



**Republic v Munyao (Criminal Case 33 of 2018)
[2025] KEHC 9322 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 33 OF 2018**

**MW MUIGAI, J
JUNE 20, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

CHARLES MUTUKU MUNYAO ACCUSED

JUDGMENT

1. The accused herein Charles Mutuku Munyao was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars of the offence being that the accused on the night of 30th and 31st August, 2018 at Ngalalya Market in Matungulu Sub- County within Machakos County, jointly with others not before court murdered David Rukungu Kimani.
3. The Mental Assessment from Mathari National Teaching and Referral Hospital dated 7th February, 2019 and filed in Court on 8th February, 2019 found the accused person Fit To Stand Trial.
4. The Accused person herein took plea on 26/03/2019 whereof after the charges were read out to him in a language that he understood he pleaded Not Guilty. A plea of Not Guilty was entered.

Hearing

The hearing commenced before Trial Judge Hon D.K.Kemei J

5. PW1 Onesmus Kimeu - He testified that since 2016, he used to work with the deceased. In 2017, he was herding livestock at the farm, when the cows strayed on to the neighbour's farm belonging to Musembi. Musembi detained the cows, and demanded for compensation amounting to Kshs. 2,000/- which was paid. He testified that on the 30th August, 2018 he was asleep in his house when Wamboia came and informed him that the deceased had been assaulted at Ngalalya market. They proceeded to the place, and ascertained that indeed the deceased was lying down near the roadside. The deceased



had his dreadlocks pulled off his head and were lying on the ground. He had no visible injuries but he could not talk. The motor bike was by his side They rushed him to Matuu Hospital and were referred to Kangundo District Hospital. He did not know the Accused person in Court.

6. PW2 Jeniffer Wanjiru Kimani - She testified that the deceased was her younger brother, who used to work at her farm in Koma rock. She recalls in August 2018, that she received a report from a neighbour that the deceased had been assaulted and was in Kangundo District Hospital. She proceeded to Kangundo District Hospital and on arrival she was informed that the deceased had passed on. On 1 September, 2018 she identified and witnessed the post mortem on the deceased.
7. PW3 Virginia Nyathira Nyokabi - She testified that the deceased was her husband. They used to reside in Koma rock in Matungulu. In 2018, cows strayed to their neighbour's farm. The cows were detained and a sum of Kshs. 5,000/- was demanded. A sum of Kshs. 1,200/- was paid and later the cows released.
8. On June 2018 at around 9 pm. a neighbour named Wambua called my husband, and requested him to pick him up using a motor cycle. She had misgivings but the deceased decided to walk to the Ngalalya Market. The following day she found her husband having injuries on the wrist as a result of being assaulted in a pub. The husband claimed that the attacker was Mbusi whom she did not know.
9. On 30th August, 2018 she was in Ongata Rongai visiting her parents, when her sister In-Law reported that the deceased had been assaulted and was in hospital. They proceeded to Kangundo District Hospital and discovered that the deceased had passed on.
10. PW4 Joseph Wambua Nzau He testified that on the 30th August, 2018 at 9pm. he was at Ngalalya market with the deceased. The deceased invited him for a drink at a nearby pub. In the pub, six people surrounded the deceased and pushed us out. We were assaulted outside and he managed to escape. The assailants wrenched the deceased's hair and assaulted him. He managed to report to Paul who was joined by his wife and they rushed back to the scene. He found the deceased lying down on the ground. The deceased was rushed to hospital. He did not know Charles Mutuku Munyao the Accused person herein. He did not see him on the material day. He had not seen him in the past arguing with the deceased over anything.
11. PW5 Benard Mutune - He testified that on the 30th August, 2018 he was on night patrol with his colleague within Ngalalya market. Nthenge spotted a certain motor cycle had fallen outside Kamanzi's bar. He saw a person on the ground surrounded by a large crowd. The person appeared unconscious. He rushed to report to the market master about the incident who alerted the Chief to brief the Police. On coming back, he met 3 people who assisted to take the deceased to the hospital.
12. PW6 Dr. Katua Daniel - He testified on behalf of Dr. Munene who was a colleague at Kangundo Level 4 Hospital. The body had multiple bruises on the right lower leg (sheen) and upper check. There was massive subdural hematoma, fractures on temporal bone (skull) measuring 9 cm, left frontal parental temporal occipital subdural hematoma. The skull was opened and blood was found. He formed an opinion that the cause of death was massive left subdural hematoma secondary to blunt trauma secondary to assault. The Post mortem report was produced as Exhibit.
13. This Court took over the criminal proceedings on 6/10/2021. The proceedings were typed and copies availed to ODPP and the Defense. On 15/12/2021, Section 200-201 CPC was read to the Accused person in Kiswahili by the Court Clerk on the legal options to proceed with the matter. The Accused person opted to proceed from where the proceedings reached.
14. PW7 Josphat Nthenge Mutii - He testified that on 30th August, 2018 he was on night patrol together with PW5 within Ngalalya Market. He spotted a motor cycle had fallen outside Kamanzi's bar. He saw a body of a person lying unconscious on the ground. He went to report to his colleague (PW5), who



informed the market master. The body of the deceased was taken to hospital. He did not witness the incident, he was not there when the fight or incident occurred. He did not know the deceased he found him on the ground. He did not witness or see anything. The next day, he heard a woman who said that Muoki Munyao and Sila beat up the deceased but he did not see/witness the incident.

15. PW8 CPL Peter Orwa - from DCIO Matungulu. He testified that he was the Investigating Officer in this case. On 30th August, 2015 the deceased in the company of PW4 met in Ngalalya Market to have a drink. They proceeded to Kamanzi's bar to enjoy themselves. At the bar, they were surrounded by Sila, Mbisi, Mutuku (accused), who took hold of the deceased and Wambua and pull them out of the bar and seriously assaulted the deceased, to the point they wrenched off his dreadlocks. Pw4 managed to escape and sought for help. He stated in the course of his investigations he established the motive for Sila, Mbisi and Mutuku (accused) to assault the deceased was that the deceased had assaulted the accused person's brother (Mbisi) with an axe, and so this was a revenge attack that resulted in the demise of the deceased. The accused was arrested 2 months later in Kariobangi area where he lived with his sister.
16. The Court delivered Ruling on 6/6/2022 on a case to answer. The accused person was subsequently placed on his defense and he elected to give a sworn statement and did not call any witnesses.

Defence's Case

17. The accused testified that the deceased was known to him as Rasta and he worked within his home area, about 2 Km from where he lived. He states that on 30th August 2018 he went off to work at a construction site within Komarock within Matungulu. Later in the day, he went to Kwa Kioko bar where he took a drink and left for his home at about 7 pm. He states that when at home, his brother Thomas Mbisi came to his house to collect a debt he owed him and since he had no cash on him, he handed his phone to him and asked him to withdraw the money and thereafter to take his phone to the charging place, and he remained at home.
18. He further states that he picked up his phone from the charging place the following day and the same was in his possession at the time of his arrest. He confirmed that in July 2018 the deceased attacked his brother Mbisi and cut him with a small axe while at Kwa Kioko bar and that his brother had to flee the scene to save his life.
19. He further stated that they took their brother to hospital for treatment but they did not pursue the matter with the police since they did not have money to process the P3 Form.
20. The Prosecution ODPP & Defense Counsel filed Written Submissions and mainly summarized the evidence adduced during Court Proceedings.

Analysis & Determination

21. The Court considered the evidence on record by Prosecution and Defense and written Submissions by respective Counsel and the issue for determination is whether the Accused person committed the offence of murder to the deceased.

Reliance On Evidence By Previous Court

22. In the case of Joseph Kamau Gichuki v. R CR. Appeal No. 523 of 2010, cited in Nyabutu & Another v. R, (2009) KLR 409, where the Court stressed that;

By dint of section 200(1) (b) of the *Criminal Procedure Code* a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid



is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See *Ndegwa v. R.* (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded.”

23. In this case the Trial court heard and recorded evidence of PW1PW2 PW3 PW4 PW5 PW6 and this Court took over proceedings after exercise of Section 200 & 201 CPC where the Accused person after the Defense was availed typed proceedings opted to proceed from where the matter stopped. This Court saw witnesses heard evidence of PW7 & PW8.
24. Upon evaluation of the evidence on record this Court found the Accused person with a case to answer and he gave sworn statement. From the above chronology of events, I find it reasonable and logical to rely on the evidence on record due to Public policy, Fair Trial and expeditious disposal of the case.

Burden & Standard Of Proof

25. The standard of proof is proof beyond reasonable doubt. According to Lord Denning on what is proof beyond reasonable doubt in *Miller vs. Ministry of Pensions*, [1947] 2 ALL ER 372 stated that:-

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

26. The accused person is faced with the charge of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
27. In *Roba Galma Wario vs. Republic* [2015] eKLR The Court held that:

For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional...”
28. In *Republic v Andrew Muecha Omwenga*, 2009 eKLR Maraga J (as he then was) considered the provisions of section 203 of the [Penal Code](#) and expressed himself as follows with respect to what the prosecution must prove to establish the offence of murder:



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. The ingredients 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.”

29. The ingredients of murder are provided in Section 203 of the *Penal Code* it is the duty of the Prosecution to lead evidence to prove the above ingredients beyond reasonable doubt under Section 107 & 109 of the *Evidence Act*. See Republic vs DWK [2020] eKLR Bungoma HCT

30. The 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...”

The fact of the death of the deceased.

31. Dr. Katua Daniel - He testified on behalf of Dr. Munene who was a colleague at Kangundo Level 4 Hospital. The body had multiple bruises on the right lower leg (sheen) and upper check. There was massive subdural hematoma, fractures on temporal bone (skull) measuring 9 cm, left frontal parental temporal occipital subdural hematoma. The skull was opened and blood was found. He formed an opinion that the cause of death was massive left subdural hematoma secondary to blunt trauma secondary to assault. The Post mortem report was produced as Exhibit.

32. That the accused committed the unlawful act which caused the death of the deceased

33. There is no evidence to connect the Accused person to the offence charged; PW1 did not know the Accused person and did not witness the incident, murder of the deceased.

34. PW2, sister to the deceased received bad news of her late brother’s demise and identified his body for post mortem examination.

35. PW3 was deceased’s wife who received news of her late husband’s attack. The deceased told her he was attacked by one Mbussi whom she did not know. He did not report the matter to the Police. On 30/8/2018 the deceased was attacked again and was admitted in hospital Kangundo Hospital and found he died. She did not know the Accused person saw him the 1st time in Court. She heard of his name after her husband died, her late husband mentioned one Mbisi who is a friend to the Kamezani neighbour. In cross examination it was not clear whether Kamezani the neighbour whose crops were destroyed by Deceased’s sister’s animals that had crossed over was father to Paul Kimeu or not. She stated her late husband told her he was attacked by 3 people and maintained Sila and Mbisi must have been together.

36. PW4 Joseph Wambua Nzau, on 30/8/2018, he left with the deceased to Nglalia to purchase groceries, the deceased invited him for a drink, Senator Keg beer, he saw several people in the Bar owned by Kamanza. As the deceased went to pay the bill and get him another drink, 6 people surrounded the deceased and pushed him outside and he was also thrown out. They started kicking them, he managed to escape he did not know why they were assaulted, They, wrenched deceased’s ‘rasta’ hair and assaulted



- him. He, reported to Paul who went with his wife to the scene. They found deceased on the ground his mobile phone and money were missing. The Deceased was rushed to Kangundo Hospital. He did not know Charles Mutuku Munyao but he knew the Accused person as he lived in the area. He did not see him on the material date. He had not seen him in the past arguing with deceased over anything.
37. PW5 watchman came to the scene after the incident found a certain motor cycle belonging to Kamanzi and the rider was lying on the ground surrounded by many people and he appeared unconscious. He rushed to report to Market master and he came back and found 3 people assisting to take the injured man to hospital he helped them. He said the Accused person Mutuku is his neighbour, he was not among the crowd found at the acene.
38. PW7 who worked as watchman with PW5 was not there when the incident took place.
39. The Evidence of Investigation Officer PW8 Peter Orwa/Oloo stated that from his investigations, on 30/31/8/2018 the Accused person and the deceased met at Kwa Komanza Bar. One of Accused person's friends Sila called him and said the deceased was in the Bar. When the deceased was leaving, the Accused person accosted him, Mbisi and Sila and Wambua and deceased were beaten, Wambua managed to escape. After, deceased was injured and taken to hospital, he later died. PW8 attended the Post Mortem. The search for Sila, Mbisi & Mutuku was on and Good Samaritans after 2 months traced the Accused person at Kariobangi South at his sister's home. In cross examination the Investigation Officer said that in 2017 there was a scuffle Mbisi, Mutuku's brother was cut. When they saw the Deceased they pursued him.
40. I have outlined verbatim the evidence on record as given to the former Trial Court and partly in this Court deliberately so as to analyze the following; whether from the above Evidence the Prosecution has discharged the burden and standard of proof or the murder charge.
41. As Odunga J. (as he then was) in Republic vs. Martin Kiio Ngei [2019] eKLR 52 stated that:
- Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eye witness, asserts actual knowledge of a fact, that witness' testimony is direct evidence.”
42. From the chronology of events outlined above, there is no witness who testified and gave direct evidence on what they saw, did, heard, touched or smelt at the scene on the fateful day to confirm that the Accused person Charles Mutuku Munyao was at the scene, was one of the 6 men who accosted the deceased and was recognized or identified, a weapon was recovered from the scene related to the infliction of injury or evidence connecting the Accused person to the crime incident / murder. Innuendoes have been floated by the investigations conducted by the Investigation Officer. Unfortunately, the law requires a witness takes the stand tenders evidence and the witness is evaluated on credibility and demeanor and his/her evidence on its veracity is also brought into consideration. As at now, even the deceased's widow said deceased referred to Mbisi as one of his assailants and not Charles Munyao Mutuku the Accused person.

Disposition

43. In the absence of any direct or circumstantial evidence to place the Accused person at the scene of crime or prove any connection to the commission of the crime through tangible and cogent evidence adduced, this Court shall halt at this stage and grant the Accused person the benefit of doubt and he is acquitted of the charge of murder under Section 215 CPC.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT VIRTUALLY ON 20/6/2025.



M.W.MUIGAI
JUDGE

