



**Republic v Kitsao (Criminal Case 45 of 2014)
[2025] KEHC 7302 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 45 OF 2014
WM KAGENDO., J
MAY 15, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

HAMISI KITSAO ACCUSED

JUDGMENT

1. Hamisi Kitsao Kombe is charged with an offence of murder contrary to Section 203 as read with Section 204 of the penal code Cap 63 of the Laws of Kenya.
2. He pleaded not guilty and the state called a total of 7 witnesses. It is however noted that PW 4 was a colleague to the doctor who filled the postmortem report. MR Lijodi, on behalf of the accused person, successfully objected to his appearance and consequently the maker of the report testified as PW 7.
3. PW 4 was the co-wife to PW 3. She also could not testify due to mental incapacity.

The Law

4. Section 203 of the *Penal Code* defines murder in the following terms:
'Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.' Thus, the central ingredients of the offence of murder are a) malice aforethought; b) an unlawful act or omission on the part of the accused'.
5. Section 206 defines malice aforethought in the following terms: -
"206, 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 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,"

6. In *Republic Vs Andrew Omwenga* (2009) EKL.R the court stated:

"It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- a. the death of the deceased and the cause of that death;
- b. that the accused committed the unlawful act which caused the death of the deceased and
- c. that the Accused had the malice aforethought."

7. The prosecution needed to prove: -

- i. The death was not disputed. Nevertheless, the Investigating Officer testified that the doctors confirmed the death before the body was placed in the mortuary. Subsequently, a postmortem was conducted on 24/10/2024 and it refers to a body preserved by refrigeration. He could not have been alive and in the fridge from 17/10/2024 to 24/10/2024.

The cause of death

- 8. PW 7 produced the post-mortem report. Externally he noted 2 cut wounds on the occipital region of the scalp. Internally, he noted large occipital fracture of the right skull – Extra Dural hematoma was present. The doctor opined that the cause of death was traumatic head injury.
- 9. We had one eye witness PW1 Draro Charo one of the wives to the deceased Charo Kombe who testified that she saw the accused person hit the deceased with a piece of wood firewood. The wood was produced in court as PEXT 1. She testified that the accused hit the deceased thrice. PW 1 testified that the deceased was with her co-wife but she could not testify.
- 10. The accused person raised the defence of insanity. He says he cannot recall the events of the fateful day.
- 11. Indeed, the accused person could not take plea for a period of 3 years. He was in and out of hospital with various reports confirming that he was unfit to take plea.
- 12. Even after taking plea he was in and out of hospital every now and then and that is why it took 10 years to hear just a few witnesses.



13. The mental capacity of the accused person has some bearing on the eventual outcome of this case. For a proper determination, the court will require an updated psychiatric report as well as a social inquiry report.
14. The final outcome to await these two reports.

SIGNED BY: HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.

MOMBASA HIGH COURT HIGH COURT CRIMINAL DATE: 2025-05-15 17:51:04

In the presence of:

Mr. Ngiri- for the State

Ms. Bebora- Court Assistant

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