



REPUBLIC OF KENYA



**Republic v Lucheli (Criminal Case E049 of 2022)
[2025] KEHC 7253 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E049 OF 2022
SC CHIRCHIR, J
MAY 22, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

MAIRON LUYEGU LUCHELI ACCUSED

JUDGMENT

1. Marion Luyegu Lucheli (the accused) is charged with Murder contrary to section 203 as read with section 204 of the penal code. The particulars of the offence are that on the 1st day of December, 2022 at Ekumirai village, Shirotso Sub-Location within Butere Sub-County within Kakamega County murdered Ian Andati Were alias Franklin.(the deceased)

The prosecution's case

2. PW1 was the deceased's mother. She told the court that she called the deceased on phone on 1/12/2022 but there was no response. There was also no response to two other subsequent calls. She got concerned. She made inquiries with the deceased's employer and informed relatives. A "missing person" report was eventually made at Butere police station.
3. PW2 was the deceased's cousin. On 2/12/2022 she learnt from PW1 that the deceased was missing. she also tried calling the deceased but received no response. She is the one who made a report of a missing person at Butere Police Station.
4. She visited the house where the deceased used to live in the company of some Nyumba Kumi people (a group of about 10 villagers in charge of security within a given village) .Inside the house, she saw blood stains on a double decker bed and clothes on a basin. There was a suitcase behind the bed. She opened the suitcase and found the deceased cellphone. The accused told her that the deceased used to sleep on the top-decker while he slept on the lower one. She asked the accused about the whereabouts



- of the deceased but she got no response. She heard the accused calling his mother . He told the mother that he was being accused of killing .
5. The group were joined by the chief. They went around the compound, they saw a partially burnt leaves of a tree. They found a store and inside was a basin with soaked clothes; the water used to soak clothes had bloody appearance. She also saw a burnt tyre,;a sack near the cow shed and inside were ashes and she also saw a blood-stained axe. At that point the Nyumba kumi people arrested him. The police were called.
 6. The following day she was informed about the findings of the body. She went and viewed the body; she described that body as having no legs, the hands folded on the chest and neck twisted to one side. The face was swollen. She also attended the post mortem.
 7. PW3 was the deceased uncle. He witnesses the post mortem examination in the company of PW2.
 8. PW4 was the employer to both the deceased and accused. He stated that he was a businessman and a farmer. He told the court that the Accused and deceased were his employees. The deceased was working with him in the shop while the accused was a farm- worker. Both the deceased and accused used to live in the house in the farm while the witness used to reside in the shop at Butere.
 9. He further stated that he parted ways with the deceased at 8 pm on 1/12/2022. The following day, the deceased did not turn up for work. He called him on a cell phone , but there was no response. The accused who used to take milk to the shop arrived ,and when PW4 inquired about the deceased, the accused told him that the deceased did not arrive home the previous night.
 10. On the third day, following calls from the deceased’s relatives, he decided to involve “Nyumba Kumi” and the chief. He accompanied them to the house. Inside the house there was blood on the upper deck of the double decker bed; there was a piece of tyre inside the pit latrine. There was a burnt tyre in the compound. He told the court that he aware that there were some differences between the two , relating to disappearances of some items in the house.
 11. On cross- examination, he told the court that the deceased and the accused used to live in the same house; and there was no one else living in the homestead. On further cross- examination he stated that in the homestead stood a 3-bed room house. He had left one room for the two for use, and the Kitchen; that in the room was a double decker bed, and the deceased used to sleep on the upper deck while the accused was on the lower one. There was also a pit latrine and an adjacent bathroom. There was a Tractor tyre in the compound. He was using it to store water for the cows.
 12. PW5 was the Government analyst from the Government Chemist laboratory at Kisumu. He testified that on 22/12/2022 he received the following samples from the corporal Omondi of Butere Police Station:
 1. A cartilage tissue from the deceased.
 2. Blood sample – indicated as belonging to the accused.
 3. A grey/black long – sleeved shirt belonging to the accused.
 4. A blue sleeveless vest – indicated as belonging to the accused.
 5. Brown shorts – indicated as belonging to the accused.
 6. Burnt debris.
 7. A piece of brown mattress.



8. A piece of blue mattress.
9. Loose ash.
10. A piece of Maroon/Blue/Purple blanket.
11. An axe.
13. He examined the items and established the following: -
 - a).The shorts (item 5) was Muddy and DNA material could not be generated from it There was equally no DNA profile that could be generated from the loose Ash (item 9).
 - b).The vest (item 4) burnt debris (items F) and mattress (item G) were moderately stained with blood of human origin while the blanket (item 10) Axe (item 11) and Mattress (Item E) were heavily stained with blood of human origin.
14. Upon examination , his findings were that:
 - a). The blood stain from the vest; burnt debris, blanket and Axe were identical and marched the DNA profile of the deceased.
 - b). The blood stain from grey/black/long sleeved shirt marched the DNA profile of the accused.
15. PW6 was Chief-Inspector Daniel Meracha, and in -charge of forensics. He did forensic documentation in respect to this case on 3/3/2024. He took a total of 23 forensic photographs on the site where the body was recovered , the homestead and inside the house.
He concluded that the primary scene of the crime was in the house, while the secondary scene was the river bank, where the body was found.
16. He formed the opinion that the scene had been interfered with. He came to that conclusion based on the burnt tyre and Ash remains. On cross- examination he stated that he documented the scene on 3/12/2022 while he prepared the report on 6/5/2024.
17. He visited the scene in the company of the accused, the investigation officer and DCIO. The body was inside a sack and buried at the river bank. He had to remove the sand covering the sack to capture the pictures. On further cross-examination, he stated that he was watching over the printing when the photos were being printed.
18. PW7 was the pathologist. He conducted the autopsy on 5/12/2022 at Butere funeral Home, on the body of the deceased. The examination was witnessed by James Mutando and John Ashioya. Externally, the front part of the neck and chest had been eaten by wild animals. Both legs were missing; save for 2 bones of the right leg.The body had started decomposing; 3 days has lapsed since death. The body had a boxer pose, which was an indication that the body had been burnt. There were heat burns on the front and back side of the head, the burns were 60% of the total body mass. The burns were 2nd to 3rd degree. There were 4 cuts wounds and lacerations on the skull, and on the upper side of the abdomen. The wounds were measuring 8x2cm and 9x2cms and totaled nine(9) in number. Internally, the lungs had collapsed, with no soot or fluid in the airways. He further stated that the absence of soot any fluid in the airways meant that both the burning and immersion in water occurred after death. There was a small scar in the abdomen and the brain had decomposed.
19. The doctor formed the opinion that the cause of death was severe blood loss secondary to blunt force trauma following assault. He took out some samples from the neck for DNA analysis.
The witness produced the port mortem report (PEXB.3).



20. On cross examination he stated that the trauma was to the skull, below the neck, and one side of the abdomen.
21. PW8 was the investigation officer ,one Mathew Omondi. On 3/12/2022, he and his colleagues went to the home of the accused in the company of some of the deceased' relatives, following a report of the incident. On searching the compound, they found charred tractor tyres in a cow- feed container, an axe, clothes soaked in a plastic basin . The clothes were partly washed and had traces of blood. There were charred substances . Inside the house was a mattress stained with blood. There was a pit latrine and on its floor were charred substance smeared on it.
22. They arrested the accused and took him to the station for interrogation. The accused relented and told them where he had taken the body. In the company of other officers, and crime scene personnel the accused took them to a river. They retrieved the body and took it to Butere Funeral Home. He produced the Axe, Piece of Mattress, 3 Pieces of assorted clothes, ashes of a burnt tyre and remains of a burnt tyre – all marked as PExb 1A to 1E respectively.
23. On cross-examination he stated that the initial report made at the station was of a missing person; that they would not have known where the body was if the accused had not taken them there .The body was at the edge of the river; that the accused pointed at the body and the accused assisted in retrieving it. The body was partially sub-merged in water. In the course of investigation ,he established that there was an apparent dispute between the accused and the deceased about some missing items in the house.

Defence case

24. The accused opted for a sworn testimony, upon being put on his defence. He told the court that he worked with the deceased for the same employer; that the deceased used to work at the shop, while he worked in the farm; that they used to live in the same house; That they slept in a double decker bed. He slept in the lower deck while the deceased slept in the upper one. They had lived together for 3 months prior to the incident.
25. He stated that on the 3rd day following the deceased's disappearance, his employer (PW3) went to the house with some people and inquired about the deceased to which he told them he did not know. He was then arrested. He was then released and went to his work , since he had been cutting the Napier grass when he was summoned to the house by PW4. On coming back, he found the police and chief, and he was arrested again. The police removed his clothes.
26. He stated that someone had informed him that there was a body in the river, hence he took the police there. He denied killing the deceased. He stated he and the deceased were the only two occupants of the house. He had no difference with the deceased.
27. On cross examination he told the court that the deceased used to report to the boss that he (the accused) was stealing his things; he admitted that it was around the time of those complaints that the deceased went missing. He further testified that when the deceased did not turn up, he informed PW4. He stated that he used to burn tyres and old clothes in the compound. He denied that he is the one who took the police to the river but changed, and stated that he took them to the river because someone had informed him that there was a body there. He could not recall the name of the person. He stated that the body was inside the water in a sack. He did not know how his clothes got stained with the deceased's blood.
28. None of the parties filed submissions.



Analysis and Determination

29. Section 203 of the *Penal Code* defines murder as follows. “Any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder” It follows, and indeed, as it has been held in several past decisions of the courts that in order to secure a conviction, the prosecution must prove that the deceased died, the cause of that death; that the person accused is the one responsible either through acts of omissions, and finally that the killing was accompanied by malice.
30. The pathologist (PW7) produced a post mortem report (PExb.3) evidencing death of one Ian Andati Were; the body was identified by James Amunga Mutanda (PW3) and one John Ashioga Mutanda. PW2 also told the court that she went to the mortuary and saw the body of the deceased. As to the cause of death, the pathologist told the court that the cause of death was severe blood loss secondary to sharp force trauma ,following assault. There was evidence showing that the body was subsequently burnt and drowned in water, but the cause was as was stated by PW7. There is proof therefore that Ian Andati Were died and the cause of his death was equally established.

Whether the accused was the cause of deceased’s death

31. The prosecution evidence shows that none of the witnesses witnessed the attack on the deceased. The prosecution’s case is therefore purely circumstantial.
32. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the court of Appeal explained the nature of circumstantial evidence as follows:

“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. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the 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 to say that it is circumstantial.” (Emphasis added)

33. However before circumstantial evidence can form a basis for conviction the said evidence must meet certain conditions. In Ahamad Abolfathi’s case (supra) the court went on to state, “Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an 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 the guilt of the Subject; (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 and none else.”(Emphasis added)

34. Turning back to the present case the circumstance following, are relevant. The accused and the deceased were the only occupants of their employer’s (PW4) house. This is as per the testimony of PW4, their employer, and the accused himself. The accused confirmed that they were the only occupants of the house and the homestead; that the deceased who worked in PW4’s shop would leave in the morning and went back to the house in the evening. There was no evidence that there was a 3rd person or any intruder in the house. PW4 further told the court that the deceased and accused shared one room, which he had given them. They had a double decker. The accused corroborated PW4’s testimony by stating that, he slept on the lower deck while the deceased slept on the upper deck.
35. Further PW2 and PW8 observed that there were blood stains on the upper deck , which according to the accused and PW4 was the one occupied by the deceased. On the same deck was a blood stain blanket. The blood of the blanket was found to be that of the deceased.

It follows that the deceased was attacked not only while in the house, but while on or near the his bed. since the were the only occupants and there was no evidence that there was an intruder, the onus was on the accused to explain how and who killed the deceased. He did not. This court is therefore entitled to infer that the Accused was the one. .
36. Secondly, Upon interrogation, the accused took the police to a river bank where the body of the deceased was retrieved. The accused could only take the police to the river because he knew where the body was.
37. Finally, the accused’s vest was found to have the blood stains of the deceased. His vests was obviously stained as he attacked the deceased.
38. Thus, the entire circumstantial evidence points to the accused as the killer of the deceased. It was for him to explain why and how his only housemate was killed and on or around his own bed; he did not; why he had traces of deceased’s blood in his vest and finally why would he lead the police to the exact location where the body was found.
39. I have considered the Accused’s defence. He denied killing the deceased. On how he was able to know the whereabouts of the body he told the court that someone had earlier informed him that there was a body in the river. He could not however name the person. Again, if this someone had informed him about a body at the river, why didn’t he inform the police. Further when he was asked about the deceased’s blood on his vest , he stated that he did not know. His defence was far from being plausible and I dismiss it.
41. I observed the accused very well. His manner of testifying and demeanor, showed some naivety, but when one considers the extent to which he went to try any conceal his crime, one cannot help but conclude that the “naïve” demeanor was meant to camouflage his culpability. For instance he went on a burning spree, burning tyres, trying to wash clothes, attempting to either throw the body in the pit latrine or some debris and finally taking the body to the river. One would say it was indeed a busy day, or night, for him.
42. I am convinced, beyond any reasonable doubt, that the circumstances point to the accused and not anyone else as the killer of the deceased.



Malice aforethought

43. Though the motive behind the attack was a pre- existing dispute between the accused and the deceased, circumstance immediately preceding the attack are unknown. Those circumstances are only known to the accused herein. He did not offer any.

Section 206 of the penal code sets out the circumstances in which the court can infer malice aforethought. It states

- “ a). an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted 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 netted 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 (Emphasis added)
44. while interpreting the provisions of section 206 of the penal code ,the court of appeal in the case of Daniel Muthee Vs Republic [2007] KECA 419 (KLR) stated “When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the *Penal Code*”
45. In Rex Vs Thibere S/O Ocher (1945) 12 EACA 63, cited in Republic Vs Silas Onjene alias Fredrick Namema (2017) eKLR, the court had this to say about he determination of malice aforethought: “to determine whether malice aforethought has been established to consider the weapon used the manner in which it is used, the part of the back targeted the nature of injuries inflicted. The conduct of the accused before during and after the incident. (Emphasis added)
46. In the present case the pathologist stated that the cause of death was severe bleeding. The examination further show that the deceased suffered cut wounds on the skull, neck and on the abdomen ranging between 8x3 cm and 4x2 cm. The total wounds numbered nine. Given the weapon of choice , the extent of injuries and the targeted area being inclusive of the head, it is evident that the accused was out not just to injure, but kill the deceased.
47. The circumstances following the attack are also instructive. The burning of the body, washing of clothes and disposing off by throwing or burying the body in the river indicate a mind of a person could not have caused the killing accidentally. I am therefore satisfied that malice aforethought was proved.
47. In the end, it is my finding that the prosecution has proved the charge of murder against the accused and pursuant to section 2015 of hereby convict him as charged.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ISIOLO THIS 22ND DAY OF MAY, 2025

S CHIRCHIR

JUDGE

In the presence of:

Godwin Luyundi- Court Assistant

Mr. Otsyeno for the Accused



Ms. Osoro for the Director of public prosecution

Mairon Luyegu Lucheli- The Accused

