniel Simiyu Chiveli. He recounted that on 14<sup>th</sup> August 2017, he went home at 8.00 p.m. and as he was going to his house, he passed by his mother PW2's house and knocked the door as it was shut. A child by the name Yvonne took long to open the door and he was upset. He went in and asked Yvonne to fetch him drinking water. Yvonne was reluctant and eventually he took a stick and caned her. PW2 walked out and shortly, the 1<sup>st</sup> Accused then walked in and hit him on the leg wherefore he escaped into the sugar cane farm. While escaping, he met other people outside the house whom he did not see but recognized one by his voice as Jacob Wekesa the 2<sup>nd</sup> Accused, who is his brother.
  17. PW4 said that he hid in the sugar cane farm till about 11 p.m. when he got out and went to his house by which time the homestead was calm. At his house, he found his wife and Brian's wife. Brian is the deceased. The duo told him that the 1<sup>st</sup> Accused had passed by twice and inquired whether he had returned and that the 1<sup>st</sup> Accused was looking for the deceased.
  18. According to PW4, after about 30 minutes, the deceased came to the house and they stayed awake upto around 3.00 to 4.00 a.m. when somebody knocked the door and on finding it open, entered. The person was the 1<sup>st</sup> Accused, Luka. It was PW4's testimony that the 1<sup>st</sup> Accused hit him with a rungu and he fell unconscious and when he woke up, he found himself at PW2's house lying on the ground with the deceased. Police officers were there saying that they be taken to hospital but he was unable to get up because his leg was fractured. He and the deceased were assisted onto a motorcycle and taken to hospital by Amos, Luka, Jacob Wekesa and Grace Chiveli. He was treated at Lugulu and Brian was taken to Misikhu. Shortly thereafter, he received a call that Brian had died. He stayed in hospital for two months before discharge. He said that there was sufficient light from a kerosene lamp at his mother's house that enabled him to identify the people who were in the house on the material day. He saw the two Accused holding rungu, some of which were broken. He said the 1<sup>st</sup> Accused had a grudge with the deceased and the 1<sup>st</sup> Accused had said he would only forgive the deceased in heaven.



19. On cross-examination, PW4 said that he had no differences with the 1<sup>st</sup> Accused, who is his stepbrother. The 2<sup>nd</sup> Accused is a paternal cousin. He denied that he was drunk when he went to his mother's house and denied beating her. He said that he did not know where the people who had gathered outside the mother's house came from. He also denied beating up the mother and vowing to kill someone. He stated that while he was in his mother's house, the deceased had gone to watch football while Amos, his first born brother was at his home in Naitiri. He reiterated that Brian went to his house at 11.00 p.m. and that Brian and his wife used to live with him. He asserted that it was not Amos who went to his mother's house but the 1<sup>st</sup> Accused and he did not know if Amos was arrested in connection with the offence. He said he did not know who beat Brian.
20. In his defence, the 1<sup>st</sup> Accused gave a sworn statement in which he stated that on the material date, he arrived home to find his step-mother, PW2 wailing. As he got into his house, a neighbour sent a child to inform him that PW2 was being beaten by his brother. He proceeded to PW2's house and found a crowd outside while Daniel had locked himself in the house with PW2, Yvonne and two other children. When they arrived, Daniel escaped through the window into the sugar cane farm and the people were unable to apprehend him.
21. The 1<sup>st</sup> Accused said that PW2 narrated to him how PW4 had arrived in her house while drunk, demanded food and decided to beat her. PW2 asked the 1<sup>st</sup> Accused to take the three children and as he left, Amos arrived and together they went to his home where they slept until around 4.30 a.m.
22. According to the 1<sup>st</sup> Accused, at 4.30 a.m., Amos woke him up and said that PW2 had called him and informed him that PW4 and the deceased had invaded her and were forcefully breaking the door so that they could assault her. He stated that they responded and on arrival, found Daniel and the deceased lying down in PW2's house and unable to speak whereof the 2<sup>nd</sup> Accused called the police at Sango Police Post. Since the police said that they did not have a vehicle, they decided to go fetch the police officers. They went and took three police officers and on arrival, the police directed that the two people lying unconscious be taken to Matete Police Station. Jacob carried the deceased while Amos carried PW4 but before they entered Matete police station, they were directed to take the two to the hospital at Webuye. At Webuye, nurses were on strike and so they took them to Lugulu then Bakhita where the two were admitted although the deceased died on arrival at around 10.00 a.m. They then went to the police station where they were all arrested but later, PW2 and Amos were released while he and the 2<sup>nd</sup> Accused were charged. He further stated that it was not true that he went to PW4's house and carried him in the presence of his wife and Brian's wife. He said that Daniel and the deceased were known for drunkenness and thievery and had been arrested severally but never charged and that was why they were beaten by the crowd.
23. On cross-examination, the 1<sup>st</sup> Accused said that he never had any differences with PW4 and the deceased and PW2 brought him up after his mother's death. He said that when they responded to the call by PW2 that morning, they found many people outside the house and the house was open. He stated that he did not know who beat up Brian and Daniel and why PW4 would say that it was him who beat him up.
24. On his part, the 2<sup>nd</sup> Accused, who is a cousin to the deceased stated under oath that on 14<sup>th</sup> August 2017, between 4.00 a.m. to 5.00 a.m., he received a call from the 1<sup>st</sup> Accused that all was not well at home and he therefore proceeded there on arrival, he found a crowd and two of the 1<sup>st</sup> Accused's brothers lying in pain. He found the 1<sup>st</sup> Accused and Amos trying to enter the house. He called them aside then went into the house to ask PW2 what had happened and her response was that she would tell him later. He decided to call the police at Sango police post and when they asked for transport, the went in three motor cycles and came back with three police officers. In company of the police officers, they



carried the two to Matete Police Station from where they were directed to take them to hospital. On the way, the deceased told him that he had been beaten by people he did not see. The deceased died while doctors were attending to him and later they recorded statements at the police station. The 2<sup>nd</sup> Accused insisted that he got into trouble because of his offer to assist his relatives as he was not there the previous evening. He said he did not know why PW2 and PW4 gave incriminating evidence against him.

25. In cross-examination, the 2<sup>nd</sup> Accused said that on the material morning there were many people but he could only recognize the 1<sup>st</sup> Accused, Amos, and Malik. Daniel who was bleeding from the mouth was there with the deceased.
26. At the close of the defence case, both parties filed written submissions which this court has considered alongside the evidence.

### **Analysis and Determination**

27. The two Accused persons are charged with the offence of murdering Brian Chiveli and the prosecution is required to prove beyond reasonable doubt, that the two Accused persons committed the offence. The degree of proof in a criminal case was considered in the case of Republic v. Kituko Mwambegu [2020] eKLR where the court cited the case of Woolmington v. DPP [1935] A.C. 462 as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of possibility proof beyond reasonable doubt does not mean proof beyond the shadow a doubt. The Law would fail to produce the connectivity if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course, it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

28. In the circumstances, the threshold for proof beyond reasonable doubt does not mean proof beyond a shadow of doubt.
29. The elements that are required to prove the offence of murder are:-
  - (a) That the person named as deceased died.
  - (b) That the cause of death was an unlawful act.
  - (c) That the accused persons were positively identified as having committed the unlawful act.
  - (d) That there was malice aforethought.

#### **i. That the person named as deceased died**

30. PW1 produced a post-mortem report on behalf of the Doctor who conducted the post-mortem. On the report, it is indicated that the body of Brian Chiveli was identified by two people as the body of Brian Chiveli. PW2 who said that she was Brian’s mother also testified that Brian died. I find that the element was proven beyond reasonable doubt. See Republic v. Boniface Isawa Makodi [2016] eKLR.

#### **ii. Whether the cause of death was an unlawful act**

31. The post-mortem revealed that the cause of death was cardiopulmonary failure due to shock as a result of pain inflicted from beatings. The injuries were found by the Doctor to be consistent with assault and with the cause of death.



32. There was no evidence that the injuries inflicted on the deceased was lawfully inflicted. The elements of an unlawful act were set out in the case of *Republic v. Kipkemei* (Criminal Case E040 of 2021) [2024] KEHC 2388 (KLR) to be as follows:-

“The elements of unlawful Acts in homicide cases have this common features;

1. A deliberated act which is unlawful (e.g. an assault)
2. The act is a dangerous act in that it is, from an objective standpoint, one which as sober, reasonable and responsible person of the perpetrator’s age and gender, would inevitably realise in an act which is likely to cause the deceased some physically harm, albeit no serious harm, and
3. The unlawful, dangerous act cause death (even though death or harm or any kind is not intended).”

33. It is apparent from the evidence that the deceased was assaulted. Whether it was because he was being treated as a suspect of stealing or anything else is immaterial. The injuries that he suffered were severe enough to lead to his death. In the circumstances, I find that the prosecution was able to prove that the deceased died as a result of an unlawful act.

### **iii Whether the Accused persons were positively identified as having committed the unlawful act**

34. The prosecution’s case was that on the material date the 1<sup>st</sup> Accused responded to a plea for assistance from PW2 who was being attacked by a drunken PW4. Later towards morning, PW2 witnessed both Accused persons cane the deceased. This was when PW4 had come to disturb PW2. According to PW2, before she witnessed the beating, she heard Daniel and the deceased crying that the 1<sup>st</sup> Accused was beating them. After the beating, the deceased and PW4 were taken into the house by the Accused and the police called. Later, Brian succumbed to the injuries.

35. PW2 was categorical that the Accused persons assaulted the deceased and Daniel. On cross-examination, she stated that on 14<sup>th</sup> August 2017, the 1<sup>st</sup> Accused brought PW4 and the deceased into the house.

36. PW2’s evidence was corroborated by the evidence of PW4 who testified that at around 3.00 a.m. to 4.00 a.m., while he was in his house with Brian, the 1<sup>st</sup> Accused entered the house and hit him with a rungu rendering him unconscious. He further stated that by the time he woke up, he found himself and Brian lying on the ground in his mother’s house. He stated that when he woke up, he saw the Accused persons standing near him and the deceased while holding runqus. Both he and the deceased were injured and taken to hospital where Brian succumbed to the injuries. Although the prosecution led no evidence to prove that PW4 was injured, the fact of his injury was not disputed by the Accused persons.

37. The prosecution’s case was reinforced by the evidence of PW3, the police officer who was called by the 2<sup>nd</sup> Accused with information that they had arrested two thieves. In furtherance to the call, the 2<sup>nd</sup> Accused and two others went to pick up PW3 and his colleague from the police station and took them to PW2’s house where they found the two injured persons one of whom was the deceased.

38. PW3’s evidence leads to the conclusion that the 2<sup>nd</sup> Accused was involved in the assault of the deceased and PW4 and the only reason he referred to them as thieves was in an effort to cover up the offence.

39. The evidence of PW2 and PW4 place the two Accused persons at the scene of the incident.



40. In defence, the 1<sup>st</sup> Accused failed to exonerate himself. In fact he places himself and the 2<sup>nd</sup> Accused at the scene. He stated that the deceased was known for drunkenness and thievery even though PW2 had testified that the deceased was not a drunkard. The 1<sup>st</sup> Accused's reference to the deceased and PW4 as drunkards and thieves lends credence to PW3's evidence that when the 2<sup>nd</sup> Accused called him, he informed him that they had arrested some thieves.
41. According to the 1<sup>st</sup> Accused who stated that he never witnessed the deceased being beaten, the crowd that he found outside beat up the deceased and PW4 due to their troublesome behaviour. If at all the crowd is the one that assaulted the duo, then one would have expected the Accused persons to report the assailants to the police and to give names of the assailants.
42. In his defence, the 2<sup>nd</sup> Accused confirmed that he is the one who called the police. He did not deny that he informed PW3 that they had arrested and chastised some thieves. He merely stated that he got into trouble for offering to assist his relatives and reiterated that the deceased and PW4 would assault PW2 and were also thieves. Like the 1<sup>st</sup> Accused, he said they were in good terms with PW2 and PW4 and he did not know why they would wrongly incriminate him.
43. Having analysed the entire evidence, I am inclined to believe the evidence of PW2. She is an elderly woman and her evidence was slightly confused but on clarification during re-examination, I find her evidence to be consistent and cogent.
44. Unlike the case of *Wanjiku Koome v. Republic* [2019] eKLR where the prosecution's case rested on the evidence of the complainant and the appellant, the evidence in the instant case is well corroborated. There was direct evidence from two eye witnesses. There was no suggestion that there was any existing grudge between the Accused persons and the 2 witnesses that would drive the witnesses to frame the Accused for the offence. In fact, it emerged that the Accused would often assist to restrain PW4 from assaulting PW2.
45. I am fully persuaded that the 1<sup>st</sup> and 2<sup>nd</sup> Accused are the ones who assaulted the deceased. Their allegations that the Accused had been beaten by a mob because he was a drunkard and a known thief was a ploy to escape liability once they realized that the deceased and PW4 were seriously injured. Besides, if the Accused persons found the deceased and PW4 already injured in PW2's house as they averred, there is no explanation for their blood stained clothes which PW3 says they had on when they reported at Matete Police Station.

#### **iv. Whether there was malice aforethought**

46. Section 206 of the *Penal Code* sets out the circumstances under which malice aforethought can be inferred and provides that it is as follows:-
  - “(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.”

47. In the case of Republic v. Juma Kituko Mwambegu [2020] eKLR the court described malice aforethought as follows:-

“In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”

In the same case of Republic v. Juma Kituko Mwambegu (supra), the court made reference to the case of Hyam v. DPP [1974] A.C in which case the court held:-

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”

48. The evidence points to a situation where PW4, who confessed to have been with the deceased in his house, invaded his mother PW2 at around 4.30 a.m. and threatened to break in and assault her as was their habit. PW2 then called the 1<sup>st</sup> Accused to the rescue. The 1<sup>st</sup> Accused called the 2<sup>nd</sup> Accused and together they went to PW2’s house where they assaulted PW4 and the deceased. As a result of the assault, the deceased lost his life.

49. The post-mortem report shows that the deceased sustained multiple bruises and petechial haemorrhage on the face and the scalp. The cause of death was indicated to be cardiopulmonary failure due to shock as a result of pain inflicted.

50. It is clear from the post-mortem report that the injuries sustained by the deceased were not so grievous but the deceased suffered shock from pain due to the beating therefore leading to his death.

51. The question that is before me is whether the Accused persons intended to cause grievous harm to the deceased.

52. The element of malice aforethought was set out in the case of Tubere S/o Ochen v. Republic [1945] 12 EACA 63 where the court held as follows:-

“The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted.”

53. In the instant case, the Accused persons were responding to a distress call from their step-mother and elderly Aunt. They used rungu to inflict the injury. The pain from the beatings caused the deceased, who was a young man, to suffer a fatal shock. I am not persuaded that the Accused persons intended to inflict grievous harm to the deceased. Their intention was to instil discipline only that they went too far perhaps because they were tired of the constant disturbances caused by the duo. An inference of malice cannot flow from their actions.



54. In the case of Christopher Watta and another v. Republic [2023] KECA 763 (KLR), the Court of Appeal held that:-

“PW1 testified that she took the deceased to the police for discipline and counselling because he was incessantly stealing her food crops. With this background, the appellants intended to discipline him through a thorough beating so that he would reform from this unsocial conduct. They requested for glucose and gave him water when they realised that they had gone too far. The circumstances of this case do not point to the appellants’ intention to kill the deceased. As was the learned judge, we too are not persuaded that malice aforethought was established. The deceased’s death was unintended, and we are therefore satisfied that the learned judge was right in finding that the appellants were guilty of manslaughter. As such, we uphold the conviction on manslaughter.”

55. From the above analysis, I find that the prosecution did not prove the element of malice. However, it was able to prove beyond reasonable doubt, that the Accused persons unintentionally caused the death of the deceased.

56. In the circumstances, I hereby convict the two Accused persons of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*.

57. Sentencing shall await a pre-sentence report from the Probation and After Care Services department.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF FEBRUARY 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Chala for the Prosecution

Ms. Rauto for the Accused persons

Court Assistant: Polycap

