



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Chabaya (Criminal Case 24 of 2020)
[2025] KEHC 8270 (KLR) (10 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 24 OF 2020**

**AC BETT, J
JUNE 10, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

DANCAN AVAYE CHABAYA ACCUSED

JUDGMENT

1. The Accused, Dancan Avaye Chabaya is charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the charge are that the Accused on 3.6.2020 at Milimani area at Kakamega Subcounty within Kakamega county murdered Britty Milikau Mwanje.
2. The Accused denied the charge and the prosecution called five witnesses to prove its case.
3. PW1 was Kipkerich Masinde Levis who testified that on 3.6.2020, he was manning the night shift as a crew commander in charge of a vehicle at his place of work which is Hesson Security Company Limited in the company of Kenneth Britty (now deceased), the driver Charles, and the guard Andayi. He said that he arrived at work, went to the changing room then came out and met up his aforesaid colleagues. PW1 stated that Britty asked him a question after which the witness went across the road where he faced the car in case a signal came through. Shortly, Britty passed him and indicated that he was going off. PW1 testified that about three (3) minutes later, he heard a strange noise like a bang on mabati. He looked up to the source of the sound and saw Britty staggering and a motorcycle a little distance from him. Britty fell into a hole. PW1 further recounted that he ran to the office to get help and on arrival at the scene, they found Britty having fallen into a hole and the bike rider sped off without responding to their question as to what the problem was.
4. According to PW1, Britty had a cut on the head near the ear/eye and was bleeding a lot. He was unconscious. The rider who had hit him was standing with his motorcycle five (5) metres ahead. They administered first aid to the deceased while the biker was at the end of the road. PW1 said that he



could identify the biker through his distinctive clothes which comprised a blue jacket, and a navy blue/black tracksuit. PW1 said that he sent a motorcycle to follow up the biker who had taken off towards Bukungu Stadium but it did not catch up with him. They then took Britty to Kakamega General Hospital where attempts to resuscitate him failed and he was pronounced dead. After that, PW1 said that he phoned the Company Director who took charge and reported the incident to Kakamega Central Police station.

5. PW1 recalled that he was later summoned to the police station where an identification parade was conducted and he identified the Accused whom he did not know before the date of the incident. PW1 went further to state that while at the hospital, there were guards who stayed in the same plot as the deceased and he heard them say that the Accused had earlier threatened the deceased.
6. PW2 was Dr. Dixon Mchana, a Consultant Pathologist in Kakamega County General Hospital. He produced the post-mortem report and recalled that on 5.6.2020, at the Kakamega County General Hospital mortuary, he conducted an autopsy on the body of the deceased which was identified by Edwin Mwilikani and Violet Mwilikani. The autopsy was done two days after death. The deceased had a blunt injury above the right eye with evidence of medical intervention with an injection on the left hand.
7. On the head, there were blood clots on either side of the forehead. The deceased had a right forehead depressed fracture extending to the bones surrounding the eyes into the nasal bones. He had bleeding below the brain covering and into the brain involving the forehead and the back with mild swelling of the brain. The Pathologist concluded that the death was due to a severe head injury secondary to blunt force trauma following assault. PW2 said that he took a piece of nail for analysis by the Government Chemist.
8. Polycarp Lutta Kweyu, a Government Analyst based in the Government Laboratories at Kisumu testified as PW3. He testified that on 10.6.2020, Corporal Samwel Kamiti of DCI Kakamega Central submitted six items to him with a request for DNA profiling. The items were a navy- blue nylon jacket marked as F1, a navy -blue tracksuit trouser marked as F2, a stone marked as F3, a piece of nail from the deceased marked as F4, a buccal swab from the Accused marked F5 and soil in two separate plastic bags marked as F6 and F7.
9. PW3 stated that he analyzed the exhibits and concluded that the jacket, trouser, stone and soil sample had blood stains from a human being. He did DNA profiles from the five samples and concluded that the blood in the said items marked F1, F2, F3, F6 and F7 matched the blood of the deceased. PW3 said that he generated a report and signed it on 22.6.2022. he produced the Exhibit Memo as PEx 3A and the Analyst Report as PExh 3B.
10. PW4 was Corporal David Kiprono Mosonik who testified that in the year 2020 he was stationed at Kakamega Police Station as the officer in charge, Crime when on 7.6.2020, DCI Officer by name Corporal Samwel Kamiti who was investigating a murder case involving the Accused as a suspect requested him to conduct an identification parade.
11. According to PW4, the witness was Kipkerich Masinde Levis, PW1 who was housed on the 1st floor of the DCI offices in Room 2 while the suspect was being held in the basement of the same building. PW4 said that he went to visit PW1 who assured him that given a chance, he would be able to identify the person he saw during the incident. PW4 made arrangements to assemble a parade after instructing PW1 that once he identified the suspect, he should touch him on the shoulders.
12. PW4 said that he first confirmed from the suspect that he was ready for the exercise, that he did not wish to have a witness on his side, and that he had not met the identifying witness after the incident.



- PW4 recounted that he then chose eight people with comparable and close body size, clothing and weight with the Accused from the cell and formed a parade. He asked the suspect to take any position in the line, and he chose to stand between the 5th and 6th members of the parade. PW4 said that he called a public officer to bring PW1 to the parade, and reminded PW1 that the suspect could be present in the parade or not and if present and he could identify him, and he should do so by touching his shoulder.
13. PW4 said that PW1, started looking at the parade members and when he reached between the 5th and 6th members, he stopped and touched the Accused. PW4 said that the Accused said that he was satisfied with the way the parade was conducted, and so he completed the identification form, and the Accused signed the same and wrote down his identification card number.
 14. Corporal Samwel Kamiti was the investigating officer and testified as PW5. He recalled that on 3.6.2020 at around 22:00 hours, he was on duty at Kakamega police station with his colleague PC Odhiambo who was on general duties while he was with the DCI, when they received a report from Lewis of Hesson Security of an incident that had occurred around 6.30 p.m.
 15. It was PW5's testimony that Lewis informed him that while at the work place, where he was talking to someone at the gate, he heard noises from where Britty the deceased, was and on turning to check, he saw Britty staggering along the sidewalk of the road. He also saw a motorcycle rider who had worn a blue jacket and identified the motorcycle as the one that had knocked the deceased. An attempt to stop the motorcycle rider proved futile as he did not stop. The injured guard was taken to hospital where he died.
 16. PW5 said that he and PC Odhiambo proceeded to the hospital where they found that the body of the deceased had been transferred to the mortuary and on going to see the body, they noted that it had an injury on the right side of the head. On interviewing colleagues of the deceased, he established that the Accused held a grudge against the deceased because the deceased was cohabiting with his estranged wife Mary Minayo and had threatened to either kill Mary Minayo or the deceased or to commit suicide.
 17. It was PW5's further evidence that he embarked on a search for the Accused who had moved from his last known address, and on 4.6.2020 in company of PC Gilbert and assisted by members of the public they went to Malava area in Kakamega where they traced the Accused's house. Outside the house was parked motorcycle registration NO KMEW 7359 Bajaj. PW5 testified that they found the Accused inside the house and recovered the key to the motorcycle from his trouser pocket. A search of the house yielded a jacket and a navy-blue trouser hanging on a rope in the house. The clothes, which were bloodstained, matched the description given to PW5 by the witnesses as to how the suspect who knocked down the deceased was dressed. PW5 said that he prepared an inventory which he and the Accused signed and took the clothes and the motorcycle to the police station. PW5 produced the inventory and the motorcycle as PExh5 and PExh6.
 18. PW5 further stated that he thereafter took the jacket, navy blue trouser, a blood-stained stone taken from the scene, and the nails that were cut off from the deceased during post-mortem and after securing a court order, accompanied the Accused to the Government Chemist where they drew his blood. He said that he also forwarded a blood sample scooped from the crime scene by officers from the Scene of Crime. He forwarded the samples to the Government Chemist. the witness further stated that an identification parade was conducted in which the Accused was identified by PW1 who had given a description of the suspect.
 19. On cross-examination, PW5 said that the person who made the report did not give a description of the motorcycle.



20. At the close of the prosecution's case, the court found that the prosecution had established a prima facie case and placed the Accused on his defence.
21. In his defence, the Accused who gave a sworn statement said that on 3.6.2020, he was in his house sleeping. He stated that he was arrested on 4.6.2020 by police officers who were accompanied by his wife Mary Minayo who had left the previous day while claiming that she was going to attend a Kesha (overnight prayer). He asserted that he did not know why the police were arresting him, and it was only after they had taken him to the police station that they informed him that he was under arrest for the offence of murder of someone whose name he could not recall.
22. On being cross-examined by the prosecution, the Accused said that he had marital differences with his wife and at one point she had told him that one day she would bring the police to arrest him. He said he was a motorcycle operator who had conducted the business for 5 months. He further stated the blood stains on the clothes that were recovered from his house were from his mouth and denied that the blood belonged to the deceased. He denied the allegation that the deceased had married his wife.
23. In support of its case, the prosecution submitted that the state had proved its case as it had demonstrated that the deceased met his death through a unlawful act and the Accused was positively identified by DNA analysis and through an identification parade as the one who committed the offence. The prosecution further submitted that once the Accused was arrested a search in his house yielded blood-stained clothes that matched the clothes described by the witnesses and when the clothes were taken for DNA analysis, the blood stains on the clothes matched those of the deceased. They relied on the case of Republic v Gordon Odhiambo Shem [2015] eKLR and Republic v Samwel Ojwang Onyango [2021] eKLR. Finally, the prosecution submitted that the act of the Accused in knowingly and deliberately knocking down the deceased with a moving motorcycle proved malice.
24. On his part, the Accused submitted that the prosecution had not proved its case to the required standard and relied on the case of Republic v Kahindi Mwasambu Kai[2020] eKLR where Nyakundi J stated as follows:-

“I will deal with each of these in the context of this case namely the existence or non-existence of facts to prove the charge of murder beyond reasonable doubt, I must bear in mind that the burden of proof rests always with the prosecution and it has never and would never shift to the accused person. It is only few exceptions an accused person may be called upon to explain matters which are within his or her personal knowledge as provided for in Section (111) of the Evidence Act.”
25. According to Mr. K'Ombwayo for the Accused the entire evidence adduced by the prosecution was insufficient to have the Accused convicted for murder. He contended that the evidence of the identifying witness, PW1 was doubtful and that the DNA report was unreliable. The Accused further submitted that there was no evidence to establish motive since the wife to the deceased was not called to testify and confirm that there was a love triangle between her, the Accused and the deceased that propelled the Accused to kill the deceased.
26. For the prosecution to prove that the Accused was guilty of the offence of murder, the prosecution needed to prove the following ingredients that are set out in Section 203 of the Penal Code:-
 - a. The death of the deceased.
 - b. That the death was caused by an unlawful act and that the accused is responsible for causing the death.



- c. That in causing the death of the deceased, the unlawful act was actuated by malice aforethought.
27. It is important to note that the burden of proof herein rests squarely on the prosecution and the proof must be beyond reasonable doubt. This means that the duty is upon the prosecution to establish that the Accused is responsible for the offence and there can be no other reasonable explanation for the facts consistent with the Accused's guilt. In the case of *Moses Nato Raphael v Republic* [2015] eKLR the Court of Appeal cited with approval the case of *Woolmington v DPP* [1935] AC 462 where the court held that:-

“The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. “Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject (to the qualification involving the defence of insanity and to any statutory exception). If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

28. PW1 did not witness the incident that led to the fatal injury and therefore the prosecution's case rests on circumstantial evidence although the prosecution did not raise the issue in its submissions. It is therefore necessary for the court to interrogate the evidence on record to ascertain whether the chain of evidence cumulatively points unerringly to the conclusion that the Accused and no one else is responsible for the death of the deceased and that the killing was intentional. In the case of *Musii Tulo v Republic* [2014] eKLR, the Court of Appeal stated thus:-

“In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of *Musoke v. R* [1958] EA 715 citing with approval *Teper v. R* [1952] AL 480, thus:

“It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference'.”

29. As held in case of *Republic v Kahindi Mwasambu Kai* (supra), the burden never falls on an Accused person to prove his innocence and where circumstantial evidence is adduced all the facts established must point to the inevitable hypothesis that the Accused is guilty. In the case of *Republic v Michael Mucheru Cate* [2002] EKLR Etyang J stated that:-

“Circumstantial evidence must be a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt. Circumstantial evidence should not only be consistent with the guilt of the accused, but should be inconsistent with his innocence. (SARKAR ON EVIDENCE pp. 32 – 33). The way to deal with circumstantial evidence was stated in *TOPER V. R.* (1952) A.C. at Page 489 as follows:- “Circumstantial evidence must always be



narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence."

30. In *PON v Republic* [2019] eKLR, the Court of Appeal rendered itself as follows:-

"This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are *Rex V Kipkerring Arap Koske & 2 Others* [1949] EACA 135 and *Simoni Musoke V R* [1958] EA 71. In *Rex V Kipkerring* (supra) the court explained that;

"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."

Simoni Musoke V R (supra) introduced an additional factor to the foregoing, to the effect that before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. Over the years these strictures have been developed further by way of explanation. For example, in the case of *Omar Mzungu Chimera V. R* Criminal Appeal No. 56 of 1998, the Court stated that;

"It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) 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'."

31. Additionally, the Court of Appeal identified the threshold which circumstantial evidence must meet to satisfy a conviction in the case of *Eric Odhiambo Okumu v Republic* [2015] eKLR, cited in *Tomito Talala Dominic v Republic* [2020] eKLR as follows:-

- "i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- ii) The circumstances should be of definite tendency, unerringly pointing towards guilt of the accused.



- iii) 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.”
32. Further, in *Erick Odhiambo Okumu vs Republic (supra)* this Court referred to *Ernest Abang’a Alias Onyango vs Republic,(supra)*, where the Court identified the following as the threshold which circumstantial evidence must meet to justify a conviction:-
- “ i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- ii) The circumstances should be of definite tendency, unerringly pointing towards guilt of the accused.
- iii) 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.”
33. Since there was no witness to the incident, the evidence that ties the Accused to the alleged offence is as follows:-
- a) The fact that PW1 heard a bhang and on rushing to the scene saw the deceased staggering while a motorcycle rider was a short distance from him and the motorcycle rider left the scene without responding to their query as to what happened.
- b) The fact that PW1 identified the Accused in an identification parade as the motorcycle rider.
- c) The fact that blood-stained items of clothing belonging to the Accused and recovered from his home after his arrest were found to be stained with the deceased’s blood.
34. That the person named as Britty Milikau Mwanje died is not in doubt. PW1 confirmed that he suffered a head injury and died while undergoing treatment. His body was duly identified by two witnesses and an autopsy conducted by Dr. Dixon Mchana who issued burial permit number 0863377 and filled a postmortem form which was produced as PExh 2.
35. On whether the cause of death was an unlawful act, the prosecution’s case is that the Accused deliberately hit the deceased with his motor bike. The motor bike registration No. KMEW 735G which was seized on 4.6.2020 from the Accused’s house and produced PExh 6 was not subjected to forensic analysis to corroborate the prosecution’s case. It is reasonable to expect that the impact of the collision when the motorcycle hit the deceased would have caused a dent to the motorcycle. In absence of proof of positive identification of the motorcycle and in the absence of forensic evidence connecting the motorcycle to a collision, there is no conclusive evidence that the motorcycle was the one that hit the deceased. This is compounded by the fact that the post-mortem did not reveal any other injuries on the deceased aside from the head injury. Logically, a pedestrian, if hit by a motorcycle, would suffer injuries to the trunk and limbs not to the head, unless the collision results in a fall. In the present case, presumably, the collision led to a fall in the course of which the deceased’s head was struck by a stone thereby sustaining the injuries that led to his demise. It is curious that apart from the head injury, the deceased did not have any other injury on his body. If at all he had been hit by the motorcycle, there would have been some injury whether soft tissue or fractures, at the point of impact.
36. The question as to what caused the head injury was not satisfactorily explained by the prosecution. In PExh 3A, the Exhibit memo, the precis of the offence states that the deceased was walking on foot when



the Accused accosted him and hit him on the head with a stone. The precis of the offence informed the investigating officer's decision to forward the blood-stained stone that was recovered from the scene for DNA analysis. By the close of the case, the prosecution had not resolved the question as what caused the death of the deceased as even the pathologist Dr. Mchana attributed the injury to an assault and not to a traffic accident. So the question that begs our answer is, was the fatal injury inflicted with a stone, was it caused during the collision with the motorcycle, or did the collision cause the deceased to fall down, get hit by a stone and thereby sustain the injury? Without a clear answer, it is difficult for the court to establish whether the cause of death was unlawful or not.

37. The prosecution's case hinged on the fact that a DNA analysis was done which established that the blood on the Accused's clothes was the deceased. However, no evidence was led to demonstrate how the deceased's blood came to be in the Accused's clothing. Aside, from the fact that the Accused's clothing was not produced in court, there was no evidence that the Accused came into contact with the deceased on the fateful date. PW1's testimony was that he concluded that the Accused had hit the deceased with the motor cycle. He neither saw the collision nor the Accused disembarking from the motor cycle to assault or hold the deceased. It is quite puzzling in view of the evidence, how the deceased's blood came to be in the Accused's trouser and jacket. This is in view of my earlier holding that the collision by the motor cycle may not have been the cause of the head injury.
38. I am alive to the provisions of Section 119 of the *Evidence Act* which provides:-
- “The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”
39. While it is true that the Accused ought to give a reasonable explanation as to the presence of the deceased's blood on his clothes, in my view, the burden only arises where there is overwhelming evidence that the Accused came into close contact with the deceased. In the case of Republic v John Kerage, Machana & another v Republic [2021] KEHC 8523 (KLR), the court found that the deceased's blood on the accused's clothes could have been present on the clothes before the crime, or the accused would have been in a place where the blood was already there.
40. It may as well be that the Accused did hit the deceased with his motor bike thereby causing him to stagger fall and hit by a stone thereby occasioning him fatal injury; but in the absence of evidence that the Accused came into contact with the deceased during or after the collision one cannot conclude that a transfer of the blood from the deceased to the Accused's clothes happened during the accident. Moreover, the failure to produce the clothes as exhibits points to a possible failure in the chain of custody.
41. It was contended that the Accused had a motive to kill the deceased. But in absence of the evidence of the Accused's wife Mary Minayo, and the witnesses who PW1 allegedly heard saying that the Accused had threatened the deceased, the allegations remain as mere allegations and or speculation.
42. All in all, I find that the chain of evidence in the prosecution's case did not point unerringly to the guilt of the Accused. No inference of guilty can therefore be made as the inculpatory facts adduced by the prosecution are capable of explanation upon other hypothesis than the guilt of the Accused.
43. Suspicion, however strong is not a basis for conviction and having weighed the entire evidence, I return a finding that the prosecution has failed to prove its case against the Accused beyond reasonable doubt. The Accused is acquitted of the charge of murder and is hereby set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 10TH DAY OF JUNE 2025.



A. C. BETT

JUDGE

In the presence of:

Ms. Chala for the Prosecution

Mr. Adeka holding brief for the Accused

Court Assistant: Polycap

