



REPUBLIC OF KENYA



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**Republic v Tubei (Criminal Case 78 of 2012)
[2025] KEHC 8937 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 78 OF 2012**

**JM NANG'EA, J
JUNE 19, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

COLLINS KIPROP TUBEI ACCUSED

JUDGMENT

1. This is a very long pending case instituted way back in 2012. The above named (hereinafter referred to as “the accused”) was on 16th October 2012 arraigned in this court on information and charge of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence state that on the 12th October 2012 at Naiswet Village, Rongai District, within Nakuru County he murdered Joseph Mongare Nyamboga (hereinafter referred to as “the deceased”).
2. The accused denied the offence.

The Prosecution case

3. Part of the prosecution evidence was recorded before three other judges (Justices M. Odero, Joel Ngugi and H. M Nyaga) who have since transferred to other work stations. This court took over the case on 8th October 2024 and directed that hearing would continue from the point the previous court left off.
4. The prosecution evidence is that the deceased was a Kenya Navy Officer who used to be based abroad while the accused was his close family friend and business associate. According to PW2 who is the deceased’s wife, she and the deceased dropped off their children at school on 12/10/2012 in the morning. She thereafter parted with the deceased who took her mobile phone with him for repairs. At 4:00 p.m. she picked up the children and drove to a place called “Poleni” to wait for the deceased who never turned up. PW2 then decided to go to Buki Garage the deceased ran with PW1 to find out if he was there. She met with PW1 who related to her that the deceased had left the garage at 11:00 a.m.



- saying he was going to meet with his friend. PW2 assumed that the friend was the accused since she was aware of a land transaction they were engaged in. The accused never returned home that evening.
5. PW2 further testified that the following day she sent her nephew to the garage to get her phone. The phone was delivered to her and she removed her sim card therefrom and inserted it in her sister's handset. She saw a text purported to have been sent to her by the deceased conveying the message that he was travelling to Nairobi for an interview. PW2 doubted authenticity of the message for the reason that the deceased did not usually communicate by text messages. On 14/10/2012 she lodged a report with the police and later received sad news from her nephew called Edward that the deceased's body had been found in the mortuary. PW2 went to the mortuary and recognised the body as that of her husband. The body was bloodied and had cuts on the back of the head. As she recorded her statement at Mogotio Police Post, PW2 saw a white Pajero motor vehicle registration No. KAY 872N that had blood on it. She identified the vehicle as belonging to the accused who always drove it during his visits to their home.
 6. PW2 continued to tell the court that police officers took her to Naiswet Village where she saw a pool of blood on the floor of a semi-permanent house where the deceased was believed to have been killed. PW2 was also shown to a place off a road 3 - 4 kilometres from the house where the body was reportedly recovered.
 7. After discovery of the deceased's body a man rang up PW2 vide a mobile phone number 0705997365 and warned her to be careful about a land transaction before hanging up. She sent Kshs. 20/= to the number by M-pesa in a bid to learn the name of the strange caller. The recipient of the cash was indicated as Boaz Godfrey Amenole. PW2 gave the name and the telephone number to the police.
 8. According to PW2, the deceased was very disturbed and stressed prior to his disappearance and subsequent death. On 10/10/2012 he had told her he was to meet up with a man over a land transaction.
 9. PW1 confirmed that the deceased was at their garage on 12/10/2012. At about 11:30 a.m. the deceased excused himself to meet with his friend over transfer of some land. The deceased never returned to the garage and was unreachable on phone. PW2 also went to the garage in search of her husband, to no avail.
 10. PW1 further told the court that the deceased and the accused were very close friends and the latter regularly visited the former at the garage.
 11. PW8 testified that he was an employee of Buki Garage at the material time. On 11/10/2012 at around 11:00 a.m. he was with the deceased at the garage. The deceased indicated that he wanted to travel to Nakuru town to see someone over a land transaction. The witness accompanied the deceased in his motor vehicle only described as registration number KBK 775. They stopped at the post office and shortly thereafter the accused appeared and entered the car. The accused allegedly asked the deceased to drive to a place Ghilanis to pick up some other people. They drove away as requested and picked two other passengers who sat at the back of the car. Then the accused is said to have asked the deceased to drive on to the Lands Office. At the Lands Office, the deceased realised that he had forgotten some photocopied documents. PW8 stated that they dropped of the two passengers at the Lands office and turned to go back to the Post Office area to collect the documents. On their way back, the accused is said to have asked the deceased to give him some documents so that he could finish some work they wanted to do the following day. PW8 stated that the deceased refused and a bitter argument ensued between them. Then the two agreed to go to the deceased's office to photocopy some documents. PW8 left after the two went into the deceased's office. He later heard of the deceased's demise the following day.



12. PW5 testified that on 12/10/2012 at around 1:00 p.m. she was at her home at Naisweit Village when she heard shouts from the direction of the accused's maize farm. She had known the accused since 2011 having met him while she worked in a farm at Naiswet area. Upon hearing the noises, PW5 got out of her house and saw children peering over the accused's fence. There was a tall man guarding the gate to the accused's farm and the man barred PW5 from entering the compound to find out what was happening therein. Then the witness saw a white Pajero vehicle usually driven by the accused, parked by the road side outside the compound. The accused came out of his compound wearing a vest full of blood on its front part. He reversed his car into his compound before the witness heard the car boot slamming. PW5 said he saw the accused driving away towards Eldama Ravine. Earlier she had heard the children who were at the accused's fence saying that a man had been put into the boot of the car. An hour after the accused drove off, he returned to his farm and left with the man who was guarding the gate. Later a charcoal seller told PW5 and others that he saw a man dump a body by the road side. She suspected the body to be that of the person who was shouting in the accused's compound.
13. PW3 told the court that he was the anonymous caller who gave PW2 information about the death of her husband. On 13/10/2012 at 8:00 a.m. he was at Kaptembwa where he lived. His friend he called Mwana visited and took him to some work to be done at Rhonda area. They went to the home of one Mary who in turn took them to meet her son called Zackaria. Zackaria later introduced PW3 to the accused who revealed that he had killed an ex-military man and he wanted his widow killed as well. The accused allegedly offered a down payment of Kshs. 20,000/= to PW3 who declined, complaining that the money was not enough. The accused promised to source for more money and pay him Kshs. 70,000/=. The witness took the deposit of Kshs. 20,000/=. The accused and Zackaria showed him the gate to the deceased's widow's home. He was then given the widow's telephone number 0726493315 and advised to call her on getting to the gate. He was to kill her when she came to the gate, after which he would be paid his balance. The accused and Zackaria left to wash away the blood of the deceased at the scene of the murder.
14. PW3 testified that he was not willing to kill the widow and never called her as directed. Instead he switched off his phone. Later that day at 6:00 p.m. he learnt that his house had been broke into and items stolen by the said Mary, the mother of Zackaria. Mary was present when the accused and Zackaria gave him instructions to kill PW2. Fearing he would be killed, PW3 escaped to his rural home in Bunyore. He then called the widow (PW2) informing her of the plot to kill her. The police later called him to Mogotio Police Station where he recorded his statement over the matter.
15. On 12/10/2012 the police received information about a body found by the roadside near Naiswet Trading Centre. PW6 and PW7 were among officers who went to the scene. They found the body that had deep cut wounds and removed it to Nakuru County Teaching and Referral Hospital Mortuary. A police informer later passed information that the accused took his blood stained motor vehicle registration number KAY 872 N to a car wash for cleaning. The officers went to the car wash and interviewed a lady attendant who confirmed the fact. The lady, however, declined to record a statement for fear for her safety.
16. According to PW9, a police officer based at Kaptwembwa Police Station, the head of the station on 13/10/2012 informed him and other officers about a report he received from an informer who related about a man who wanted a house cleaned after his quarrel with another person in the house. The informer refused to undertake the task and instead made the report to the police. A day earlier the deceased's body had been recovered. With the help of the informer, the officers laid an ambush to arrest the person as he went to supervise cleaning of the house. They arrested a man who came to meet the informer. The man introduced himself to the officer as Zackaria Bulinda and that he was going to clean the house at the instance of the accused. Zackaria led them to a house where the accused allegedly was.



- He was not found in the house but his Pajero motor vehicle registration number KAY 872 N suspected to have been used to commit the crime was in a garage at the homestead. The vehicle had blood spots. A woman found in the homestead was arrested. It was later established that the woman called Grace was the accused's mistress.
17. PW9 continued to testify that after post-mortem examination of the body a doctor took some blood samples from the accused which was given to the case Investigating Officer. According to the police the accused surrendered to the police on 16/10/2012 and he was arrested.
 18. Post-mortem examination of the body was conducted on 15/10/2012 at Nakuru County Teaching and Referral Hospital Mortuary. The body had multiple lacerations on the head; fractures on the right forearm and left thigh as well as bruises to the chest. The cause of death was opined to be the multiple injuries caused by blunt force trauma, in keeping with homicide. The Pathologist extracted a blood sample from the deceased at the request of the police for further investigations. The autopsy report dated 15/10/2012 was tendered and admitted as evidence.
 19. Blood samples from the deceased and accused as well as the deceased's blood stained clothes were submitted to the Government Chemist for DNA analysis. The findings inter alia were that blood on a tissue paper and piece of metal was found to be that of the deceased. Blood stains on a piece of cloth also submitted for analysis did not generate any DNA profile due to physical or chemical effects, in the opinion of PW 10.
 20. PW11 is a gazetted Scenes of Crime Officer. On 14/10/2012 he visited the house where the deceased was reported to have been killed and took several photographs. He took more photographs at the place the body was found. The witness exhibited the photographs together with his certificate of the photography.
 21. PW12 was the officer assigned to investigate the case. He confirmed the circumstances leading to arrest and prosecution of the accused as recounted by the witnesses. The said Zackaria Bulinda and others were also arrested during investigations into the case. All the other suspects except the accused were later released. On advice of the Director of Public Prosecutions, Zackaria was to be a prosecution witness but he declined to co-operate with the police and the prosecution.
 22. During the investigations, blood samples suspected to belong to the deceased were taken from the accused's car. PW12 had also visited a mabati structure in which the deceased was allegedly killed and saw a pool of blood covered with beans.
 23. The accused gave sworn evidence in his defence and called two witnesses. He confirmed that he knew the deceased and his wife (PW2) as his very close friends. They would even borrow money from each other. He denied committing the offence saying that on the material date he was in Kampala, Uganda, attending a medical conference to which he had been invited by letter dated 5/10/2012. He left Kenya for the conference on 9/10/2012 in the morning by bus through the Busia border. As he returned to Kenya by flight on 16/10/2012 he heard that the police were looking for him over the deceased's killing and he presented himself for investigations. Police officers took his blood sample without his consent.
 24. The accused denied driving his Pajero motor vehicle registration number KAY 872N saying it was defective and was parked at the home of his relative called Grace.
 25. In proof of his travel to Uganda, the accused produced copies of his letter of invitation to attend the conference; his bus ticket No. 244; extracts from his passport showing his entry into Uganda and receipts showing his payment for hotel accommodation in Uganda. He did not have his original copy of the passport with him in court.



26. The accused denied that at the material time he was to transfer any land to the deceased adding that there was no dispute between him and the deceased over land. All their accounts of their business dealings including transactions had been satisfactorily reconciled.
27. DW2 is the accused's wife who reiterated her husband's innocence. She told the court she had escorted the accused to the bus stage for his travel to Uganda. When he returned on 16/10/2012 she again picked him up in the same taxi in which he had been dropped off at the bus stage.
28. The taxi driver (DW3) supported the accused's and DW2's evidence. He confirmed dropping off and picking up the accused as per DW 2's testimony.
29. The prosecution Counsel (Ms Sang) filed written submissions. She submits that the accused caused the death with malice aforethought. The court is told that in homicide cases, death is presumed to have been unlawfully caused unless it is otherwise accidentally caused in circumstances that make it excusable. In support of this proposition, Counsel referred the court to two Ugandan cases to wit; Uganda vs Lydia Draru Alias Atim HCT-00-CR-SC-0404 High Court of the Republic of Uganda and Akol Patrick & Others vs Uganda (2006) HCB (Vol. 1) 06. The Court of Appeal for East Africa in R vs Gusambiza s/o Wesonga 1948 15 EACA 65 is also said to have underscored the legal position. According to the Prosecution Counsel, the evidence adduced proves that the deceased's fatal injuries were deliberately inflicted with intention to kill.
30. According to the Prosecution Counsel the evidence and the circumstances of the case point to only one conclusion, the guilt of the accused. The court is told that the evidence places the accused at the scene of the murder and so he was duty bound to explain how the deceased met his death (see the judicial decision in R vs F.O.O {2021} eKLR cited by Counsel).
31. The Prosecution also dismisses the accused's alibi defence as incredible. The court is referred to the judicial determinations in Charles Kasena Chogo vs Republic {2019} eKLR and R vs Mahoney (1979) 50 CCC in which it was held that failure to disclose an alibi defence at a sufficiently early opportunity may determine the weight to be given to it. It is underscored that early disclosure enables the police to investigate the veracity of the defence and avoid prejudice that may otherwise be occasioned to the prosecution.
32. The defence counters that the prosecution have not proven the charge beyond reasonable doubt. The defence Counsel refer the court to case law in Republic vs Gideon Wambua Kioko & 2 Others (2019) eKLR in which three essential elements of the offence of murder were listed as hereunder;
 - i. The death and cause of death of the deceased.
 - ii. That the accused caused the death through an unlawful act or omission.
 - iii. The accused possessed the intention to cause harm, or kill, or malice aforethought.
33. While observing that the prosecution case depends on circumstantial evidence herein, the accused cites the judicial determination in Republic vs Ali Suleiman Ali (2021) eKLR which states that circumstantial evidence must always be examined narrowly because it may be fabricated to unfairly cast suspicion on another person. According to this case law, before drawing an inference of guilt the court should be sure that there are no co-existing circumstances weakening or destroying that inference. For instance, the court is told that the prosecution's failure to call the children who allegedly saw a body being loaded onto a vehicle in a farm said to belong to the accused weakens the inference of the accused's guilt. So does the failure to call one Zackaria Bulinda who had also been arrested and then made a prosecution witness.



34. The defence further submits that the accused's alibi defence has not been rebutted. According to the accused, in law the burden is on the prosecution to prove falsity of an alibi defence (see Victor Mwenda Mulinge vs Republic (2014) eKLR referred to by Counsel). The court is told that the defence was adequately corroborated.

Issues for Determination

35. The sole issue for determination is whether the prosecution has proved beyond reasonable doubt that the accused murdered the deceased, actuated by malice aforethought.
36. There is no direct evidence linking the accused to the killing as none of the witnesses testified to seeing the accused commit the offence. Determination of the case therefore wholly depends on circumstantial evidence. In *Mwangi vs Republic (Criminal Appeal No. E054 of 2023) [2024] KEHC 3113 (KLR) 15 March 2023 (Judgment)* this court explained that for circumstantial evidence to be reliable it must be inconsistent with the accused person's innocence.
37. In the case of *Ahamad Abolfathi & Another vs Republic (2018) eKLR* also cited by the Prosecution and Defence Counsel, it was elaborated that;
- “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.”
38. In a much older case (*Republic vs Taylor, Weaver & Donoram (1928) Cr. Application R 21*), it was observed that;
- “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 is circumstantial.”
39. In the often quoted case of *Sawe vs. Republic (2003) KLR 364*, it was stated that circumstantial evidence must satisfy three tests, namely;-
- “the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; 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.”
40. As in the case of *R vs Kipkering Arap Koskei (1949) EACA 135* Counsel further made reference to, the prosecution must also show that there existed in-culpatory facts that were incompatible with the innocence of the accused and incapable of any explanation upon any other reasonable hypothesis other than that of guilt.
41. Section 206 of the *Penal Code* provides that malice aforethought is proven by one or more of the following circumstances;-
- a. Intention to cause death or do grievous harm whether the death actually occurs or not.
 - b. Knowledge that the act or omission causing death will probably cause the death or grievous harm to a person, whether the death is actually caused or not.



- c. An intention to commit a felony.
 - d. An intention by an act or omission to facilitate flight or escape from custody of any person who attempts to commit a felony.
42. The prosecution does not have to prove the motive for commission of any crime, and neither is the evidence of motive sufficient by itself to prove commission of a crime by a person who possesses the motive (see Case law in Robert Onchiri Ogeto vs Republic (2004) KLR (1a))
43. The accused relies on alibi defence saying that he was away in Uganda in the material period and tendered documentary evidence in proof of the claim. PW1, PW3, PW5 and PW8, however, implicated the accused telling the court that they saw and/or interacted with the accused on the material date. Their evidence, in my view, has not been discredited either on cross-examination by the accused or by the defence evidence. The alibi defence is not therefore reliable, further considering that as per the prosecution and defence submissions notice of such defence ought to have been given to the prosecution in good time so that the police investigate the claim. The default adversely affects the weight to be given to the defence.
44. The alibi defence does not accordingly displace the prosecution evidence implicating the accused. I find that failure to call some of the witnesses alluded to by the defence does not weaken the prosecution case. The murder appears to have been motivated by a dispute between the accused and the deceased over transfer of some land as is apparent from the testimony of PW2 and PW8.
45. In the premises, I find that the prosecution proved the charge beyond reasonable doubt. The accused is accordingly convicted thereof pursuant to the provisions of section 215 of the [Criminal Procedure Code](#).

J. M. NANG'EA, JUDGE.

JUDGEMENT DELIVERED THIS 19TH DAY OF JUNE, 2025 IN THE PRESENCE OF:

Ms Mwaura for the Director of Public Prosecutions.

Mr. Mong'eri Advocate for the Accused.

Court Assistant (Jeniffer).

