



REPUBLIC OF KENYA



**Republic v Kairu (Criminal Case 5 of 2018) [2025] KEHC 7481 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7481 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL CASE 5 OF 2018**

**MW MUIGAI, J**

**MAY 19, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**IBRAHIM MUGO KAIRU ..... ACCUSED**

**JUDGMENT**

**Background**

1. The accused person was charged with the offence of Murder of Faith Muthio Ibrahim.

The information that led to the arraignment of the accused person before the Court was as follows:

Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#), Laws of Kenya.

Ibrahim Mugo Kairu: On the 1st day of February, 2018 at Kasina Township in Athi River Sub-County within Machakos County, murdered Faith Muthio Ibrahim

**The Prosecution Case**

2. The prosecution case was anchored on the evidence of eight [8] witnesses. The hearing commenced before Hon. D. K. Kemei J
3. In this case, PW1 was Catherine Mwendu Mulinge. It was her testimony that the accused herein is her husband, the deceased herein was her child. She testified that she was cohabiting with the accused and that on 31/1/2018 she left for work around 11:00 and came back around 2pm and found the accused and the child. According to PW1, the accused claimed that he wanted them to discuss an issue. She claimed that the accused wanted them to resolve their frequent disagreements. They did not manage to discuss the issues. PW1 found that he was in a bad mood and he closed the door from inside and PW1 noticed that his temper had risen. Testifying that the accused kept the door keys in his pocket.



4. PW1 was ordered by the accused to wear a white dress and proceed to the bedroom. She complied with the order and proceeded to the bed where the accused held her on the chest and PW1 felt that the accused had pressed a knife on her left chest. PW1 saw the knife which was stacked on his waist. According to PW1 the knife had a blue handle. PW1 tried to persuade him and even kissed him then the door was opened to allow their child who was from school to enter the house.
5. PW1 then prepared a meal of rice while the accused remained in the sitting room the accused declined to eat the meal while the deceased ate. PW1 then alerted the deceased of dire circumstances they were in at the time. The deceased alerted PW1 of the presence of a panga nearby. PW1 went about the Kitchen chores and there was no conversation. It was PW1's testimony that this went on up to around 3:00am, at around 4:00am she went to bed after persuading the accused that they make love which they did. PW1 organized for the deceased to sleep in the sitting room.
6. According to PW1, the accused removed his trouser which still contained the knife and made love. They did not sleep for long as she woke up at around 5:00am. Accused also woke up and headed to the sitting room. PW1 went to the kitchen to prepare breakfast for the deceased who was to go to school. However, that deceased could not go to school as accused refused to open the door. PW1 did not request him to open the door. PW1 did some washing up to 9:00am. As per PW1 all the while accused remained at the sitting room with the baby. She finished washing at around 9:00 am. All the while the Accused remained in the sitting room with the baby. PW1 testified that the accused agreed to open the door and she managed to put clothes on the drying lines. PW1 then went to the bed room to arrange clothes only for the deceased to get hold of her. PW1 then dashed outside but he pursued her there. PW1 managed to rush to Mlolongo police station which was about 1.5 Kilometer away. She lodged a report. PW1 told the police to assist her collect her items and child as accused had made threats to kill her and the baby.
7. PW1 claimed that there was a delay and she decided to get contact number for the village elder. That the village elder was one Mutuku whom PW1 called and informed that she needed to vacate her house due to threats from her husband. He agreed to assist her and they agreed to meet at a certain bar near to where PW1 lived. According to PW1 the clan elder arrived with another colleague of his and they proceeded to her residence.
8. On arrival they found the accused had locked the house from inside with a padlock. PW1 peeped through the window and confirmed the same. PW1 saw the accused inside and he could see her as well. PW1 requested the accused to open the door but held his head and then got hold of the baby by her chest and stabbed her with a knife five times.
9. According to PW1, the clan elder and his colleague were there and witnessed the incident. PW1 ran down the stairs as she was shocked beyond belief. The clan elder and the colleague managed to break the door but by then the baby had already passed on. PW1 entered the house and found the accused had placed the child on the bed. The accused lay on the floor having stabbed himself sustaining minor injuries.
10. According to PW1 some police officers were called by the clan elder and arrived at the scene and collected the knife at the time PW1's mind was on her child. PW1 told court that the body of her child was removed by the police and that is when she saw the knife. That police officers took photographs of the scene. The body was taken to Shalom Hospital and the accused was taken there as well.
11. On 5/2/2018 PW1 went to Shalom Hospital mortuary in Company of Benson Wambua to participate in the post mortem examination. They identified the body of the deceased. PW1 referred to post mortem form MFI 1- post mortem report dated 5/2/2018. PW1 told court that the body was later



transferred to Machakos Hospital mortuary which mortuary's name PW1 could not recall. PW1 stated that the accused has never beaten up the deceased however he had beaten PW1 severally and that she had not made reports to the police or the chief or village elder but, she used to inform their respective relatives who warned the accused.

12. In cross-examination by Mr. Ojiambo, PW1 testified that she left the baby with the accused as PW1 went to town to work. The child did not go to school that day when she came from work PW1 found the baby at home. PW1 on 31/1/2018 reported to work and left the child with the accused at home and that she recalls on 31/1/2018 the baby had attended school after she prepared her. The baby had alerted PW1 of the presence of a panga in the house and the baby had informed PW1 that the accused had earlier threatened to cut her with the panga. PW1 did not record the issue of a panga in her statement. The accused seized PW1's mobile phone and her child later managed to retrieve it from him and handed it to PW1. According to PW1 the deceased was close with the accused and that she used the phone to make calls around that time. PW1 stated that her number is 0720XXX623 but she also had a Celtel line and that she made calls to various persons. PW1 could not recall the airtel line off head. That the other line is 0729XXX066 which was being used by her late daughter. They had three mobile phone handsets one was for her daughter but each of them could use to make calls. PW1 met the clan elder at the chief's office and then they went to the house. As per PW1, she briefed the chief about the incident and it is true she met the clan elder at a nearby bar. PW1 claimed that she made call using her Safaricom line. According to PW1 the accused had kept the knife tightly between his trouser and his body and that the accused removed his long trouser before they slept and wore it the following morning. PW1 testified that accused hand worn a pair of shorts when she went outside to hang clothes and that she could not escape at night as it was risky.
13. In re-examination, PW1 testified that on 31/1/2018 the baby was in school when she left for Mlolongo town. PW1 on 1/2/2018 she made several calls to her friend Loki Kituku and her mother and that she cannot recall the sim card numbers off head. PW1 was using Safaricom line. PW1 met the clan elder outside Highrise building where her house was and then proceeded to the chief's camp for authority to proceed to her house. PW1 walked from the police station for some distance before picking up a motorbike. On 1/2/2018 PW1 woke at around 5:00am.
14. Mr. Machogu sought to have PW1 recalled for the purposes of identifying the knife and photographs. Court gave directions that PW1 to be recalled.
15. PW1 upon being recalled testified that she had seen the photographs and knife. PW1 was aware of the knife which was in the kitchen and she was certain it is the murder weapon. She identified the knife MFI -2 one bloodstained kitchen knife with a blue handle. PW1 identified the first photograph showing the house they lived in fifth floor Sunbrook apartments, the second photograph shows the body of her daughter lying on the bed and is covered with blood. PW1 identified the third photograph MFI-3 A, B & C – photographs. She testified that on the material date her mobile line was 0720XXX423 but she also had a celtel line but was missing at the time and that she does not recall celtel line though she might have used it to communicate.
16. In cross-examination, PW1 testified that she was standing outside the house when the photographs were taken by police officers. PW1 witnessed the incident and saw the accused stabbing the deceased since he started doing so in the sitting room and then moved the deceased to the bedroom where he continued stabbing her. PW1 did not see the accused stabbing himself although she later saw his injuries. PW1 had a small mobile phone which she used to communicate with people as she headed to the police station.



17. PW2 was Titus Simiyu Wanjala. It was his testimony that he currently resides in Bungoma. In 2018 he used to reside in Mlolongo. PW2 is an estate agent and he recalls on 1/2/2018 he was at phase 3 Mlolongo around 1pm and while on his way in company of a colleague David Mutuku as community policing, his colleague received a call from a certain lady who claimed to be in distress. They agreed to go see the lady at Gossip Hotel and who informed them that her husband had refused to release her child. According to PW2 the lady had disagreed with her husband and she led them to the house. PW1 testified that on arrival she tried to open the door but found it closed from inside. That a young girl called out to the lady. As per PW2 minutes later he heard the girl pleading with the father not to kill her. The father then dragged the girl towards the bedroom. PW2 tried to persuade the man not to harm the child. PW2 saw him heading to the kitchen and picked up a knife suddenly PW2 saw blood splattered all over. PW2 enquired from him as to why he had killed the child he did not respond but suddenly stabbed himself and fell down. PW2 then alerted the OCS who sent an officer SGT Kanyi to rush to the scene. They later broke into the house and found the man who is presently the accused herein lying on the floor while the deceased lay on the bed. PW2 identified the knife the accused used to kill the deceased (MFI 1) PW2 claimed that the accused was before court (pointing at him in the dock). According to PW2 the same was used by the Accused to injure himself. PW2 identified the three photographs showing the body of the deceased and that there was blood all over the bed. PW2 was certain that the accused is the one who killed the deceased.
18. In cross-examination by Mr. Ojiambo, PW2 testified that they received the call at 1pm and they took the motorbike and that he had not known the mother of the deceased before. According to PW2 the lady wanted to pick up her daughter; that the lady claimed that the accused had been staying with the deceased while she slept outside as the husband locked her out. PW2 was not aware that the incident was splashed in the newspapers. PW2 did not know the chief named in the report but he used to work with the area chief Peter Ndunda. That the lady had been claimed to have slept outside after disagreeing with the accused. PW2 pushed the window curtain and saw everything that happened and that the deceased was not stabbed while at the sitting room and that whoever claims that the stabbing started at the sitting room would be lying. According to PW2 the knife was picked by accused from the kitchen. PW2 saw the accused stabbing himself and he fell down while the knife flew towards the sitting room. As per PW2 the blood on the floor emanated from the accused and that the photographs were taken by police officers. PW2 claimed that the accused took the action upon seeing them; that the accused slit the throat of the deceased and then stabbed himself and that he had not seen the medical report he had seen the photographs and again PW2 confirmed that the accused stabbed the deceased on the neck.
19. In re-examination, PW2 testified that the accused stabbed deceased with a knife.
20. PW3 was Sylvester Kioko Peter. He gave a sworn testimony that in 2018, he was a caretaker at Sun Brook Apartments having been employed in December 2017. PW3 recalls on 1/2/2018 around 2pm when he received a call from one of the tenant Christine who ran a shop within the building and who alerted him that a child of Mwende had been killed by the father and who in turn killed himself. PW3 found a large crowd near the gate and visited the fifth floor of the flat and entered the house where he saw a kitchen knife, blood on the floor and the accused herein lying on the floor while the body of deceased on the bed. PW3 then rushed downstairs and met the police officers whom he led to the scene. PW3 testified that the police picked up the man on the floor plus the child on the bed. PW3 had seen the knife (MFI 1) but could not tell if it was the one he had seen on the floor. PW3 identified the photographs of the scene and could easily recognize the body of the deceased and the blood.
21. PW3 testified that on 29/4/2017 Mwende and her mother visited him and he gave them the tenancy agreement and the said Catherine Mwende was in company of her daughter. According to PW3 later on the husband joined the said tenant and that later the accused and Catherine Mwende kept on



- quarreling and fighting and PW3 used to intervene and warn them. PW3 testified that the violence persisted and he was forced to report to Mlolongo Police Station; that they used to quarrel a lot. PW3 had known the accused herein as husband of Catherine Mwende. PW3 saw him lying on the floor of the room with a lot of blood.
22. In cross-examination, it was PW3's testimony that the quarrels were so bad that times the mother of the deceased would sleep outside. As per PW3 squabbles were too much as they used to chase each other from the fifth floor to the ground floor thereby disturbing other tenants. According to PW3 the apartment is surrounded by several businesses and there are several movements within the area and if an incident took place then those nearby could have noticed. PW3 testified that as a caretaker he was to receive all reports or problems affecting tenants for his attention and that one cannot see the bedroom from the sitting room window unless the bedroom door is open. PW3 only came in after the incident and found the door already broken and that it takes time for one to break the metal door. PW3 found the door ajar and saw the accused lying on the floor while the deceased lay on the bed. PW3 saw the photographs showing that the accused had been moved.
  23. In re-examination, PW3 testified that he knows the lay out of the rooms within the apartment and one can see the bedroom from the sitting room window if the bedroom door is open.
  24. PW4 was No. 76XX4 PC (D) Muthoni Christopher. He testified that he is attached at Mlolongo police station, PW4 has been in service for twenty-five years. On 1/2/2018 members of the community policing called them over an incident of murder. They rushed to the scene around Kasina area of Mlolongo. They found a large crowd which directed them to the house where incident had taken place. According to PW4 they found a young girl lying on the bed with a lot of blood around the body. The door had been broken by members of the public. As per PW4 there was a man lying on the floor with injuries and there was a lot of blood on the floor. The had stabbed himself on the chest. They picked the two into their vehicle and rushed them to the hospital. PW4 gave his testimony that the deceased was booked in the morgue while the injured man was admitted and placed under police guard. They cleared the scene after it had been secured by the community policing members. PW4 testified that photographs were taken before the body of the deceased and the man were picked up and that there was a kitchen knife beside the man. PW4 identified the Knife (MFI 3) he also identified the photographs taken of the scene (MFI 3 A, B & C).
  25. In cross-examination, PW4 testified that the man admitted in the hospital after discharge was escorted to the police station. PW4's role was only to transport the victims. PW4's duty is to drive police vehicles. According to PW4 he cannot recall where he was when they received the call from the police station directing them to rush to the scene and check. He visited the scene and the mother of the deceased was then outside the room. PW4 did not witness the incident and did not see the man stab himself. PW4 did not confirm whether the girl had died. Testifying that the man was admitted and guarded by police and that no one was arrested from the scene. PW4 claimed further that he was present when the photographs were taken which was done before the bodies were removed. According to PW4 he did not see photographs containing the man lying on the ground as no photos were taken of the man. PW4 could see the knife on the photograph which had be roved and placed near the door step where it was photographed. As per PW4 he could not determine the source of the bloodstains on the knife. Both victims had bled.
  26. In re-examination, it was PW4's testimony that they were the first people to join the community policing members at the scene. PW4 was not present when the incident took place and that they rescued the man who was bleeding from a stab wound. According to PW4, photographs could not be taken on the man as scenes of crime officers were far away and they needed to save him by rushing him to the hospital.



27. PW5 was Benedict Wambua Matoloka. In his testimony, he used to work with Dusit 2 Hotel in Nairobi. PW5 while in Nairobi received a report that a child had been killed in Mlolongo. He learnt that the killer had attempted to kill himself. PW5 rushed home and established that his cousin's child had been killed. He visited Mlolongo police station and went to Shalom Mortuary for the Post Mortem. According to PW5 this was on 5/2/2018. He positively identified the deceased body. He claimed that the body had three stabbed wounds on the back. Pw5 had not known the accused before until the incident and came to know that he was cohabiting with his cousin.
28. In cross-examination, it was PW5's evidence that the accused visited them at home after the incident when he went with his family to engage them on compensation under Kamba Customs but they did not agree. PW5 testified further that he learnt of the accused and his niece were staying as husband and wife. PW5 had not learnt of squabbles between the couple and the issue of compensation has not been pursued as case was lodged in court. PW5 testified that he saw the stab wound on the body even though he did not touch it. PW5 did not witness the incident and the doctor informed him that a knife had been used as a weapon. It was PW5's evidence that his common sense is that a knife was used as the weapon and that he did not see a stab wound on the neck and further that he did not see the accused stabbing the deceased.
29. This Court took over Trial Proceedings on 16/11/2021 and granted orders for Proceedings to be typed and availed to parties. On 7/2/2022 Section 200 CPC was explained to the Accused person and he stated that the matter proceeds from where it stopped.
30. PW6 was David Mutuku Kaloki. He testified that he lives in Mlolongo Phase 3 and was in community policing in 2012-2018 at the Chief's Office at Mlolongo. As per PW6 on 1/2/2018, that morning and they went about business with Titus Simiyu and they were called by the chief. They stayed there until 1pm. According to PW6 they were standing outside and they saw a lady come screaming and she said that Officer at the chief's office were to help her as her husband wanted to kill her with her child. She said she could not get to the police station as she left the child at home. They followed the lady to help and she showed them to their home. They went up the stairs up to the fifth floor on the left side House/room.
31. PW6 testified that Titus knocked the door and found it locked with a padlock. PW6 checked through the window and saw the child was held by the neck and squeezed on the seat and PW6 heard the child plead/ cry "dad I love you Daddy usinimalize" "Dad usiniue sitaambiya mum usiniue" it was PW6's testimony that he saw the man strangle the child and blood spilt out and he wiped blood on his shirt. PW6 told Titus he was going to report to the chief and they came quickly to the scene. According to PW6, they called police and police came to the scene and they went away. PW6 claimed that he had pictures that he could see them. He saw the child was placed on the seat. PW6 identified the photographs as MFI 3 a, b & c. testifying that the accused stabbed himself with a knife after child was stabbed. PW6 saw the side of the face as he held on the child. PW6 could not see his face.
32. In cross-examination, it was PW6's testimony that they did not know the lady who went to them that day at the chief's office. As per PW6 he did not know if she had known his colleague. It was PW6's evidence that they followed the lady who had gone for help and followed her to the house. According to PW6 his colleague was at the door trying to open the door and he was at the window. PW6 called him and he told him to go to the chief. PW6 claimed that he is the one who saw first and he called Titus. He saw blood spilt out and the man was wiping the blood with the shirt according to PW6, the child lay on the seat and that child kept silent after it was stabbed. Testifying that he heard child cry "Dad I love you do not kill me I will not tell mum". PW6 claimed that at the window he could see clearly and there was a sitting room. PW6 saw the child held to the head and the man on the one side. PW6 saw



the pictures shown to him in court (MFI 3 (C) photo and he was able to identify blood and a knife. According to PW6, he thought the blood was for the child and the accused person as he had stabbed himself and he lay there too. He claimed that doctor must come and tell the court. PW6 testified that Titus told him that saw the accused person stab himself when the door was about to be opened. PW6 did not want to see the blood of the child. He went away after the door was opened. He claimed that he did not know what happened there after.

33. PW7 was Dr. Ndegwa Peter Muriuki and he works for Ministry of Health, Department of Diagnostics & Forensics Services- Medical- legal Section since 2005. He testified that he holds Bachelor of Science & Masters in Pathology and that he had two reports the one for Faith Muthio. It was PW7's testimony that he filled this Report on 5/2/2018 at Athi River Shalom Hospital. PW7 performed a post mortem on Faith Muthio the body having been identified by Catherine Mwendu and Benedict Wambua mother and grandfather to the deceased. PW7 noted and confirmed that body of female African child of 9 years in blood stained clothes good nutritional status and height of 165 cm. PW7 noted penetrating stab wound right nipple 4x1cm, noted penetrating stab wound left nipple 4x1 cm, noted penetrating stab wound interior right shoulder of 3x1cm, noted penetrating stab wound below right scapula 3x1 cm, noted penetrating stab wound below left scapula 3x1 cm. according to PW7, the body was very pale and that the right chest cavity was penetrated is a fracture of the lateral caridge and left chest cavity penetrated fracture of 3rd 4th 5th ribs at the level of anterior auxiliary line. PW7 testified that both lungs were perforated. According to PW7 left lung from behind, bilateral haemothorex blood in both lungs 1.5 liters and that hymen was intact. He claimed that other systems externally were normal. It was PW7's evidence that the cause of death was exsanguination for haemorrhage due to chest injuries due to multiple penetrating sharp force trauma consistent with assault. PW7 told court that after examination he proceeded to fill the post mortem Form MFI -1 on 5/2/2018.
34. In cross-examination, PW7 testified that he observed 5 stab wounds in total and 2 stab wounds at the back of the shoulder blade. He claimed that he did not communicate with the accused person as he did not know him/her
35. PW8 was CPL Richard Muthee. He told Court that previously he was attached to DCI Mlolongo. On 1/2/2018 at 2:30pm he was in the office with Inspector Peter Momanyi (now retired). They received information that there was murder incident which occurred at Sun Brook Apartments at Mlolongo Township. They proceeded to the apartment. According to PW8 on arrival at the ground floor they found a crowd of people and they enquired which floor the incident occurred, a good Samaritan took them up to 5th floor room B21.
36. They assessed the scene as the body was removed by officers from Mlolongo police station and the suspect had been arrested and murder weapon taken by the police and scene of crime came and took photographs of the scene.
37. It was PW8's testimony that the beddings had blood and they did not do much. They left the scene and went back to the office. They took over the case as DCI officers and commenced investigations. PW8 testified that they recorded statements of witnesses. Later he filled the Post Mortem form and took the same to Shalom Hospital where the Pathologist was and post mortem was conducted. As per PW8, after post mortem was conducted, the cause of death was due to injuries caused by stabbing. They interrogated the suspect and later charged the accused person.
38. He testified that at the same time, he received the photographs from the scene of crime personnel, which showed the scene of crime. PW8 later recorded his statement to that effect. PW8 highlighted the things collected from the scene to be, blue handle knife with blood stained collected at the scene



MFI-2 P- exhibit 2, photographs taken of the scene 3 photographs MFI 3 (a) (b) & (c) P- exhibit 3 (a) (b) & (c). He pointed to the accused as the one who was in the incident that day.

39. In cross-examination, PW8 gave his evidence that they found the body removed and accused was arrested. They only assessed the scene there were blood stains. He testified there was no doubt whose blood it was as after they took over the matter the police officers told them that where the blood was the body of the deceased was there. He testified that they recorded witness statement and collected photographs and the knife which was handed over to them by the police officers who arrived at the scene first.
40. According to PW8 excerpt photograph report indicated the deceased death. He testified that the deceased mother implicated the accused person, that the deceased's mother said that the accused killed the deceased and she confirmed that she saw the incident as it happened. According to PW8, the deceased mother peeped at the door and saw what was happening, she saw the accused person stabbing the deceased inside the room B21 and she told PW8 that deceased died and the doctor confirmed the deceased death.
41. He claimed that he believed her and that the deceased and accused person were the only one in the room. He was told by the deceased mother as she was there and she made the statement. PW 8 told court that there are photographs of the scene and there is no accused person in the photos. He stated that the accused person will explain to the court. PW8 claimed that he is not a photographer but scene of crime took the photographs and there are blood stains and the knife and that the photographer would explain to court not him. Testifying that there was no accused person in the photographs and that he read the witness statements. He cannot remember very well the evidence. He claimed that the witness statement of Arresting officers/ police officers. According to PW8, the accused person was lying next to the knife and that the scene of crime did take the photograph and that PW8 was not at the scene so he did not take up the matter. He relied on the evidence on record/ statement to charge the accused person.
42. PW8 did not take the finger prints on the knife as when they arrived at the scene the other police officers had arrived to the scene and there. According to PW8, something to connect the accused person with the incident. It was PW8's testimony that the accused person was found in the house where the knife with blood stains was found and that the deceased mother did not confirm to PW8 her whereabouts the previous night.
43. PW4 was No. 76404 PC (D) Muthoni Christopher (Recalled), upon recalling of PW4, he testified that on 1/2/2018 as the 1st person who arrived at the scene as per his Statement, they were called on 1/2/2018 and arrived at the scene of murder. According to PW4, they found a little girl lifeless and the older/ bigger man struggling. They immediately met with the community. He testified that Esther Miu photographer for the police station. He claimed that they were not Scene of Crime officers. She took the photographs not PW4.
44. In cross-examination, PW4 testified that the scene of crime officers could not be reached at the time. He was at the Airport and the others were few in Nairobi and that the police called the lady who took the photographs.
45. In re-examination, PW8 told court that he only knew her by one name Mary since she lost her husband and stopped taking photographs
46. At the close of the prosecution's case, court issued directions that parties file and serve their written submissions. which directions were complied with Ruling on case to answer was on 31/10/2023.



### **The Accused's Defence.**

47. The accused was placed on his defence as per ruling of this court read to him on 4/7/2013 Directions were taken under Section 211CPC and the accused chose to give sworn evidence .
48. The accused testified in a Sworn Statement that he was in the house with Faith Muthio Ibrahim on 31/1/2018. The they were alone. The the child's mother was away and that he did not know where she was, she did not come back on 1/2/2018 .
49. That PW1 lied to Court when she testified that she was in house on 30<sup>th</sup> & 31<sup>st</sup> January 2018 . On 1/2/2018 is when PW1 mother of the child came back after being away for 2 days. That incident was reported in the Nairobian.
50. The Accused person was with the child on 30/1/2018. The child did not go to school on 31/1/2018 as she was unwell, he also did not go to work and they watched a movie that day .That the child went to school herself, mostly he would also take her to school..
51. That PW1 testified that she arrived with 2 men .However, the door was not locked, PW1 & the Accused person also argued with her for being away for 2 days and who the 2 men were. Further that he did not know what transpired, he saw one man remove a knife and he did not know what happened. That he found himself on the hospital bed where he was handcuffed, he was later taken to the police station where He recorded his statement. He referred to evidence of PW2, PW6 and PW3 and disputed that the door was not locked it was open a steel door
52. He also stated that he did not stab the child, that he was close to his child and he did not kill her .That he did not carry the knife on his belly. He stated he was not the one who stabbed the child with a knife and he did not carry the knife in his belly
53. He testified during cross examination that he was with the child at that time and that PW1 had left. That they had a disagreement with PW1 about the 2 men and where she had been, that before the incident she was alone with the child watching TV. That the 2 men and the mother were there and he did not know what happened.
54. They had a good relationship with the mother and the child. He also tried to call PW2 and sent her a message until she came back home. That he was a victim offender,
55. He was cross examined by the victim's advocate and admitted that they had disagreement with his wife and she had ran away from home. That PW1 came with the child when he married her but he cared for the child.

### **Written Submissions.**

#### **The Prosecution's Submissions.**

56. The prosecution filed closing submissions dated 5/12/2024 and framed issues for determination as whether the accused was involved in the murder of the deceased, did the accused have malice aforethought was the accused identified appropriately was the cause of death as a result of the injuries inflicted .
57. The cause of death was proved by the postmortem as exsanguination due to chest injuries multiple penetrating sharp force trauma consistent with assault .That the accused was placed on the scene by Pw1 who left him with the deceased and he went to report to the police station. Pw2 and pw6 responded to her distress call and they accompanied her to the house where they witnessed the accused



take a knife and stab the child 5 times .That they were able to break the door and upon entry the accused stabbed himself.

58. That malice aforethought was proved by the nature of injuries inflicted on the deceased, by stabbing her with a knife and the differences between the accused and Pw1.
59. The accused was identified by Pw1, pw2, pw6 and pw8 as the perpetrator of the crime and the witnesses watched helplessly as the accused stabbed the deceased 5 times. That the evidence tendered by the prosecution witnesses and the exhibits produced prove the offence beyond reasonable doubt .The accused confirmed in defence that he was in the house .The knife was also recovered from the same house and was positively identified by Pw1,pw2 and Pw6 as the one collected from the house.

### **The Accused Written Submissions.**

60. The accused case is that the scenes of crime was not called and that the knife was not dusted for finger prints and blood samples were also not analysed .That the case relies on the oral testimony of Pw1 , pw2 and pw6 which must be carefully analysed, be found to be credible reliable believable logical and free from errors and inconsistency .
61. That the evidence was not corroborated .Further that the defence evidence was corroborated by independent report filed at the ‘Nairobian’ proved to be the correct facts of the case, The accused submits that Pw1 returned on 1/2/2028 and her narration on the events from 31/1/2018 and morning if 1/2/2018 are fabrications .
62. That the events narrated on 31/1/2018 are not credible , she did not call or text her relatives to alert them of the danger she was in . That the accused was said to have had carried a knife around his waist, he was in a bad mood but PW1 went on with her chores, slept on the same bed with her and they made love. She also claimed to have had chance to get out at night to pick clothes from the hanging line yet she did not take opportunity to flee. She did not do it when the accused opened the door for her to hang clothes the next day. Instead to returned to the bedroom, that she must have met other people as she did this and would seek for help.
63. That a Police Station could not have only one officer, PW1 stated how she could not get assistance at the station and resorted to look for Community Policing Officers, she did not produce the OB extract to prove her report at the police station while PW1 and PW6 said that she told them that she could not get to the station due to urgency of the matter .
64. That the house was said to be surrounded by garages and shops, the station was about 1.5 Km. It was logical to seek help from the immediate neighbours , she did not alert the caretaker or call relatives immediate family members on her way to the station , she had her phone all along. That PW1 left at 9:00am and returned with help at 2:00pm with the 2 men.
65. Further that she did not tell the investigating officer about the presence of a panga in the house, the panga was also not recovered from the house meaning that her evidence was a fabrication.
66. The evidence of PW6 and PW8 is also discredited, the pw1 said that she was with PW2 who decided to call pw6 on his cell phone. That they met at gossip area and when they arrived is when she told them that her husband had locked himself with the deceased.
67. PW6 evidence was different, his stated that PW1 came at the Chief’s camp when he was with PW2. That she led them to the place, his account was that they peeped through the window and saw the accused straining the deceased on the sofa and he saw blood on his hands, he was also wiping it on



his shirt. PW2 said that the accused stabbed the deceased in the sitting room and dragged her to the bedroom where he continued to stab her.

68. The accused submits that the credibility of PW1 as a witness is doubtful. PW2 also testified that the accused went to the kitchen to pick the knife while PW1 said that he had carried it on his waist. That two people watching the same event in close proximity cannot give a different account. These inconsistencies create doubt on the truthfulness of the case.
69. The accused submits that from his defence, it is possible that PW, PW2 and PW6 could have been inside the house before the victim was stabbed. Then who between pw1, pw2 and pw6 stabbed the deceased?
70. This would be resolved by forensic evidence of finger prints and DNA. That the door was heavy and metallic in nature but PW2 and PW6 seemed to have broken it easily without noise or heavy machinery which would destruct the neighborhood. Further other witnesses did not testify about the door being broken.
71. The accused's case is that the two men PW2 and PW6 were the perpetrators and that they in fear of PW1 as the possible witness wiped away the evidence.
72. That malice aforethought was not proved, PW1's evidence of how he carried a knife around the waist was a fabrication, the witness also feigned ignorance and even claimed that she left the accused behind as she went to work. In another account she prepared the child who went to school also that the child did not go to school such that it is difficult to follow and understand her evidence.
73. The Accused produced evidence of photographs with the child as testimony of good relation with his daughter.  
  
The child was feeling unwell and did not go to school that day and he remained behind to take care of her. That there was no reason to jump and pick the knife and stab her when PW1, PW2 and PW6 came to the house later.
74. That they had been watching TV with the child and they spent time together all morning and previous nights when PW1 was away proving a perfect opportunity.
75. There was no evidence of tension or emotion between the deceased and the accused or bad feeling towards her to prove malice aforethought.

### **Analysis and Determination.**

76. This Court considered the evidence on record, the evidence adduced before this Court submissions and exhibits.
77. I find that the issues for determination of the case are: whether the accused caused the death of the deceased and whether the Accused had malice aforethought.
78. For the accused to be convicted of murder contrary to Section 203 of the [Penal Code](#), the prosecution must prove the following elements beyond reasonable doubt:

Court of Appeal in *PON vs. Republic* [2019] eKLR had this to say on direct evidence;

“In its ordinary meaning, direct evidence would be that which directly links a person to a crime; that which is based on an eyewitness account, on personal knowledge or observation. The direct evidence sought in the matter the subject of this appeal is - who saw how the



deceased meet her death. There is no such evidence hence the recourse to circumstantial evidence...”

79. In Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR the elements of the offence of murder were listed by Hon. M. Odero, L.J. as follows:-

The fact of the death of the deceased.

- 2) The cause of such death.
- 3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly
- 4) Proof that said unlawful act or omission was committed with malice aforethought.
  - (a). The death of the deceased.
  - (b). That her death was through unlawful acts or omission of the accused.
  - (c). That the accused had malice aforethought.
  - (d). As such, the quality of the evidence placed the accused person at the scene of the murder

#### **The death of the deceased.**

80. It was submitted that PW7 the doctor testified that he filled the post mortem report upon conduct of Post Mortem and formed an opinion that the cause of death was exsanguination due to chest injuries due to multiple penetrating sharp force trauma consistent with assault.

81. The postmortem and the doctor’s evidence proved that the deceased succumbed to assault injuries, The cause of death was exsanguination and sharp penetrating wounds. The body was recovered on 1/2/2018 witnesses testified that the deceased was lying on a pool of blood in the house and that her body was laid on the bed while the accused was on the floor and he had also stabbed himself. The postmortem was done on 5/2/2018. The Pathologist confirmed 5 stab wounds on the body of female African child aged 9 years in blood stained clothes and both her lungs were perforated. The cause of death was exsanguination for hemorrhage due to chest injuries from multiple penetrating sharp force trauma consistent with assault.

81. The evidence of the Pathologist further corroborates the evidence of the 3 witnesses who witnessed the Accused person strangle and stab the child to death.

#### **That her death was through unlawful acts or omission of the accused.**

82. The prosecution case was represented by oral evidence of 8 witnesses. The evidence on record by PW1 was that they had a misunderstanding with the Accused, her husband and he threatened her and the deceased, on 1/2/2018, she left to seek for help to collect her child and belongings. On coming with the Village elder and another man to the house the door was locked from inside. PW1 requested the Accused person to open the door, instead he took the deceased the child and removed a knife and stabbed her 5 times.

83. PW2 the Estate Agent at Phase 3 Mlolongo accompanied David Mutuku PW6 of Community Policing to the scene PW2 heard the deceased plead with the Accused person not to kill her, he saw the Accused person, her father drag the deceased to the bedroom. The deceased was still pleading with him. PW2 also persuaded him not to harm the child. PW2 saw the Accused person go to the kitchen pick the



knife and suddenly saw blood splattered all over. PW2 asked why he killed the child, the Accused person stabbed himself and fell down.

84. PW3 Caretaker of Sun Brook Apartments said on 1/2/2018 as per the Court record, he was called by Christine a tenant and told that Mwende's child was killed by the father and he killed himself. He went to the scene and found the Accused lying on the floor and the deceased was on the bed and saw the knife. Police Officers came and took the Accused person and deceased away. PW1 and Accused person used to quarrel and fight and he intervened and warned them.
85. PW6 testified before this Court that on 1/2/2018, PW1 came screaming that Officers at Chief's office were to help her as her husband wanted to kill her and her child. They accompanied her to the house upstairs 5<sup>th</sup> Floor on the left side the last house/room. The door was locked and checked through the window and saw the child held by the neck and squeezed on the seat and heard the child pleading that the Father should kill her and she will not tell Mom. He saw the child strangled and blood spilt out and was on Accused person's shirt. He took the knife and stabbed himself.
86. This Court finds the evidence of PW1 PW3 & PW6 direct evidence as they witnessed the death of the deceased. The child/deceased was in the house with the Accused Person alone and the door was locked. The Accused person and PW1 had earlier had altercation, the Accused person threatened her and the child. PW1 ran out to look for help as their lives were in danger.
87. The evidence of the 3 witnesses is corroborated by presentation of the knife recovered from the scene and produced in Court as Exhibit. There were was that on A knife with a blue handle was produced as the weapon and photographic evidence of the scene were produced as Exhibit 2.
88. There were also photographs taken of the scene produced as Exhibit 3 (a) (b) & (c) taken by Scenes of Crime. PW4 was recalled and he clarified that on the fateful day, he with other Police Officers arrived at the scene and one Esther Miu took the photographs at the scene, The Photographs showed the knife, blood splattered in the house and the deceased.

That the accused had malice aforethought.

Proof that said unlawful act or omission was committed with malice aforethought

89. Section 206 of the [Penal Code](#) sets out the circumstances which constitute malice aforethought as follows:

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

- a. An intention to caused death or to do grievous harm to any person whether such 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 such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.
- (c) An intention to commit a felony.
- d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.



90. On the issue of Malice, counsel placed his reliance on Section 206 of the Penal Code to support his point on malice aforethought and averred that the accused had malice aforethought because he had an intention to commit death to child, based on the differences he had with his wife (PW1). He had earlier on locked the door, was in a foul/bad mood and refused to eat dinner and chased after PW1 when she ran out.
91. On the accused identification, Counsel for the State placed reliance on direct evidence for identification by PW1, PW2, & PW6 who according to State Counsel identified the accused as the perpetrator of the heinous crime. PW1, PW2 and PW6 saw the Accused Person in the house with the child. Of special interest PW6 pleaded with the Accused Person as the child pleaded not to be harmed by the Accused Person.
92. The prosecution's case was that the accused was the deceased father and that there had been arguments between PW1 and the accused over a long period. PW 3 the care taker corroborated this fact testifying that they quarreled and fought severally before and he would intervene and even warn them. They also ran down the stairs and would disrupt other tenants.
93. PW1 testified that on the accused was in a bad mood and that he ordered her to wear a white dress, they proceeded to the bedroom where they made love , she noticed a knife on his waist which also pressed on her chest as they made love. Also that the knife was not removed that night and the next day when they were in the house.
94. The accused refused to open the door for the child to go to school and she woke up and did her chores, washed clothes at about 9:00am and he accused open the door to let her hung clothes on the clothes line .
95. She stated that she returned back and went to the bedroom when the accused came and held her .This is when she ran out and went to seek help from the police station. From her testimony , the child was left with the accused in the house ,she came back with Pw2 and pw6 and found that he had locked the door with a padlock.
96. I find the murder of the deceased premeditated, the evidence on record is that PW1 & the Accused person had a tumultuous relationship they quarreled and fought and PW1 would be locked as per evidence of PW3 the Caretaker of the building they lived in. This evidence corroborates PW1's version that the Accused person was upset previously and refused dinner and locked her and child inside till the next day when she managed to get out and seek help.
97. On coming with 2 men PW2 & PW6 the Accused person refused to open the door and as the child pleaded with him not to kill her as told by PW6, he strangled and stabbed her 5 times. The knife was presented as exhibit in Court and the Photographs taken on the same day depicting the knife, the scene and body of the deceased. Pictures do not lie.
98. The Accused person was seen committing the offence , by the time the witnesses were able to break the door, the murder had occurred and he also stabbed himself. The photographs depicted the scene shortly thereafter.The Accused was found on the floor and rushed to hospital.There was no evidence of a breaking to the house or any other person who was in the house.The Caretaker or neighbours did not see or hear of anyone else in the house in the house except the Accused person as he admitted in his sworn statement and was with the deceased. I am inclined to believe the evidence of PW6 who testified he saw the Accused person and the child and just before deceased's death, the child pleaded with the father not to kill her she would not tell her mother. That is a dying declaration as discussed in Philip Nzaka Watu Vs. Republic 2016 C.A. KECA and Section 33(a) Evidence Act. The child spoke to her killer the father.



99. The Accused person was the one found at the scene of murder with the weapon of murder and not being a stranger he had the knowledge and opportunity to commit the offence, murder the child. The motive was to avenge the mother whom they had disagreed and she ran away. If the murder was caused by either of the 2 men who came with PW1 as insinuated in the Accused person's Defense no questions were raised to the 2 men in cross examination when they testified to test that fact. The Accused person's defence considered against the evidence adduced by the Prosecution is a mere denial and an afterthought.
100. From the above evidence on record and the evidence this Court recorded under Section 200(3) & 201(2) CPC

- (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
- (4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

Section 201 (2) The provisions of section 200 of this Act shall apply mutatis mutandis to trials held in the High Court.

The court relied on the evidence on record of PW1, PW2, PW4 and PW5. This court heard PW6, PW7, PW8 and recalled PW4 Section 200 CPC was explained to the Accused Person 7/2/2022 and opted to proceed from where the matter stopped with the above the court relied on all evidence on record.

101. The discrepancies pointed out in the submissions are also noted. PW1 and pw2 claimed that she called pw2 and that they met at Gossip hotel where she told them of the ordeal and that the child was with the father who wanted to kill her. PW6 said that he was with PW2 at the Chief Camp that day when PW1 came at around ..crying for help .She also claimed that she could not get to the police station because of the urgency, pw1 said she went to the station but was not attended to causing her to seek help from the chief and community police officers .
102. The prosecution did not address these contradictions in the evidence of eye witnesses brought to prove the causation. The evidence on record does not cast doubt on the Prosecution case. Each witness was subjected to intense cross examination, of all inconsistency none controverted the Accused was in the house with the child and stabbed her 5 times.
103. Reliance is made in the case of Richard Munene –vs- Republic with regard to contradiction or inconsistency in the evidence of the prosecution witness and the Court stated that;

“.....Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”



104. The photographs were produced in proof of the bloody scene and how the deceased body was recovered.

Section 78 (1) of the [Evidence Act](#) provides that :-

Photographic evidence—admissibility of certificate

1. In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.

105. In the case of *Erick Indimuli Siaya vs. Republic* [2016] eKLR, the court held that :-

Our understanding of the above provision is that photographic evidence may be admissible in criminal cases on condition that the photographic prints or enlargement have been prepared by an officer appointed by the Director of Public Prosecutions (hitherto by the Attorney General). The officer shall then be required to prepare a certificate to the effect that he produced the prints and enlargements from the exact film or any other annex where they were exposed. The certificate shall accompany the photographs at the time of production.

In the instant case unfortunately, the production of the photographs by PW6 was not accompanied by a certificate prepared by him pursuant to Section 78(1) of the [Evidence Act](#). Furthermore, there was no evidence that PW6 was an appointed officer by the Director of Public Prosecutions specified under the said provision. In that respect, we hold that the photographs were not admissible in evidence and that it was an error on the part of the trial magistrate to admit them as evidence.

106. In *Republic –Vs- Jackson Ngara Nderitu* [2018] eKLR Matheka J also held the same position

I am of the view that section 78 lays the law on how photographic evidence will be admitted in evidence. The photos may be taken by gazetted officer or any other officer. The officer who took them is a competent witness who ought to testify as to their veracity and contents. However, in both cases the production of those photos must be accompanied by the scenes of crimes officer's certificate that he either took the photos or developed them from whichever source. In the absence of the scenes of crimes officer someone else could produce the certificate on their behalf but the court is at liberty to call him for cross examination if necessary.”

107. The trial court granted order that PW1 the complainant mother of the deceased was recalled to confirm exhibit knife and photographs. The court also recalled to confirm the issue of photographs. PW4, police officer from Mlolongo police station who was among the first officers to arrive at the scene stated that the photos were taken by Esther Miu and that the officers from scene of crime “were few and were in Nairobi.” The photographer did not lead evidence, she was also not appointed by the director of public prosecution under Section 78 above thus adding to the inadmissibility of the photographic evidence .

108. The court confirms that Section 78 of [Evidence Act](#) was not complied with and hence production of photographs was not in line with the law. They are expunged from the Court Record. Even without



evidence of the Photographs, the evidence on record by 8 witnesses discloses the offence of murder committed by the Accused person. PW1, PW2 & PW6 place the Accused person at the scene and they witnessed the commission of the crime.

109. Of importance is that PW6 whose evidence this Court took, Testifying that he heard child cry “Dad I love you do not kill me I will not tell mum”. Dad I love you Daddy usiniue Dad usiniue sitaambia Mum usiniue.
110. The accused must have motive or premeditated to commit the offence. The prosecution’s case is that the accused action was informed by the disagreements he had with PW1 who was the child’s biological mother while the accused was her step father .The accused testified that he had enough opportunity to kill the child when they had been left alone the previous night and the day time when they watched movie and it did not make sense for him to kill the child when they arrived . PW1, PW2 and PW6 stated that he stabbed her when they arrived at the scene and saw him through the window stabbing the deceased.
111. PW1 admitted that the accused had never beaten the child and that they had a good relationship .
112. PW1 testified how the accused had locked them that morning and that he did not let the child go to school . Also that the accused still had the knife and had even come to her at the bedroom before she fled.
113. That evidence was enough to prove that he had threatened PW1. PW1 also said that the child told her how there was a panga in the house and further that he told her that he would cut PW1. This was not recorded on the statement and the police did not investigate this or look for this panga .
114. I find that the accused had the criminal mind and intention to kill or cause grievous harm on PW1.

#### **The accused defence.**

115. The accused claimed that the disagreement between him and PW1 related to PW1 leaving the home on 31/1/2018 until 2/2/2018 and that he did not know her whereabouts. She came back with the 2 men (PW2 and PW6 ) further fueling the disagreement. That the two men stabbed the deceased and hid the evidence. That PW1 was a potential eye witness.
116. The witnesses were not cross examined on these issues making the defence an afterthought. PW2 and pw6 did not have any motive or reason to kill the child and the accused claimed to have fallen unconscious and he later found himself handcuffed at the hospital corroborating the prosecution case that he was removed from the scene in a bad state and had to be taken to hospital .
117. The accused defence did not cast doubt on PW1 evidence and he did not cross examine her on how she left the house for 2 days. The accused was said to have stabbed himself. He was taken to hospital and the doctor had 2 Reports but only produced 1 Report. The accused stated in his defence PW2 and PW6 could have stabbed the deceased. He was at the scene. What did he do to stop the same. He said he did not know what happened.
118. I find that the inconsistencies in the prosecution’s case do not go to the root of the offence as even without the evidence of the photographs that were not produced by Scenes of Crime were omitted , the evidence on record is direct evidence.

#### **Disposition**

119. The Accused person is found guilty as charged for the offence of murder contrary to Section 203 of the *Penal Code*.



**JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT MACHAKOS HIGH COURT  
VIRTUALLY /PHYSICALLY ON 19/5/2025**

**M.W.MUIGAI**

**JUDGE**

Ms. Kaburu ODPP – present online

Accused present in court

COURT – Judgment read over and explained to Accused Person

Bond/Bail is cancelled.

He is guilty as charged.

**M.W.MUIGAI**

**JUDGE**

