



**Republic v Nyaga ‘alias’ Samow (Criminal Case E008 of 2023)
[2025] KEHC 2776 (KLR) (11 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E008 OF 2023
JN ONYIEGO, J
MARCH 11, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

ANTHONY MURITHI NYAGA ‘ALIAS’ SAMOW ACCUSED

JUDGMENT

1. The accused person herein, Anthony Murithi Nyaga ‘alias’ Samow is charged with the offence of murder contrary to Section 203 as read together with Section 204 of the, [Penal Code](#).
2. The particulars of the offence are that on 23.05.2023 at Wangai Dahan Location in Mandera West Sub Location within Mandera County, he murdered Hassan Salat Mohamed. The prosecution called eleven (11) witnesses in support of its case.
3. PW1, Hassan Salat Mohamed Assistant Chief Wagadahan Sub-location and a brother to the deceased testified that on 26.05.2023 at 9.00 a.m., he met the wife of the deceased who informed him that the deceased had gone missing for three days. That PW3 informed him the deceased was last seen with the accused person heading to the quarry. Thus in search of the deceased together with others, they visited the said quarry where they were met with a foul smell as flies gathered around a particular scene.
4. That they spotted a shallow grave covered with stones, sand and tree branches. In attempt to find out what the shallow grave contained, they scooped the stones and to their surprise, they saw the body of the deceased. They called the sub chief who in turn called the DC and the police who arrived after about 45 minutes and took the body to Takaba hospital and thereafter commenced investigations.
5. PW2, Samia Shariff, wife to the deceased stated that she had been married to the deceased for 25 years and blessed with 9 children. She told the court that she knew the accused person as he was previously employed by the deceased. That on 22.05.2023 at 9.00 p.m., the accused called the deceased as he



- wanted the deceased to accompany him to the quarry to take measurements of the stones that he previously drilled.
6. That the deceased informed him that he would not be available as he planned to take Dinow to the shamba. That on the following day, Dinow and the deceased left for the shamba using a motor cycle but later returned home claiming that the mpesa shops had not yet opened as he needed to withdraw money to pay some workers. When the mpesa shop finally opened, the deceased withdrew Kes. 48,000/- and left never to return. It was her evidence that Dinow returned home at 1.00 p.m., alone claiming that he waited for his father at the shamba in vain. That they came to find the deceased dead and buried at the quarry.
 7. PW3, Dinow Salat testified that on 23.05.2023, he was with the deceased his father as they left for the shamba on board a motor cycle. On the way, the deceased withdrew Kes. 50,000/- at an mpesa shop before they proceeded to the shamba. While still on the way, the accused person tried in vain to stop the deceased but later, the accused showed up at the shamba with Ali Adan who brought him aboard a motor cycle. That the deceased told him to wait for him till 4.00 p.m, as he left with Anthony for the quarry. He further stated that he waited for his father till 8.00 p.m. when he chose to return home as the father failed to turn up. Upon bumping on the accused person in town, he(accused) told him that he had parted with the deceased at the quarry. They waited for the return of the deceased in vain till when they discovered his body at the quarry.
 8. PW4, Ali Abdullahi, a police reservist and a neighbour to the deceased recalled that he used to work for the deceased at the quarry. That on 24.03.2023, while at Takaba on his way to Doble, he met the accused who asked him to take him to the shamba of the deceased. It was his statement that they agreed that the amount due for fare was Kes. 400/- which the accused person told him was to be paid by the deceased. At the shamba, he met Dinow and the deceased and upon being paid the amount owed, he left the trio there.
 9. PW5, Dr. Mohamed Rashid Abdi Mohamed from Takaba Referral Hospital testified that he conducted post mortem examination on the decomposed body of the deceased. On physical examination, the body had a fracture injury on the right side of the head, face, neck bone and left elbow. In as much as he did not open the body, he opined that the cause of death was severe injury to the head and neck as a result of trauma caused by blunt object.
 10. PW6, No. 100123 PC Elphas Langat recalled that on 26.05.2023 at 12.00pm while at the police station, IP Mose informed him of a murder case that had been reported. That together with IP Mose, they headed to the scene where they found a decomposed body buried in a shallow grave. They picked the body and took it to Takaba referral hospital where post mortem was done.
 11. PW7, No. 80042 PC Phineas Mworja recalled that on 30.05.2023, the CCI Mbeere South informed him of a suspect who had fled Takaba after having killed someone and that the said person had been spotted at his Mbeere home. The DCCI together with PC Bakari, and other officers visited the said home and upon entering the suspect's house, they found his wife who informed them that her husband had left home two years ago.
 12. The suspect's father on the other hand informed them that the suspect had since rented a house elsewhere and so, they embarked on the process of looking for him. That one of the deceased person's relatives spotted the motor cycle of the deceased at Meka but without a number plate. While there, they spotted the accused person seated next to the said motor cycle and so, they arrested him. According to him, the motor cycle recovered was a Bajaj boxer which the relatives of the deceased identified as belonging to the deceased.



13. PW8, No. 236824 CIP Francis Kyeti stated that he was a forensic crime investigator based at the DCI Forensic laboratory and appointed by the ODPP under Gazette Notice No. 1145 dated 3/2/23 for purposes of producing photographic evidence. Concerning the matter before the court, he stated that on 13.06.2023, he received a request from PC Kangera Kimathia of DCI Takaba requesting him to process a compact disk and thereafter print the same. He stated that he printed 18 photographs and thereafter prepared a photographic certificate which he consequently signed and produced before the court.
14. PW9, No. 112381 PC Moses Kingera testified that on 26.05.2023 at 2.00 p.m., he was informed by PC Moris Mwaka of a murder case within a quarry within their jurisdiction. They entered the same on the OB and thereafter, together with PC Moris, IP Mose, PC Langat and other officers set out to visit the said site. At the scene, they found a decomposed body covered with sand.
15. He documented the scene and recovered a hammer, spade, a chisel, a torn shirt partly burnt which was identified as that of the accused person's shirt and thereafter drew a sketch plan of the area. They picked the said body but thereafter released it to the family for burial. He averred that on 27.05.23, the GPRS location showed that the suspect was in Wajir but on further investigations, the accused person was tracked and consequently arrested and charged with the offence herein.
16. PW10, Rashid Salat Mohamed, brother to the deceased testified that the accused person was an employee of the deceased. That the accused person lived in Takaba and was always in the company of the deceased. It was his evidence that on 26.05.2023, he was informed of the death of the deceased and so, they organized for burial. Later, together with Ali, Abubakar, Bishar and Abdulzack, they left for Mbeere North, the birth place of the accused person. That they requested for help from police officers Kiritiri Mbeere North police station and in the process of searching for the accused person, they found him at a miraa selling joint. That the accused person was sitting on top of the deceased's motorcycle and so they identified him to the police who consequently arrested him.
17. Mr. Okemwa, counsel for the prosecution made an application seeking to recall PW2 to identify the motor cycle which application was not opposed by counsel for the defence. PW2 in producing the said motor cycle reiterated that the same belonged to her husband, the deceased herein.
18. PW11, No. 92707 PC Moris Musyoka, the investigating officer stated that on 26.05.2023 at 2.00pm, he was at the station when he received a phone call from one IP Mose who informed him of a murder incident at a place known as Wagaldahari. He mobilized a team of officers comprising of PC Kingara, PC Kiritim and IP Mose and together proceeded to the scene of crime. Upon arrival, they found several people gathered among them family members who showed them where the body of the deceased had been found. The decomposed body was partially covered with sand and upon uncovering it they noticed that it had injuries on the head and both hands.
19. He averred that there was proof that the body was dragged to the scene of crime and buried there. He stated that they took the body to Takaba Hospital for post mortem and subsequently embarked on recording statements from witnesses who narrated how the deceased had on the material day met the accused person only to fail to show up and thereafter, found dead.
20. That upon checking the cyber system, they noticed that the accused person had last used his phone number 0722501199 at about 2.00 am while in Wajir town. From the analysis, the phone was switched on and using their GPRS, they located the accused person at his home in Mbeere in Kiritiri.
21. He thus made arrangements with the DCI Mbeere South who circulated a signal over the stolen motor cycle and a wanted person. He then sent some family members who knew the accused to Mbeere South office in company of some officers to search for the accused person. That they managed to get hold of



- the accused person at a market place while in possession of the deceased's motor cycle. They arrested the accused person and then took him to Kiritiri police station where he was booked and later transferred to Mandera police station. He wrote a letter to the NTSA on 08.06.2024 from where he got a search certificate of the motor cycle; he also swore an affidavit dated 06.06.2023 requesting for call data and mpesa statements for both the deceased and the accused person's phone numbers. The Safaricom data showed that between 9.00 am and 11.00 am on 23.05.2023, the accused and the deceased persons' numbers were switched off and so, he concluded that the two phones were at the same place which in his opinion, the shamba where there was no network.
22. The second request was the call log data for No. 0722501199 belonging to the accused. It was his case that he monitored his movement with that of the deceased and realized that at 1.57 pm on 23.05.2023, the accused and deceased persons' numbers were active at Jakeba. Between 8.00 am to 1.57 pm both the deceased and accused persons' numbers were off as probably they were at the shamba. He thus concluded that the deceased must have met his death in the hands of the accused person while they were at the shamba.
 23. According to him, the accused and the deceased differed over payment of the accused person's wages. He also necessitated the process of identifying the deceased as the body was badly decomposed and so DNA was carried out and the swabs of the deceased's mother matched that of the deceased. On cross examination, he stated that the DNA analysis was simply for identification purposes noting that the body was badly decomposed. In the same breadth, he stated that he had no evidence to support the averment that the deceased and the accused person had differences. According to him, he connected the accused to the death of the deceased circumstantially for the reason that he believed the deceased was killed on 23.05.2023 and the last person seen with the deceased was the accused person.
 24. The prosecution closed its case and via a ruling delivered on 16.10.2024, the court found that the prosecution had established a prima facie case against the accused person warranting him to be placed on his defence.
 25. DW1, Anthony Muriithi Nyaga in his defence stated that he is a stone dresser and in the year 2016, he started working for the deceased. On the material day, they spent the night together at the deceased's place and upon waking up in the morning, they proceeded to the farm. That they worked on the farm and thereafter, started dressing the stones and by 1.00 p.m., they started measuring the said stones. He stated that during that time, working in the quarry was prohibited and therefore, they were mostly hiding while working. After some point, the deceased left him and returned home and before that, he paid him Kes. 5500/- as he was to complete the balance on a later date.
 26. It was his testimony that, before the deceased could leave, the Al Shabaab attacked them thus the deceased told him to run away and so, in the confusion, the deceased was attacked by one of the members of Al Shabaab. The deceased thus fell down as one of the attackers ordered him to follow them. They left the deceased at the scene while he was warned by the attackers to leave and never to set foot in Mandera again. That at that point, he picked the motor cycle and left for Embu. He thus denied killing the deceased herein.
 27. On cross examination, he reiterated that he knew the deceased as he was his employer and that on 23.05.2024, he was together with the deceased from morning to 5.00 p.m. He reiterated that they were attacked by the Al Shabaab but he was at pains in explaining why he did not report the said attack.
 28. The court directed the parties to file their respective written submissions.
 29. The prosecution filed submissions dated 29.11.2024. It was its case that its witnesses gave consistent and trustworthy evidence as the same informed the reason why the accused person was placed on his



- defence. That the accused person failed to explain to court how the deceased met his death as his evidence was pure denial. The prosecution while relying on the case of Anthony Ndegwa Ngari vs Republic, [2014] eKLR, urged that it had a duty to prove the following elements: that death occurred, that the accused person caused the said death and that he caused the death intentionally.
30. On the first element, the prosecution urged that indeed death was proved as PW5 produced a post mortem report showing that he performed post mortem on the body of the deceased and in his opinion, death was caused by the injuries sustained on the head and neck which possibly were caused by a blunt object. On the second element, it was urged that the accused person was the last person seen with the deceased prior to him meeting his death and therefore, it was expected that the accused person explain how the deceased met his death. That the accused person was culpable for the death of the deceased noting that he withdrew money from the deceased's mpesa account and then escaped to his birth place where he was found with the deceased person's motor cycle.
 31. On whether mens rea was proved, the prosecution relied on the case of Roba Gama Wario vs Republic [2015] eKLR and Nzioka vs Republic [1993] KLR 171 where the court held that the nature of the injuries suffered by the deceased and the manner in which the injuries were inflicted is a clear manifestation of the intention of the accused. The prosecution relied on the doctrine of last seen arguing that the same lay squarely on the accused person to explain how the deceased met his death noting that he was the last person with whom the accused was seen. To that end, reliance was drawn from the case of Kamau vs Republic [2024] KECA 1193 KLR and section 111 of the *Evidence Act*. This court was thus urged to find the accused person guilty of the offence herein.
 32. The defence in opposing the prosecution's case filed submissions dated 25.11.2024 thus urging that the prosecution did not prove its case beyond any reasonable doubt. To that end, reliance was placed on the case of Musili Tulo vs Republic [2014] eKLR where the court stated that it was convinced that the offence charged was not proven for the reason that there existed suspicion that the appellant did not commit the offence charged.
 33. In regards to the allegation that the accused person was the last person seen with the deceased, it was contended that the same was normal for the reason that the duo used to work together and further, inspect work done at the quarry. This court was invited to take judicial notice of the fact that the accused person together with the deceased after being attacked by the Al Shabaab, had a right to protect his life as he was directed to leave Mandera and never to return.
 34. The defence put a fight that indeed the accused person was so scared that despite the fact that he was arrested at Embu with the motorcycle belonging to the deceased, he had plans to report the attack at the Embu police station. It was argued that the evidence by the prosecution was purely circumstantial and did not point at the accused person as responsible for the death of the deceased. This court was thus urged to dismiss the case against the accused person and acquit him under section 215 of the *Criminal Procedure Code*.
 35. I have considered the evidence adduced by the prosecution witnesses and the defense proffered by the accused person. In my view, the main issue for determination is whether the prosecution proved its case against the accused person beyond reasonable doubt to sustain a conviction for the offence of murder as charged.
 36. Section 203 of the *Penal Code* under which the accused is charged provides that: -Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. Nyakundi J. in the case of Republic vs Ismail Hussein Ibrahim [2018] eKLR observed; "... the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and there is no burden on the part of the accused to prove his innocence at any one given time. The law



- only permits very few statutory exceptions where an accused person can be called upon to give an explanation in rebuttal. However, this does not shift the burden of proof from the prosecution”
37. In *Republic vs Mohammed Dadi Kokane & 7 Others* [2014] eKLR the elements of the offence of murder were listed by M. Odero, LJ. as follows: -
- i. The fact of the death of the deceased.
 - ii. The cause of such death.
 - iii. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, and lastly
 - iv. Proof that said unlawful act or omission was committed with malice aforethought.
38. On whether there is proof of death and the cause of the said death, PW5 testified that he conducted post mortem examination on the body of the deceased and consequently signed the post mortem report. He testified that in as much as the body was decomposed, the same had an injury on the right side of the head and face. According to him, the cause of death was severe head and neck injury possibly with a blunt object. I therefore have no doubt that the deceased subject of this case indeed died.
39. On whether the death of the deceased was caused by an unlawful act, there is no doubt that the death of the deceased was caused by the injuries that he sustained. It cannot therefore be said that the same was lawful as there was no justification for the said act or at all.
40. Article 26 (1) of *the Constitution* of Kenya 2010 guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by *the Constitution* or other written law. [See *Gusambizi Wesonga vs Republic* [1948] 15 EACA 65]. The evidence before this Court irresistibly points to an unlawful act that led to the death of the deceased.
41. On whether the prosecution proved beyond reasonable doubt that it was the accused person and not any other person who committed the unlawful act which caused the death of the deceased, it is clear that the prosecution is relying on circumstantial evidence to prove its case. The same notwithstanding, the prosecution is relying on the doctrine of last seen to prove its case against the accused person.
42. In the case of *Ahmad Abolfathi Mohammed & another vs Republic* [2018] eKLR, the Court of Appeal had this to say on circumstantial evidence:
- “However, it is altruism 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 as strong a basis for proving the guilt of an accused person just like direct evidence.”
43. The Court of Appeal in the case of *Moingo & Another vs Republic* [2022] KECA 6 (KLR) reiterated that: The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.” [Also see *Ngeno vs Republic (Criminal Appeal 24 of 2016)* [2024] KECA 757 (KLR)].



44. Similar position was held in *Abanga Alias Onyango vs Republic* CR.C No.32 of 21990(UR) where the court of appeal stated that circumstantial evidence must satisfy three tests;
1. The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;
 2. Those circumstances should be of a definite tendency unerringly pointing towards guilty of the accused;
 3. 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 and none else.”
45. The record is unequivocal that the appellant was the last person to have been seen with the deceased a few hours before his death. The foregoing has equally been supported by the testimony of the accused person himself. According to his defence, he said that, while at the scene, the Al Shabaab attacked them prompting him to run away. That noting that he was warned never to return to Mandera again, he shifted to his home in Embu more than 1,000 kms away from Mandera.
46. The foregoing notwithstanding, the accused person did not give a viable explanation as to why he did not report the said incident to any police station within Mandera let alone any other station along the way as he rode on the deceased’s motor cycle to Embu. Additionally, the accused person did not explain why he was possessing the deceased person’s motor cycle with the number plate effectively removed.
47. The above notwithstanding, in as much as the accused person blamed the Al Shabaab for the death of the deceased, for a moment, taking his explanation that indeed they were attacked by the Al- Shabaab to be true, it is my view that the opposite would be true. I say so for the reason that it is within the public knowledge that Al-Shabaab are in the habit of killing the non – locals as opposed to the locals. Assuming he was lucky which I am not convinced, why did he keep the attack as a secret until the day he was arrested. This is not a normal conduct of an innocent person in the circumstances.
48. How come he did not call even a single relative to the deceased informing him or her of what had happened to his long time employer. His conduct after the incident is wanting.
49. Surely, it was incumbent upon the accused person as provided for under section 11 of the *Evidence Act* to explain how the deceased met his death. But having miserably failed to do so, it becomes apparent that the accused person cannot escape liability. Having failed to do so, an adverse inference must be drawn that he and no one else was the person who caused the death of the deceased.
50. Finally, on the question whether there was malice aforethought on the part of the accused person, the prosecution had a duty to prove malice aforethought on any of the circumstances stated under section 206 of the *Penal Code* which states that:
- Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;



- (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
51. What can be deduced from the section above is that, malice aforethought can either be direct or indirect depending on the peculiarity and facts of each case. In the classic case of Republic vs Tubere S/O Ochen [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
52. In the instant case, the evidence adduced by the prosecution showed that the aim of the deceased's attacker was clearly to kill the deceased. I say so for the reason that from PW5's assessment, the deceased died as a result of severe head and neck injury possibly with a blunt object. From the nature of the injuries sustained by the deceased, it is clear that indeed, the accused person wanted the deceased dead or intended to cause him grievous bodily harm.
53. Taking into account the totality of the evidence on record and the general circumstances surrounding the death of the deceased, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond any reasonable doubt. Accordingly, I find the accused person guilty of the offence of murder as charged contrary to section 203 of the [Penal Code](#) and therefore convict him.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF MARCH 2025

J. N. ONYIEGO

JUDGE

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