



**Republic v Mathiwa (Criminal Case E022 of 2022)  
[2025] KEHC 7308 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7308 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE E022 OF 2022  
WM KAGENDO., J  
MAY 15, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**WAMBUA NGOVE MATHIWA ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused person was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap. 63 Laws of Kenya. The particulars of the offence as per the information dated 30th August 2022, being that on the 20th day of August 2022, at Malewa C Village, Lungalunga Sub-County, within Kwale County, murdered Richard Ngove Mathiwa. Prosecution's Case
2. PW 1 was Dorcas Ngove. She lives in Malewa C Village, Lungalunga. On the 8th of August 2022, at 9:00pm she was at home cooking for her children when she heard screams. The noise came from her brother's place. She heard the voice saying, 'Wambua *wacha kunipiga*' and Wambua responded '*Nitakuua leo.*'
3. She said that it was Ngove, the father of Wambua who told Wambua not to kill him. After that, everything went quiet, and Wambua left the house. He used the torch on his phone to look around. When he saw that there was no one, he went to his house which is closer to PW 1's house. She said that Wambua's father stayed alone in his house which was on the upper part of the land.
4. The following day at 6:00am, she woke up and went to tell her husband about the screams she had heard. He went to check on his brother, Wambua. Muli accompanied him. She joined them when the police arrived.



5. She heard the conversation between the accused and the deceased, and she saw Wambua leave the deceased's house. He used a torch to light his path.
6. In cross-examination, it came up that she did not go to the deceased's house on the material night and her husband was not at home as he had gone for prayers. When he came back, she told him what she had heard but he did not go check on his brother immediately.
7. She also said that the relationship between the accused and the deceased was good. They drank together. They would quarrel sometimes. She does not know the reason they were quarrelling, and she did not bother finding out.
8. PW 2 was Joel Nzioka. The deceased was his elder brother, and the accused is his nephew. On 21st August 2022, he was at home when his brother's wife, Dorcas came and reported that his brother Richard had been beaten by his son Wambua the previous night.
9. He went to his brother's house. He saw blood-stained clothes- MFI 1(a), (b) and (c). The clothes belonged to his brother. His brother's face and mouth were swollen, and he was groaning. The sheet that he used to also blood-stained.
10. He then went to call the deceased's son, Kenzi, who also stays at the same home. Kenzi had a visitor so he told PW 2 he would go to his house. He then accompanied PW 2 and his son Muli to the deceased's house. When they arrived, PW 2 called out but there was no response.
11. They were then told by Dorcas that it was Wambua who had beaten the deceased. They then went to Wambua's place. Wambua asked his children to place chairs for them behind the house. Before they could even sit, Wambua told them that he knew what had brought them. He knew that it was concerning his father. He told them that they had drunk together the night before and had fought.
12. They told him to see how his father was. He went. When he came back, he allowed them to leave. As his father's caretaker, he went to look for money to take his to hospital.
13. Another brother of the accused came to see his father and found him dead. He reported to the police. When the accused came back, his father had already died. The police came and arrested him.
14. The body was taken to Msambweni Sub- County hospital. PW 2 went and identified the body for post-mortem. He then went to Lungalunga Police Station and recorded his statement.
15. The deceased used to stay with one of his sons, but he was not present on the material day.
16. During cross-examination, he said that he was in his house on the material day. The houses are not far apart. The accused told him that he had gone drinking with the deceased during the day. He says that the accused beat the father because he took his alcohol.
17. PW 3 was John Kioko Muli. On 21st August 2022, at about 9:00am, he received a call from the son of the deceased. He asked him to go to his father's place. Before he could go, he received another call. On arrival, he found Mbiu, in the company of Kenzi, Ngove and Joel as well as Muli. They informed him that their father was beaten. They discussed the perpetrator, and he was told it was Wambua.
18. As the village elder, he took charge of looking for means to take the deceased to hospital. Before they found any, the deceased passed on. He made a call to Wambua to come back so that the father is taken to hospital. When he came back, they interrogated him on what had happened. He said that he was the one who had beaten his father, and he was ready to take him to hospital. They then apprehended him with ropes.



19. He then reported to the police who came and arrested Wambua. Members of the public took the deceased to Msambweni Sub-County Hospital. He then accompanied Joel and Kenzi as they went to identify the body for the post-mortem.
20. PW 4 was Muli Nzioka. On 21st August 2022, at around 6am, he went to his father's house. When he got there, he was informed that his uncle had been beaten. He accompanied his father and Kenzi to his uncle's house.
21. On arrival, they found blood-stained clothes. They entered the house and found his uncle injured. They asked him what had happened, but he did not talk. They tried to raise him from the bed, but he was in great pain.
22. They then went to Wambua's house. They sat behind his house. He told them that he knew what had brought them. He said that he was the one who beat his father. They asked him what actions he had taken. He said he planned to take him to hospital. He promised to come back and take his father to hospital.
23. They then reported the matter to the village chairman. When he came, he reported to the Chief as they waited for Wambua. When Wambua came, many people surrounded him, and he was apprehended with ropes.
24. Police came to the scene. They collected the body and arrested Wambua.
25. During cross-examination, he said that the relationship between Wambua and the deceased was very good, and they would drink together.
26. PW 5 was Dr. Samuel Mungai. He works at Msambweni Sub-County Hospital as a Medical Officer. He conducted the post-mortem examination. The deceased was identified as Richard Ngove by Joel Nzioka. P.C Richard Bore accompanied the witnesses who identified the body.
27. The deceased was clothed in a trouser and t-shirt that were blood-stained. He was an African male aged 78 years, height 155cm and well-nourished. His pupils were dilated, fixed and cornea reflexes were absent. His body was stiff on all joints and cold indicating that death had occurred some time back. There was a 3\*4cm swelling on the right of the scalp. There were no bruises observed. He also fractured his cervical vertebrae.
28. PW 6 was Mbiu Richard Ngove. The accused is his brother. He said that on his way to the farm, he decided to pass by Wambua's house to greet them. When he got there, Wambua's wife welcomed him. There were people talking behind the house. Wambua emerged from his father's house looking worried. Wambua took him aside and told him that he had beaten his father the night before when drunk and he would like to take him to hospital.
29. He said that Wambua then left to his place of employment to get some money so that he could take his father to hospital. The people speaking behind the house then came in and explained the situation to him again. They then went to check on his father. They found him already dead. They informed the village chairman. He came and apprehended Wambua and called the police.
30. PW 8 was P.C Ibrahim Mosabi attached to DCI Kwale County. On 31st August 2022, he reviewed photographs from P.C Bore from Lungalunga. The offence indicated was murder.
31. PW 9 was CPL Richard Bore, No. 8-433 from DCI Lungalunga. He was the Investigating Officer. On 21st August 2022, he was in the office at Lungalunga when Mr. Tuai, the DCIO called him and told him of a death in Malewa C Village. He got some colleagues, and they went to the village.



32. He found that the deceased, Richard Ngove. On the ground, there were a group of people who had arrested the accused person. They were told that the accused and the deceased had fought the night before.
33. They then went to the deceased's house where they found him lying across the bed. He had visible injuries. His head was swollen. They attended to the scene by collecting the body and arrested the suspect. They also collected some bloodstained shirts. Some photographs were taken at the crime scene- they were produced as P. Exh 3.
34. They took the body to Msambweni Sub-County Hospital where the post-mortem was done. He was present for the post-mortem. A report was prepared, and it has been presented as P. Exh 1.

### **Defence Case**

35. The accused person- Wambua Ngove Mathiwa, testified as DW 1. He gave sworn evidence. He told the court that he was a peasant farmer, and he also sold alcohol. He knew the deceased as the deceased was his father.
36. On the 20th day of August 2022, he had woken up early in the morning and taken breakfast. He fed his cows up to 9am then went to the shamba up to 11am. He went back home between 11.30am to 12.
37. Upon his arrival, his father inquired whether the alcohol was ready. He told his father that it was not despite it being ready. This is because the regulations state that he can only operate after noon. They then walked to the club together and his father helped him carry the empty bottles that were to be used to drink.
38. As the club customers started coming in, he took a 500ml bottle of muratina and gave one to his father. Other customers also bought his father alcohol since he was an old man. They drank together until 8:00pm, when the stock ran out and customers started leaving.
39. As they were preparing to leave, it started raining. The accused asked his father if they could leave, and his father responded that they could not leave other men drinking. The accused tried telling him that the alcohol was over, and it was about to rain. He even promised to buy him some alcohol and take it to him. He refused. The accused then tried tricking him with a bottle that had water and telling him that it was alcohol that he had saved for himself. This worked.
40. They then walked home together. The accused poured the contents of the bottle because he knew it was dirty water. When they got home, his father demanded his alcohol. The accused told his father that it had poured as they walked home. His father then turned violent on him and grabbed him by the neck of his t-shirt. He tried telling his father that he would get more alcohol, but his father would not reason.
41. When his father released him, he fell against the wall. The accused tried to get his father into the house because he knew that his father would sleep as he was drunk. His father fell against the wall again and got up and sat on the bed.
42. Since it was a one-roomed house, he left his father's house and went to his own house which is just 80-100 meters away and slept.
43. On 21st of August 2022, the accused woke up. His uncle and brother had gone to his house and found him taking tea. He welcomed them and gave him tea. This was around 8am. He then told them to move behind the house where there was some shade. He planned to tell them what his father had done the previous night.



44. When they were seated outside, he asked his uncle and brother why they did not help him when his father attacked him. They said that they did not hear. They told him that they had passed by his house and that his condition was not good. He told them that he would see him.
45. He saw his father and confirmed that his condition was not good. He had a head injury and a few other bruises. The accused told his brother and uncle to change his father's clothes as he went to get a tuktuk. He got the money then went to get a tuktuk.
46. He told the tuktuk driver to go round to his home as he used another tuktuk. Along the way, his brother called him to tell him to hurry up as his father's condition was deteriorating. He told his brother that he was on the way. He arrived in less than 5 minutes.
47. The accused found that many people had gathered at the home. Unfortunately, he found that his father had passed on.
48. The accused has heard the evidence of Dorcas Nduku Muli who said she heard him comment saying she would kill him. He does not recall saying that. He had not fought with his father before. He also did not understand the doctor's evidence as it was given in English.
49. He also heard the evidence of PW 3- John Muli who said that the deceased was strangled. The accused does not recall strangling him as he was drunk and did not remember majority of the events. All he remembers is his father grabbing his throat and he pushed him off.
50. During cross-examination, the accused said that he lived with his father. His mother passed on in 2014 and he was the one who looked after him. They did not quarrel over how he looked after his father.
51. When he saw the, he knew they were following upon the noise from the previous day. He agrees that PW 1 had heard the noise on 20th August 2022.
52. There was no re-examination, and the defence closed its case. No submissions were to be filed as they would rely on the evidence.

### **Analysis and Consideration**

53. Considering the testimonies of both the prosecution and defence it was now upon this Honourable Court to determine whether or not the offence of Murder had been proved beyond reasonable doubt.
54. Article 26 of *the Constitution* of Kenya provides that a person shall not be deprived of life intentionally, except to the extent authorized by *the Constitution* or written law. The accused person herein faces the charge of murder contrary to section 203 as read together with 204 of the *Penal Code*. It is upon the prosecution to prove beyond reasonable doubt, that the accused murdered the deceased. Section 203 of the *Penal Code* provides the elements of the offence as follows: -
  - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
55. In the case of *Republic v W.O.O. [2020] eKLR* (Migori High Court Criminal Appeal No. 26 of 2017) the elements of murder were explained, as guided by the Court of Appeal in the case of *Anthony Ndegwa Ngari v Republic [2014] eKLR*, as follows:

“For the offence of murder to be proved, there are three elements 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.”

56. The fact of the deceased’s death is not in contention. Dr. Samuel (PW5) conducted a postmortem on the deceased’s body and concluded that the deceased had succumbed to severe injury due to a blunt force trauma to the head.
57. It is common for legal practitioners to attack and deride circumstantial evidence in criminal cases, almost suggesting that it has little probative value or at the best, rate such evidence as weaker, in comparison to direct evidence.
58. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal had this to say on this point: -

“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.”

59. The Court of Appeal in proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated: - “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 Accused 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 Accused; 9iii) 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.

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.

60. In *Dhalay Singh v Republic*, Cr. App. No. 10 of 1997, this court reiterated this principle as follows: -

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”



61. In *Sawe v Republic* [2003] eKLR the court reiterated the above stated conditions and added that the prosecution must also establish that there are no other coexisting circumstances, which could Weaken or destroy the inference of guilt.
62. In this case, there is no question as to whether the accused and his father fought and whether it is this fight that led to the death. What is in question is whether the accused meant to kill his father- the mens rea.
63. Majority of the witnesses have testified that the accused and the deceased, his father, enjoyed a good relationship and had no bad blood. They accused also states that they fought that night. He did not intend to kill him.
64. Therefore, there is no malice aforethought, and the accused cannot be found guilty of murder.

### **Conclusion**

65. The accused person is found guilty of the offence of manslaughter contrary to Section 202 of the [\*Penal Code\*](#).
66. A pre-sentence report be filed.  
Mention on the 10/6/2025.

**SIGNED BY: HON. LADY JUSTICE WENDY MICHENI**

**THE JUDICIARY OF KENYA.**

**The Judiciary of Kenya**

