



**Republic v Mutinda (Criminal Case 26 of 2017)
[2025] KEHC 9348 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 26 OF 2017**

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

BETWEEN

REPUBLIC PROSECUTION

AND

JOHN KYALO MUTINDA ACCUSED

JUDGMENT

1. The accused herein John Kyalo Mutiawas charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars being that the accused on 2nd December, 2017 at Wamunyu Trading Centre, Wamunyu Location, Mwala Sub-County within Machakos County murdered Mirriam Mwikali Musau.
2. The Mental Assessment Report dated 16th January, 2018 was filed in Court on 18th January, 2018 and found the accused person Fit to Plead. The Accused person herein took plea on 5/02/2018 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 on his behalf by the Court.
3. The Accused person was represented by Mr. Kituku Advocate while the State was represented by Mr. Machogu and later Mr. Mwongera. The court gave Pre-Trial Directions that ODPP serves the Defense with Witness Statements Post Mortem Report & Exhibit Memo Form.
4. The hearing took off before Hon D.K.Kemei J and the prosecution called a total of Nine (9) witnesses in support of its case.
5. PW.1 Amos Kyalo Musau, told the Court that the deceased herein was his sister. That on 7th December, 2012 he was at Machakos Level Five Hospital where he identified the deceased's body for the purposes of post mortem examination.



6. PW. 2 Brian Mwendwa Mwikali, aged 11 years old after the Trial Court conducted voir dire examination and determined that PW2, the minor gave unsworn statement. PW2 told the Court that the deceased herein was his mother. They used to live in a rented place at Wamunyu Market. He used to see the Accused person within the place where they had rented. That the deceased was a fruit's vendor at Wamunyu Market. The Accused person was not his friend nor friend to his mother.
7. That on 30th November, 2017 the deceased arrived home with a chicken. They had another chicken in the house and the two chicken started cockfighting. His mother asked him why he allowed the chicken to fight. The Accused person who was also present and he mistook that to mean he was the one being addressed and confronted the deceased why she was insulting him. Later on, the Accused sent the deceased a message complaining of being disparaged. His mother put the fruits back in the store and they went home. They went to a nearby hotel had dinner and went home.
8. On 2nd December, 2017 PW2 and his mother (the deceased) were removing fruits for sale. The accused person herein pretended to be placing clothes on the clothes line. The accused held the deceased and stabbed her with a knife on the chest and removed the knife and the deceased fell down screaming. His Aunt Kamanthe was present and she witnessed the incident She ran and called Mama Senya for help. The Accused placed the Knife on his chest and pressed it against the wall. People came including Mama Katoli who called the landlord. The landlord came and took his mother to the Police Station. He briefed the Police what happened. Police Officer called a Pastor who prayed for him and took him back to the Plot. The next day his Aunt came and took him to Mbooni. His mother later died from the injuries. The Accused sustained injuries but later he survived. He said he did not know if there were differences with her mother and the Accused person except that remarks by his mother about chicken fighting which was to him and not the Accused person. He forgot the knife.
9. In cross examination he stated he accompanied the landlord to the Police Station. He did not write anything, He recorded the statement the Landlord was explaining and he did not sign the statement and it was not read back to him. He stated that he did not know the Accused person but saw him in the Plot that he resided West gate Plot. His mother sold fruits and vegetables and she used a knife to cut cabbages. On 2/12/2017
10. PW3 Margaret Mumbua told the Court that the deceased herein was her niece. On 2/12/2017 at 11 am she had gone to Wamunyu Market to visit the deceased. They spent the day together; the deceased made chicken and they had a chat. They went to her farm and then to the other farm. On the way, the deceased informed her that there was a certain young man who was threatening her. They arrived back at the Trading Centre and stayed upto at around 6 p.m. They left to deceased's home whereby the accused person approached them and she saw the Accused person she pointed at him in Court who approached them while keeping his hands behind. He suddenly got hold of the deceased and stabbed her in the chest with a knife, it was a kitchen knife then he removed the knife and threw it away. PW3 raised alarm which attracted members of the public. The Police Officers later took her body away. She left the scene. She did not know if the deceased had a disagreement with the Accused person.
11. In cross examination, PW3 stated she recorded a Statement, the incident occurred on 4/12/2017, she saw the Accused but did not know him before, it was a brief duration of the incident, she raised alarm. Her statement did not describe the assailant for identification parade to be held. The deceased sold vegetables and used a knife, on the day she was behind her. She reiterated she witnessed the incident; she saw the Accused person removed the knife and stabbed the deceased. The Accused used the knife on his stomach by pressing the knife against the wall. Earlier, the deceased informed her that a young man had threatened her life. The deceased did not tell her she was cohabiting with the young man. It was not true that she was going to team up with the deceased in confronting the Accused.



12. The ODPP applied to recall 3 witnesses to identify the exhibit the knife, the Defense Counsel objected as Accused person would be prejudiced, he was in custody and the case was prolonged. The Trial Court allowed the application on the basis the Government Analyst previously testified in Court they had a backlog of exhibits to examine hence the delay.
13. PW4 Ruth Wangare Kahi a Government Analyst told the Court that she carried out DNA analysis on Exhibits Memo Form originating from Masii Police station in respect of a Police Memo dated 18/01/2018. The following items being
 - (i) A1 silver knife with a blue handle in a khaki envelop,
 - (ii) A2 blood sample for John Mutungi (accused) and
 - (iii) A3 blood sample for Mirriam Wakoli (deceased) were to be examined to establish any biological evidential material.
14. After analysis it was established that the knife (A1) was heavily stained with human blood. Blood samples generated from A1 matched with A3. The Government Analyst Report of 30/9/2019 was produced as Exhibit 2 in Court.
15. In cross examination PW4 confirmed blood stains on the knife were of the deceased (Item A1) only and not the Accused person (Item A2)
16. PW5 Dr. Waithera Githendu a Consultant Human Pathologist at Machakos Level Five Hospital told the Court that she performed post mortem on the body of the deceased herein upon identification by relatives. On examination it was found that the body was partially decomposed. There was a cut wound on the right forearm. There was stab wound on the chest and which pierced through and injured the heart. She had severe internal bleeding. PW5 formed the opinion that the cause of death was severe bleeding (haemorrhage) secondary to penetrating stab wound injury. Blood sample was collected for DNA.
17. PW3 Margaret Mumbua was recalled and she identified the knife in Court – 1 Kitchen knife with blue handle.

PW6 Cpl. Zimo Awadhi attached to Athi River Police Station previously stationed at Masii Police Station. On 2/12/2017 he was the duty officer at the said police station when the OCS instructed him to rush to Wamunyu to check on a murder scene. On arrival he found a large crowd of people. It was in a rental premises with many tenants. He saw two persons a man and a woman lying on the ground. The woman was lying down facing upwards. She was bleeding from her chest and she was already dead. The man was also bleeding from the chest but he was still alive. There was a kitchen knife next to the man. The body of the deceased was taken away while the accused was taken to hospital. He took photographs of the 2 people and he identified the kitchen knife.
18. Counsel for the Accused person objected to production of photographs as they were not served / notified or shown earlier. The Trial upheld objection stood down witness to be recalled once defense had seen photos.
19. PW6 continued that they took the body of deceased in one car and the Accused person in another vehicle. The injured man was John Kyalo Mutinda and deceased he learnt was Mirriam Mwikali.
20. PW.7 PC Alfred Kifyaso Rupia Police Officer based at Masii Police Station told the Court that on 2/12/2017 he was directed by the OCS to accompany him to a murder scene. On arrival at the scene, they found the body of the deceased. The accused person herein was unconscious. A son of the deceased (Pw2) told them that the accused person and the deceased had earlier disagreed over some chicken.



Photographs were taken. The accused person was rushed to Machakos Level Five Hospital where he was admitted while under police guard. It was established that the Accused had stabbed the deceased with a knife and later turned the knife on himself. The body was escorted to the mortuary.

21. On 6/12/2017, the accused person was discharged from hospital and escorted to Masii Health Centre where Blood samples were taken and those that had been taken from the deceased to the Government Chemist for analysis. PW6 identified the knife in Court and identified the Accused person from online proceedings as one who taken to hospital after he was arrested at the scene.
22. In cross examination PW6 stated he did not witness the altercation; the knife was not with the Accused but near the toilet. He took the blood samples of Accused and deceased and the knife for analysis, he could not tell the Government Analyst's report, he established the Accused used the same weapon to injure himself.

This Court

23. On 21/10/2021, this Court took over the matter and sought from the Accused person in Court what option he preferred under Section 200-201 CPC after Court proceedings were typed and availed to parties/Counsel. On 14/12/2021, the Advocate holding brief for Accused's Advocate confirmed the Accused person was to proceed from where the matter stopped.
24. PW8 Dr. John Mutunga, a doctor at Machakos Level Five Hospital testified he examined the accused person John Kyalo Mutinda herein and filled a P.3 Form. The Accused had a history of stabbing himself in the stomach on the 2nd December, 2017. The Accused sustained penetrating abdominal injury, he was operated on and taken to the Ward and he healed. The weapon was sharp as per history availed. At the time of filling the P3 Form the approximate age of injury was one month and three weeks. The incident was reported on 2/12/2017 and he filled P3Form on 25/1/2018. He produced P3 Form as Exhibit 5.
25. In cross examination PW8 said the Accused person was brought by Police who said he stabbed himself. PW8 did not treat the Accused when he came to Emergency but afterwards and he filled the P3Form.
26. PW9 Inspector Ndunda Maurice Scene of Crime Officer, testified that he received four coloured photographic prints from PC Alfred Kifasyo (PW7) of DCIO Masii for investigation. The photographs were taken at the scene at closer view of the crime scene. Photograph 1- the deceased lying on the floor; Photograph 3-closer view of the deceased on the ground; Photograph 4- closer view of kitchen knife and Photograph 5 all produced as Exhibit 7 & 8. He produced the Certificate he prepared.
27. In cross examination he received photographs from PW7 PC Alfred Kifasyo; there was photograph of the Accused person at the site of the injury and there is blood all over his body on the ground and no knife near him.
28. PW6 Cpl. Zimo Awadhi was recalled for cross-examination on line after he testified on 28/1/2020 before Hon.D.K.Kemei J. He found the Accused and deceased were bleeding and were injured and by looking he could not tell who did what but the knife was found next to the Accused person. He admitted that he took photographs. He took a photo with the accused person and the knife but he did not know such a photo was not seen in court. He left the matter with the Government analyst. He did not know the deceased sold vegetables and therefore had knife. It was a kitchen knife not from 'marikiti'.
29. The Prosecution closed its case on 27/07/2022. The Court directed the parties to file and serve their written submissions an order which the parties complied with. The Court delivered Ruling on case to answer on 16/2/2023.



Accused Person Defense

30. On 17/10/2024 the Accused person John Kyalo Mutinda gave Sworn Statement as his Defense and stated as follows; He stated he was a fundi. He admitted that he killed Miriam Mwikali Musau the deceased who was his lover/girlfriend and they lived together for 1 year and 8 months on 2/12/2017.
31. In 2016, they lived in Wamunyu where he had 3 rooms, 1 PW2 Brian slept there, the other he and the Deceased slept there and there was 1 store and kitchen. He did not know Margaret Mumbua PW3
32. On 30/11/2017, the Accused and deceased quarreled over finances. He built a kibanda where the deceased used as vegetable shop he had sold chips before and he left to be a mason. The Kibanda was not making money they quarrelled and parted ways. She took her clothes to her son's house.
33. On 2/12/2017, he fetched water showered and deceased was washing clothes and PW3 Margaret Mumbua 'Is this the one?' Miriam said yes, he did not know Margaret she begun to quarrel him and He said that he was not interested in the affair. They told him to leave Wamunyu he refused. Miriam Deceased and Margaret PW3 pushed him to the wall, the deceased brought the knife and stabbed him. They rolled and he saw took the knife and stabbed the deceased in self defense before she stabbed him again.
34. Brian Mwendwa lied to Court he lived with them PW2 was not there only PW3 was there. He did not intend to kill the deceased it was in self defense. He was admitted in hospital 7-8 days.
35. In cross examination, he said he saw the knife in Court had the blood of deceased and not his blood. They quarrelled before the day of the incident. The deceased stabbed him first and he stabbed her in anger and he did not know where he stabbed her Margaret was there neighbours also lived there. The Kibanda was his business and he gave Miriam and it was not hers at all.

Analysis & Determination

36. This court considered the evidence on record the documents produced written submissions by respective Counsel and finds the matter in question for determination is whether the Accused person committed the offence of murder on the deceased or not.

Abdi Adan Mohamed V Republic [2017] Keca 517 (klr) Criminal Appeal No. 1 Of 2017 Makhandia, Ouko & M'inoti, JJ. A MSA HCT

Section "200. (1) Subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

- (a) deliver a judgment that has been written and signed but not delivered by his predecessor; or
 - (b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.
- (2)
- (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 re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.

37. The same court referred to the case of Ndegwa v. R [1985] KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-

“It could also be argued that the statutory and time honored formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanor and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanor of all the witnesses in the case. A fatal vacuum in this case in our opinion.for these reasons we have stated, in our view the trial was unsatisfactory.”

38. The Court also referenced 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.”

39. In this case the Trial court heard and recorded evidence of PW1PW2 PW3 PW4 PW5 PW6 PW7 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 PW8 PW9 & PW6 was called for cross examination.

40. 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.



41. 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.”

42. 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 v DWK* [2020] eKLR Bungoma HCT

The fact and cause of death

43. PW.1 Amos Kyalo Musau, on 7th December, 2012 he was at Machakos Level Five Hospital where he identified the deceased’s body for the purposes of post mortem examination.

44. PW5 Dr. Waithera Githendu a Consultant Human Pathologist at Machakos Level Five Hospital told the Court that she performed post mortem on the body of the deceased. On examination it was found that the body was partially decomposed. There was a cut wound on the right forearm. There was stab wound on the chest and which pierced through and injured the heart. She had severe internal bleeding. PW5 formed the opinion that the cause of death was severe bleeding (haemorrhage) secondary to penetrating stab wound injury that the accused committed the unlawful act which caused the death of the deceased

45. PW. 2 Brian Mwendwa Mwikali gave unsworn evidence that on 2nd December, 2017 PW2 and his mother (the deceased) were removing fruits for sale. The accused person herein pretended to be placing clothes on the clothes line. The accused held the deceased and stabbed her with a knife on the chest and removed the knife and the deceased fell down screaming.

46. PW3 Margaret Mumbua stated she was with the deceased at the deceased’s home whereby the accused person approached them and she saw the Accused person she pointed at him in Court who approached them while keeping his hands behind. He suddenly got hold of the deceased and stabbed her in the chest with a knife, it was a kitchen knife then he removed the knife and threw it away.

47. PW6 & PW7 found the Accused at the scene injured and took him hospital and the deceased at the same point/place and she was dead. A knife was recovered at the scene identified in Court by PW2 & PW3. PW5 Government Analyst confirmed blood stains on the knife were of the deceased.

48. The Accused person in sworn statement admitted that he stabbed the deceased his lover they had quarrelled earlier and parted ways. On the fateful day he stated he was stabbed by the deceased and he took the knife and stabbed her in self- defense and provocation.

49. Cumulatively, the evidence of identification of the Accused person is not controverted, PW2 unsworn statement was/is corroborated by PW3 who was at the scene and both witnessed the Accused take a knife and stab the deceased on the chest.



That the accused had the malice aforethought

50. The evidence of PW2 is that the Accused person was angry at deceased who talked to PW2 about chicken fighting and thought reference was to him. Later on, the Accused sent the deceased a message complaining of being disparaged. 50. On 2/11/2017 on the way, the deceased informed her that there was a certain young man who was threatening her.

Republic v Andrew Mueche Omwenga[2009] KEHC 1573 (KLR) in part states of self-defense and/or provocation; In the words of Lord Morris of Borth-y-Gest in the said English case of Palmer v R., [1971] 55 Cr. App. R. 223 at p. 242 quoted with approval by the Court of Appeal in John Njoroge v Republic, Cr. App. No. 186 of 1987:-

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances... It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation....If the moment is one of a crisis for someone in imminent danger, he may have to avert the danger by some instant reaction.”

51. The Accused admittedly in his defense spoke to a relationship that went sour between him and the deceased and he admitted he stabbed the deceased in anger and self defense as the deceased stabbed him first.
52. This Court read the Court record, at no point or juncture did the Accused raise the allegation of being intimate with the deceased and that they lived together in a relationship that turned sour resulting in violence between and by each to the other with the deceased. These facts came up the 1st time in his Defense, he did not cross examine PW3 on her alleged part of holding him to be stabbed by the Deceased. He alleged PW2 lied to Court.
53. Be that as it may, the Accused person stated that they were in a relationship and parted ways, if the deceased stabbed him, why did she move out and left him safe and sound until he went to her for her to now stab him. She knew him and where he lived she had the kitchen knife and would have gone to stab him. She did not instead it is the Accused who followed her, he sent messages on her phone as per PW2's testimony and had threatened her with death as per what the deceased told PW3 as she stated in her testimony. Death tells no tales and the deceased is not here to defend herself. Instead, all direct evidence points to the Accused person's pre meditated intention to cause grievous harm or kill the deceased. He went to the deceased and stabbed her with a knife. The self defense and provocation are afterthought being raised late in the proceedings during Defense proceedings.
54. The allegation of self-defense and provocation does not cast doubt on the prosecution case that has witnesses who presented direct evidence and their corroborated by expert witnesses the Government Chemist PW5 who examined the knife that had only deceased's blood stains and not Accused person's blood and the Pathologist who conducted Post Mortem and found that the deceased died from stab wounds and other witnesses who found the Accused person at the scene, where the deceased's body lay. The evidence by scene visiting Officers the Accused person was not at his house or place of work but to the deceased's home yet they had parted ways.



Disposition

55. From the totality of the evidence on record, I find that the Prosecution proved its case beyond reasonable doubt, that the Accused premeditated the murder of the deceased, he was found at the scene where the deceased was stabbed to death, the Blood-stained knife was at the scene where both deceased and Accused person were stabbed, deceased died and accused was rushed to hospital and survived.
56. The Accused said that he did not know PW3 Before the day of the incident and admitted she was at the scene of the incident. Her testimony of Deceased's fear for life due to a young man who threatened her speaks the Accused person's intention malice aforethought and coupled with PW2 testimony that the Accused sent his mother; the deceased a message on phone after they quarreled.
57. This evidence against the Accused person's Defense is unshaken. Therefore, the Accused is found guilty as charged of murder of Miriam Mwikali Musau under Section 203 read with 204 of the [Penal Code](#).

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

M.W.MUIGAI

JUDGE

