



**Republic v Kong'a (Criminal Case E030 of 2023)
[2025] KEHC 8267 (KLR) (10 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE E030 OF 2023**

**JM NANG'EA, J
JUNE 10, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

JACKSON KIPKOECH KONG'A ACCUSED

JUDGMENT

1. The above named (hereinafter referred to as “the accused”) was on 23rd August 2023 arraigned in this court charged with the capital offence of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence state that on the 8th August 2023 at K9 Unit, Dog Section, Nakuru East Sub County, within Nakuru County he murdered Sgt. Christopher Kimeli (hereinafter referred to as “ the deceased”).
2. The accused denied the offence.

The Prosecution case

3. Part of the prosecution evidence was recorded before my brother (Justice H.M Nyaga) who has since transferred to another work station. 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 accused and the deceased were both police officers based at K9, Dog Section in Nakuru where the former was the officer in charge. On 7th August 2023 at around 6p.m. PW1 (Cpl Dickson Rotich) assigned the accused an AK 47 Rifle Serial No. BK 5804 M with 30 rounds of ammunition. The accused then left for night sentry duties at Gate B of the Station along side his colleague Police Constable Samson Kigo (PW2). The following morning at around 4 am other officers arrived at the gate with two theft suspects they had apprehended. Minutes later the deceased appeared at the gate for his routine inspection and directed that the suspects be taken to the Report Office, and



- the officers complied. According to PW2, the deceased and the accused angrily exchanged words at the Report Office, with the deceased questioning why the suspects had not been escorted to the Report Office immediately they were handed to the sentry guards. The accused is said to have complained about the deceased insulting him as a “fool” and threatened to “finish” him. During the altercation, the accused allegedly cocked his gun and went outside the Report Office. PW2 further testified that the deceased also got outside the Office shortly after booking the suspects. Then the witness heard gunshots outside the Office before the accused came announcing that he had “finished” the deceased and offered to surrender his gun while asking to be arrested. The deceased was then found lying down on a tarmac about 200 meters away. He appeared dead and there was blood on the tarmac.
5. PW1, PW3 and PW4 who were also at the Station at the material time confirmed PW 2’s testimony. PW1 told the court he had found the deceased on the ground bleeding from the chest after hearing of the shooting incident. He took possession of the accused’s firearm from PW2 who had taken it from the accused. The gun had 29 rounds of ammunition, 1 less than the 30 that had been issued to him. None of the officers witnessed the actual shooting.
 6. PW 9 (CI Jetmore Malit) was based at the Directorate of Criminal Investigations (DCI) Nakuru, Scenes of Crime Unit. His duties included taking photographs at scenes of crime for purposes of investigations and prosecution. On 8/8/2023 in the morning he was informed of the shooting incident in question and was dispatched to the scene where he took photographs of the deceased’s body. There was a spent cartridge beside the body but the witness conceded that same is not shown on the photographic evidence. The Officer testified to observing wounds in the chest and back of the deceased. He tendered 7 photographs and his certificate dated 26/4/2024 in respect of the photography in evidence.
 7. PW7 (IP Francis Karori) is a Ballistics Expert at the DCI Head quarters in Niarobi. He told the court that the DCI Nakuru East on 14/8/2023 submitted to them an AK 47 Rifle Serial No. BK 5804 M; a Magazine with 29 rounds of ammunition and a spent cartridge. Inter alia, they were required to establish if the Rifle and rounds were firearms within the meaning of the *Firearms Act*; whether the spent cartridge had been fired from the Rifle and whether the gun had been used to commit crimes before. During his examination of the exhibits, PW 7 said he successfully test-fired 3 of the rounds using the Rifle. The Magazine was found to be capable of carrying 30 rounds and was in good serviceable condition. On comparing the spent cartridges from the test-fired rounds with the other spent cartridge sent for analysis, PW 7 opined that they were fired from the same gun based on the firing pin markings unique to every gun among other observations. The Ballistics Analysis Report was exhibited for the court’s consideration.
 8. Post- mortem examination of the deceased’s body was conducted at Nakuru County Teaching and Referral Hospital on 15/8/2023 by Dr Titus Ngulungu (PW 5). The Pathologist noted that there was a gunshot wound to the upper side of the chest. The bullet exited from the back leaving a wound measuring 40 mm. The pathologist’s opinion was that the cause of death was a single close range gunshot wound to the chest that resulted in chest organs, lungs, heart and spinal injuries. The autopsy report dated 15th August, 2023 was tendered and admitted in evidence.
 9. PW 8 and PW 10 (Cpl David Kipkoros Chelengo and Police Constable Victor Katuta) respectively were the case Investigating Officers. PW 8 told the court that he was one of the officers who rushed to the scene in the company of PW 9. He took possession of the deceased’s dirty blood-stained blue jacket; dirty torn white vest; dirty checked shirt; blue boxer; pair of socks and maroon trousers which he identified in court. The witness said he didn’t prepare an inventory of the items and wasn’t aware if any was prepared.



10. PW 10 confirmed PW 8's testimony. He produced the cloth exhibits as well as the AK 47 Rifle, rounds of ammunition, spent cartridges and records of handling of firearms at the Station among other exhibits.

The Defence Evidence

11. Upon close of the prosecution evidence and consideration of the defence submissions on "no case to answer", the accused was put on his defence to the charge. He gave sworn evidence and called no witnesses.
12. The accused told the court that he is a Police Constable attached at the material time to K9 Dog Section, Nakuru. He confirmed the altercation between him and the deceased at the Station's Report Office that fateful morning. The deceased had inquired why arrested suspects had not been taken to Nakuru Central Police Station. Before he could explain, the accused states that the deceased abused him as stupid and that he didn't know his work. He didn't react but the deceased continued taunting and insulting him in the presence of other officers and grabbed his firearm. In the ensuing struggle the gun's nozzle pointed at the deceased's chest and the trigger went off in the course of the tussle. The accused claimed that the deceased pressed the Rifle's trigger during the confrontation. The deceased had allegedly followed him for 50 meters before the gun went off near the Station's gate. He denied threatening to kill the deceased, adding that he never intended to kill him.

Final Submissions

13. 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 as unlawfully caused unless it is otherwise accidentally caused in circumstances that make it excusable. Counsel referred the court to two Ugandan cases to wit; Uganda v Lydia Draru Alias Atim HCT-00-CR-SC-0404 High Court of the Republic of Uganda and Akol Patrick & Others v Uganda (2006) HCB (Vol. 1) 06. The Court of Appeal for East Africa in R v 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. It is argued on the authority of decided cases that circumstantial evidence attending to this case proves the accused's complicity beyond reasonable doubt.
14. The defence Counsel on their part submit inter alia that the prosecution evidence does not prove the charge beyond reasonable doubt. It is submitted that the prosecution evidence does not prove the element of malice aforethought allegedly harboured by the accused in the commission of the offence. Counsel referenced various decided cases including the Ugandan case of Musili v Republic CRA NO. 30 of 2013 (U R) and this court's decisions in *Muthini v Republic (Criminal Appeal 15 of 2023)* { 2024}KEHC 2182 (KLR) (22 February 2024) (Judgement) and Republic v Andrew Mueche Omwenga [2009] KEHC 1573 (KLR). In the former case it is restated that for a conviction to be founded on circumstantial evidence the chain of relevant events must consistently and unerringly point to guilt and not innocence. The latter two cases emphasize the prosecution's burden of proof the charge beyond reasonable doubt. For the burden to be discharged, guilt should be the only rational inference to be drawn from the court's appreciation of the entire facts and circumstances of the case in terms of the cited case law.

Issues for Determination

15. The sole issue for determination is whether the prosecution has proved beyond reasonable doubt that the accused murdered the deceased, actuated by malice aforethought.



16. There is no direct evidence linking the accused to the killing as none of the witnesses testified to seeing the accused pulling the trigger and shooting the deceased. Determination of the case therefore wholly depends on circumstantial evidence. In *Mwangi v 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.
17. In the case of *Ahamad Abolfathi & Another v 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.”
18. In a much older case (*Republic v 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.”
19. In the often quoted case of *Sawe v 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.”

As in the case of *R v 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.
20. The accused disputes malice afterthought in the killing of the deceased seeming to contend that the deceased accidentally pressed the gun's trigger in their struggle. 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.
21. 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 v Republic* [2004] KLR (1a).



22. In this case, the Pathologist's opinion as to the cause of the deceased's death was a gunshot in the chest, the bullet exiting through the back. As per the testimony of the police officers who witnessed the altercation between the accused and the deceased before the shooting, the accused was incensed by what he considered the deceased's insults directed at him, cocked his gun and exited the Report Office where the arguments occurred. There is uncontroverted evidence that the deceased followed him up to the place, meters away, where he died of the gunshot. The accused appears to have been provoked by the deceased berating him over his handling of the arrested suspects. His colleagues told the court that he surrendered his Rifle shortly after the incident and offered to be arrested remarking that he had "finished" the deceased and was now a "civilian". The evidence of these witnesses has not been discredited.
23. I am satisfied on the evidence and in the circumstances of this case that the accused intentionally killed the deceased. The kind of weapon used leaves no doubt that the accused knew that death could result. Although, the accused was angered by the deceased's insults, this was no grave or sudden provocation so as to remove the case from the realm of murder in law. The accused's act evinced intention to cause death or do grievous harm in terms of Section 206 of the Penal Code set out supra. As noted above, he must have known that such act of shooting could cause death, and he was therefore driven by malice afterthought.
24. The court is therefore satisfied that on the evidence and in the circumstances of the case, the stated inculpatory facts are incapable of explanation upon any other reasonable hypothesis other than guilt. The prosecution proved the charge beyond reasonable doubt. Accordingly, the accused is convicted of the offence pursuant to section 215 of the Criminal Procedure Code.

J. M. NANG'EA - JUDGE

JUDGEMENT DELIVERED IN PHYSICAL COURT THIS 10TH DAY OF JUNE, 2025.

In the presence of:

The Prosecution Counsel, Ms Sang.

The Defence Counsel, Ms Kemunto for Mr Mong'eri (present online).

The Deceased Family's Counsel, Ms Kirui

The Accused, present.

Court Assistant, Jennifer.

J.M. NANG'EA - JUDGE.

