



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Lelemen (Criminal Case 1 of 2018)
[2025] KEHC 9655 (KLR) (16 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL CASE 1 OF 2018**

**GL NZIOKA, J
JUNE 16, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

BENJAMIN KIPROTICH LELEMEN ACCUSED

JUDGMENT

1. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) (Cap 63) Laws of Kenya.
2. The particulars of the charge are that, on the of 4th day of January 2018, at Kongoni in Naivasha Sub-County within Nakuru County he murdered Beatrice Nyokabi Mutura.
3. The charge was read to the accused and he pleaded not guilty and case proceeded to full hearing. The prosecution case is that, the accused was a police officer who was at the time of the offence was stationed at Kongoni Police Station, while the deceased was his girlfriend and had visited him at his residence.
4. That, on the 2nd January 2018, the accused made a report at 8.45am vide OB No. 12 of 2nd January 2018 that the deceased had taken documents including his KCPE certificate and a jungle uniform shirt from his house. That Officer Commanding Station (OCS) Chief Inspector Benson Orandi requested (PW2) No. 77918 PC Shadrack Musau to deal with the report.
5. Subsequently on 4th January 2018 PW2 PC Musau called the deceased and he met both the accused and deceased at Kongoni Trading Centre at Muthoni's shop whereby the deceased informed him that the items the accused was looking for were in the accused's house and she would get them from there and hand them over.
6. That, on the same day the accused went for an operation at Kosovo area and returned at 5:30pm. He then inquired from (PW2) PC Musau if he had met the deceased and PW2 Musau confirmed they met.



- PW2 PC Musau accompanied by the accused went to Muthoni's shop where they met the deceased and discussed the issue of certificates and it was agreed that the deceased would retrieve them from the accused house and hand over the accused to PW2 PC Musau then left the accused and the deceased on their own.
7. PW1 No. 88575 Corporal woman Devoter Orlando, In charge of the armoury at Kongoni Police Station, informed the court that on the same day at 22.10 Hrs she issued the accused with a rifle serial No. KR 006 containing thirty (30) rounds of ammunition of 7.62 calibre special she produced a copy of the Arms Movement Book (as Pexh 3).
 8. That at around 10:00 pm, (PW1) No. corporal Orlando, PW2 PC Musau, PW3 No. 81158 PC Daniel Lemiso heard a gunshot from the within police station. That, PW3 (PC) Lemiso came out of his house and shortly afterwards saw the accused standing outside his house holding a rifle by the pistol muzzle facing the ground. (PW3) PC Lemiso approached him and requested the accused to remove the cartridge from the rifle and hand it over to him. The accused complied and handed over the rifle and PW3 PC Lemiso noted the serial number of rifle AK KP 82K90006.
 9. PW3 PC Lemiso, (PW1) Corporal Orland and PW2 PC Musau entered into the accused house where they found the deceased lying on the bed facing upward while naked and had gunshot wounds on the abdomen. That, PW1 Corporal Orlando called the officer in charge crime Davies Kivanani (PW4) who returned to the station and secured the scene. He ordered the accused to be placed under arrest informed his superiors and investigations commenced.
 10. That on 9th January 2018, (PW5) Johnston Musyoki Mwangela a firearms expert attached to Director of Criminal Investigation Nairobi testified that he received an AK47 assault rifle serial No. 82 KR 006, an empty AK47 magazine, 24 rounds of ammunition, two (2) fire bullets, six (6) fired cartridges from Corporal Duncan Ochieng to examine and ascertain whether; the AK47 rifle fired 24 rounds of ammunition and where the two cartridges fired from.
 11. That PW5 examined the AK47 rifle and determined that, it was in good mechanical condition and was not prone to misfiring. Further the magazine was in good working condition. That, he took four (4) at random rounds of ammunition out of the 24 and test fired them with the rifle he had received and compared them with the two fired rounds of ammunition that he had received and established that they were all fired from the same gun being the rifle he had received. Additionally, he examined the six (6) cartridges that he received and established they were fired from the rifle he had received. He produced his report marked as prosecution (Pexhibit 6).
 12. PW7 Dr. Titus Ngulungu testified that he performed a post-mortem on the deceased body on 8th January 2018 and noted six (6) gunshot wounds at the front abdomen at prei-umbilicus and hypochondrial region which had five (5) exits at the back. That Internally, the lungs had collapsed, vascular injuries were noted, extensive lacerations with fragments were seen in the abdomen mixed with faecal matter, the spinal column was missing L2 and L3 that were avulsed by the gunshot and the nerves were torn around the lumbar area. He formed the opinion that the cause of death was severe abdominal organ region with blood loss due to multiple gunshots to the abdomen.
 13. PW8 No. 235221 Chief Inspector Benard Cheruiyot a document examiner at the Director of Criminal Investigation Officer Headquarters at Nairobi testified that, he received the arms movement register book, specimen signatures and the known signature of the accused, with a request to verify if the signature in the arms movement register book belonged to the accused. That he examined the said signatures and established that they had been made by the same person, the accused.



14. At the close of the prosecution case, the court ruled that the accused had a case to answer and he was placed on his defence. He gave a sworn testimony that, on the 4th January 2018, at 10:00am PW1 Corporal Orlando issued him with a firearm and assigned him duty to go on patrol at Kospor area where there was a conflict between Maasais and Kipsigis. That he was in the company of other police officers and the in-charge was PW4 IP Davies.
15. That while out on patrol, he spoke to the deceased over the phone who informed him that she had come to see him. That they completed the patrol and returned to the police station at 6:00pm. That he went to return his firearm but he did not find PW1 Corporal Orlando at the armoury and therefore opted to keep his firearm in his house. Thereafter, he went and met with the deceased at a bar where they ate and drunk about five (5) quarter bottles of Kenya Cane spirit until 10:00pm. That they proceeded to his house where they drunk a further six (6) bottles. That he does not know what happened afterwards found himself in a cell in and the following day he was informed that he had killed the deceased.
16. The accused alleged that the books of record produced by the prosecution had been altered as the time indicated was not correct. He stated that, he was issued with the firearm at 10:00 am and he signed for it not 10pm as indicated in the arms movement report. Furthermore, that despite being on patrol on the said day, the evidence adduced in court was to the effect he was on office duty.
17. That, PC Omari and PC Chepseba who were in the report office and crime stand when he left for patrol were never called to testify. He stated that, due to the alterations of the documents, he was not sure whether he committed the offence but he does not think he did.
18. At the conclusion of the trial, each party filed their submissions which are considered herein. The prosecution in submissions dated 27th September 2023 cited section 203 of the Penal Codes on the definition of murder and submitted that the elements to be proved to satisfy the charge of murder are: the death and cause of death, the act of commission or omission being linked to the accused (actus reus), and the act of commission or omission must have been actuated by malice aforethought (mens rea).
19. The prosecution submitted that, the evidence adduced was both scientific and circumstantial in nature as there were no eye witnesses to the incident and relied on the case of; Hamad Abolfathi Mohammed and Another v Republic [2018] eKLR where the Court of Appeal stated that the guilt of an accused person can be proved either by circumstantial or direct evidence. That, circumstantial evidence is evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, and can form a strong basis for proving the guilt of an accused.
20. Further, that in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21 Lord Heward CJ stated that, circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics.
21. The prosecution argued that, the evidence of PW1 and PW2 confirmed that the accused and deceased was near the accused house and therefore squarely placed the accused as the scene of the crime. That PW2 had seen the accused and the deceased together before the incident. Further, after PW1 and PW2 heard the gunshots, they proceeded to the accused house where they found the accused holding the rifle while the deceased lay on the bed with gunshot wounds.
22. Furthermore, PW1 confirmed that she had issued the gun to the accused which fact was confirmed by the arms movement register produced as exhibit 3. In addition, PW5 J. M. Mwangela the firearms examiner produced a forensic report (Pexhibit 6) and formed the opinion that, the two (2) bullets and six (6) cartridges were fired from the AK 45 assault rifle S/No. 82 KR 006 issued to the accused.



23. Moreover, PW7 Dr. Ngulungu produced the post mortem report as (Pexhibit 5) that indicated the cause of death was due to severe abdominal organ injury with blood loss due to multiple gunshot to the abdomen which corroborated the evidence of other witness that the deceased was shot in the abdomen by the accused.
24. The prosecution placed reliance on the case of; Juliet Karisa v Joseph Barawa and Another Civil Appeal No. 108 of 1988 where the Court of Appeal stated that, expert evidence is entitled to the highest possible regard and must be considered alongside evidence of other key witness and should not be rejected unless there is a cogent basis to do so.
25. The prosecution submitted that, the defence of the accused to that when he woke up he found the deceased had been shot was mere denials. That, the accused admitted that he returned to the house with the deceased and there was no one else in the house and that he had been issued with the gun. In totality, the circumstantial evidence points a finger to the accused as the person who committed the offence.
26. On the issue of malice aforethought, the prosecution cited the case of Republic v Gedion Wambua Koko & 2 others [2019] eKLR which quoted with authority the Republic v Tumbere S/O Ochen [1945] 12 EACA 63 where the East Africa Court of Appeal in determining malice aforethought considered the elements to be considered are being; the nature of the weapon used, the manner it was used, the part of the body targeted, the nature of the injuries inflicted either single or multiple, and the conduct of the accused before during and after the incident.
27. The prosecution argued that, the accused was a police officer who used an authorized rifle and fired seven (7) bullets that was more than sufficient to kill the deceased.
28. The prosecution further argued that, it produced sufficient evidence to prove beyond reasonable doubt malice aforethought and excluded intoxication raised by the accused in his defence. The court was urged to find the accused guilty of the offence of murder.
29. However, the accused in submissions dated 27th September 2023, cited Article 50(2) of *the Constitution* that provides that an accused person has a right to fair trial including the right to be presumed innocent. That the prosecution has the onus to prove the charges levelled beyond reasonable doubt. Further that, the prosecution case was based on circumstantial evidence as there was no eye witness to the incident and therefore required corroboration.
30. The accused argued that, the prosecution did not establish mens rea and therefore failed to prove malice aforethought. That, in his defence he testified to the effect that he did not know what transpired on the night of the offence. Further that the last thing he remembers was drinking Kenya Cane with the deceased only to later find himself in a cell at Naivasha, which evidence was not challenged by the prosecution.
31. He further submitted that his defence indicates his mental status was comprised to the extent he was not conscious of what was happening and therefore incapable of forming the necessary mens rea for the offence of murder. He cited the case of; *Republic v Nickson Peter Sadera Narok High Court Criminal Case No. 7 of 2019*, where the High Court held that, the charge of murder is not proved where there is lack of mens rea.
32. The accused urged the court to acquit him under the provision of section 215 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya.
33. In considering the evidence adduced herein, I find that the key question to address is whether the prosecution proved its case beyond reasonable doubt.



34. I note that the offence of murder is provided for under Section 203 as read with Section 204 of the *Penal Code*. The pertinent provisions read as follows: -
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
35. The ingredients of the offence are settled through various decision. The Court of Appeal in the case of; *Joseph Githua Njuguna v Republic* [2016] eKLR stated as follows: -
- “Under section 203 of the *Penal Code*, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are:
- (a) the death of the deceased and the cause of that death;
 - (b) that the appellant committed the unlawful act which caused the death of the deceased;
 - (c) and that the appellant had harboured malice aforethought. See *Milton Kabulit & 4 others v Republic* [2015] eKLR.”
36. Based on the foregoing provisions of the *Penal Code* and the Court of Appeal decision, the ingredients of the offence of murder can be summarized as follows; a) occurrence and cause of death, b) whether the death was lawful or unlawful, c) proof of commission of the offence by the accused and d) malice aforethought.
37. As regards the element of whether the death occurred, I find that, there is no dispute to the same as PW1 Corporal Orlando, PW2 PC Musau, and PW3 Lemiso confirmed that they heard gunshot and rushed to the accused’s house where they found the deceased body on the bed. Further PW6 Job Waithaka Kariuki, a cousin to the deceased, identified the body for post mortem which was carried out by PW7 Dr. Ngulungu on 8th January 2018. Therefore, all these witnesses confirm that death occurred.
38. The cause of the death was supported by the evidence of PW2 PC Musau who saw the deceased’s body with a wound on the abdomen while PW4 IP Kavanani saw the deceased body with gunshot wounds in the stomach. Furthermore, PW7 Dr Ngulungu during the post mortem saw six (6) gunshot wounds at the front abdomen at prei-umbilicus and hypochondrial region which had five (5) exits at the back. He testified that the cause of death was severe abdominal organ region with blood loss due to multiple gunshots to the abdomen. Therefore, there is no dispute on the cause of death.
39. The next question is whether the accused committed the offence. PW1 Corporal Orlando and PW2 PC Musau both testified that they heard gunshots and went to the accused’s house where they found the deceased’s body on the bed. Further PW3 PC Lemiso stated that he heard gunshots and he saw the accused outside his house holding his gun. That he asked the accused to surrender his gun which he did after which PW3 entered the accused’s house and saw the deceased’s body lying on the bed. In addition, PW4 IP Kaivanani testified that when he arrived at the accused’s house he saw the deceased lying on the bed.
40. All these witnesses confirm that, the deceased met her death in the accused’s house. The accused corroborated this evidence thus by testifying that, indeed before the deceased met her death, both had retired to his house.



41. It is also noteworthy that, the deceased died out of gun shot. The evidence of PW1 CPL Orlando is that, she had issued the accused with a firearm serial No. KR006 and 30 rounds of ammunition. Further evidence reveal that, the accused was found with the firearm outside his house after the incident. He surrendered it to PW3 PC Lemiso.
42. The firearms was subsequently examined by PW5 Mwongela and found to be in good working condition and was not prone to accidental discharge, that the magazine was in good working condition, and two (2) bullets fired were fired from that firearm. Therefore, it is logical to conclude that, the two spent cartridges which were discharged from that firearm are the ones that caused the death.
43. It is the accused who had the firearm and therefore he is the only one who can explain who discharged the bullets that killed the deceased. Furthermore, the evidence herein is that the accused was all along with the deceased when the incident occurred hence last seen doctrine applies.
44. Be that, as it were the accused does not deny having shot the deceased or not. All that he states is that he doesn't know what happened. It is therefore clear that, as no one else was in that house the accused is the one who shot the deceased.
45. The last question that arises next is whether, the accused had malice aforethought. In answer to this question regard must be held to the evidence of PW2. He told the court how the accused had recorded a complaint of his uniform and documents missing and how he blamed it on the deceased. That he was instructed by his boss to establish what was the issue and learnt from the deceased that, they said they were in the accused's house. It does appear that the issue was not resolved.
46. In the considered opinion of the court the afore establish the motive of the murder. The accused does not in his defence offer any explanation as to what transpired before the deceased died. He is not pleading any provocation or even accidental death or even self defence. It therefore follows that, the accused was very enraged with the loss of his uniform and document that, he decided to kill the deceased after she failed to avail the same.
47. This conclusion must be seen in the seriousness of the matter where the deceased actually made an office report over loss of his uniform and certificates to the police station and OB entry made. Yet the suspect was his own long-time girlfriend. It can only be that, on the particular night of the murder the accused found an opportunity to eliminate the death due to her defiance to produce the subject items. Therefore, one cannot rule out the motive to kill is well established.
48. In support of the aforesaid the provisions of section 206 of the [Penal Code](#) states as follows in relation to malice aforethought: -

“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 of 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; or



- 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.

49. Further in the case of *Kaburu v Republic (Criminal Appeal 103 of 2023)* [2024] KECA 536 (KLR) (9 May 2024) (Judgment) the Court of Appeal stated: -

“27. Malice may be express or implied. Express malice is when a deliberate intention is manifested to take away the life of a person unlawfully. Malice is implied when no considerable provocation appears or when the circumstances attending the killing show a reckless and wicked heart. To be convicted of murder, malice aforethought must be proved. Malice cannot not be imputed to an accused person based solely on their participation in a crime. If it is shown that the killing resulted from an intentional act with express or implied malice, no other mental state need be shown to establish malice aforethought.”

50. However, the question whether the accused was intoxicated during the commission of the offence that he was not aware of what he was doing.

51. In further consideration of the evidence, it is clear that the evidence herein is circumstantial. The law on circumstantial evidence is settled. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows: -

“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.” (emphasis mine)

52. The parameters for admission of circumstantial evidence were well settled in *Rex v. Kipkerring Arap Koske & 2 others* [1949] EACA 135 as follows;

“In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

See also *Sawe versus Republic* [2003] KLR 354, *Musili versus Republic* CRA No.30 of 2013 (UR) and *Abanga Alias Onyango versus Republic* CRA. No. 32 of 1990 (UR)).

53. In summation, based on the afore case law, it is settled that, before any conviction is based on circumstantial evidence, that evidence must be adequate to prove the case beyond reasonable doubt.



54. In that regard, the court will admit circumstantial evidence if it meets the following criteria: -
- a. The evidence is logically connected to the case.
 - b. The evidence must prove or disapprove a fact relevant to the case.
 - c. The evidence should be reliable, trustworthy with minimal chance of falsehood.
 - d. Its potential to influence a decision should not outweigh the probative value.
 - e. The evidence should not be hearsay
55. Based on the afore and taking into account, the circumstances of this case, I find the accused guilty as charged and accordingly convict him.

DATED, DELIVERED AND SIGNED THIS 16TH DAY OF JUNE 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Chepkonga for the State

Mr. Sirma for Mr. Kipkeni for the accused

The accused present physically

Ms Hannah –court assistant

