



REPUBLIC OF KENYA



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**Republic v Wamalwa (Criminal Case E026 of 2022)  
[2025] KEHC 10640 (KLR) (22 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10640 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE E026 OF 2022**

**RK LIMO, J**

**JULY 22, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GRIVIN KUNYU WAMALWA ..... ACCUSED**

**JUDGMENT**

1. Grivin Kunyu Wamalwa, the accused herein is charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on 18/7/2022 at Moi Farm in Kiminini Sub-County within Trans-Nzoia County he murdered Evans Barasa (hereinafter to be referred to as the deceased).
2. The accused denied committing the offence and the prosecution has called a total of 8 witnesses. The prosecution's case is based on circumstantial evidence and the doctrine of last seen. The accused person gave sworn defence denying being involved with the murder. Below is a summary of the evidence tendered during trial.
3. Benard Wanyonyi Wafula (PW1) testified that he works as a caretaker of a sugarcane farm at Amagoro in Moi's Bridge known as Ekirapa Farm. He recalled that on 18/7/2022 (hereinafter to be referred to as the material date) he picked a tractor at Maili Saba to take to the farm. He stated that he met his boss one Peter Barasa on the way who informed him that he had dropped police officers at the farm. He stated that he proceeded to the farm and met one Patrick who was a National Police Reservist in the company of an old person.
4. He stated that as he was going around the farm on his duties he saw some drops of blood. He stated that he asked some women who were doing casual jobs in the farm but they were unaware of the same. He stated that he saw one of the employees seated and looked tired. He stated that on inquiry the employee told him that as he was coming from the farm he heard someone groaning and got scared



- and went to the open field. He testified that the employee told him that he had seen a National Police Reservist Officer down and he rushed to the scene and found a person covered with sugarcane leaves with soil covering the nostrils and eyes. He stated that he notified his boss that he had found Evans (deceased) dead. He stated people heard about the incident and converged at the scene and that police officers also arrived.
5. He stated that the deceased was one of the National Police Reservist officers in the farm and that the accused person used to be a cane cutter in the farm and that he disappeared after the death of the deceased. He also clarified that the person who alerted him about the presence of deceased body is an employee known as “Mfalme” and that the said “Mfalme” was the first person to discover the remains of the deceased.
  6. Godfrey Wanjala Chemwanyi (PW2) a casual labourer and a cane cutter for Peter Barasa, testified that on the material date, he was working on a tractor at the farm when PW1 went to inform him about the murder of the deceased. He stated that he together with other employees at the farm proceeded to the scene of crime. He stated he saw the leg protruding from the sand where the body was covered. He stated that the DCI officers came and collected the body and never recovered the gun which the deceased had.
  7. He stated that he knew the accused as a fellow cane cutter at the farm and that he was with him in the morning of the material date but only disappeared when the body of the deceased was discovered. He stated that when he gathered employees at the farm to discuss about the incident, the accused was absent. He however added under cross-examination that the accused and 7 other employees were also absent. He stated that he later learnt that the accused had proceeded to another farm at Makele.
  8. Dr. Dennis Nanyingi (PW3), a medical doctor who testified on behalf of Dr. Barasa who performed the post mortem examination testified that the deceased died as a result of severe head injury caused by a blunt object secondary to assault. He tendered the Post Mortem report as Pexhibit 1.
  9. Patrick Wekesa Ekoloi (PW4) a police reservist commonly referred to as NPR (National Police Reservist) testified that the deceased was a colleague and that he was working with him at Moi Farm Amagoro on the material date. He stated that he had been tasked by the Farm owner one Barasa to provide security cover at the farm together with the deceased. He stated that they were dropped at the farm by Barasa in the morning and began surveillance on the farm. He stated that as they went about their work they met 2 men who wanted to talk to Barasa.
  10. He stated that one identified himself as Griffin and that he pulled the deceased inside the sugar plantation and talked to him for a few minutes before the deceased went back to where he stood. He stated that he then left the deceased and took another route to continue with surveillance. He stated that after 20 minutes his boss Mr Barasa called him and told him that his colleague the deceased had been killed. He stated that he rushed back and found many workers at the scene. He stated that he found the deceased lying down dead covered with some sugarcane. He stated that he informed Mr Barasa who in turn notified the police who arrived shortly and picked up the body. He stated he observed head injuries on the body of the deceased adding that he also bled from the nose.
  11. He clarified under cross-examination that the farm he was guarding is approximately a block of 100 acres with many roads cutting across the farm. He also stated that there was a jembe stick next to the body of the deceased which was suspected to be the murder weapon. He stated that the police collected it. He stated that he had worked with the deceased for about 3 to 4 months prior to the incident and that the deceased was armed with a rifle at the time he left him.



12. Bernard Wekesa Nyongesa (PW5), testified that he was a casual worker along River Nzoia assisting people to cross Nzoia River. He stated that on the material day at around 9.30am, a person he knew as a cane cutter at Moi Farm arrived at the river dressed in a track suit. He stated that he sensed that he was worried and asked how much it would cost him to cross the river and that he told him he charged 50/- instead of the normal rate of 20. He stated that he paid the money and his co-worker Emmanuel assisted him to cross. He stated that when he had crossed the river, he appeared anxious and wanted to run but he cautioned him against running as he would be mistaken for a thief and be lynched. He stated that he offered to give the person a sweater but before he did so one Mama Sarah gave him hers which was red-yellow in colour and the person left.
13. He stated that he then continued with his work. He stated that he then decided to rush home and met cane cutters on the way. He stated that he inquired from the workers what the problem was. He stated that he was then told that an NPR officer had been killed. He stated that he did not know that the accused had killed somebody and that he would not have assisted him to cross the river. He maintained that the accused looked worried when he was crossing River Nzoia.
14. He stated that he was later called by the police to attend an identification parade and was able to pick out the deceased from the parade. He stated that he thought the accused had fought with someone as he was bare-chested but did not know of the murder. He stated that the sugar cane farm is about 3KM away from the river crossing and that the accused arrived at around 9.30am looking worried and without shoes adding that it was chilly and that is why he offered a sweater. He stated that he did not ask the accused why he looked worried.
15. Metrin Khasambu Situma (PW6) on her part testified that on the material date at around 9.30am as she was going to look for casual work at Nzoia Scheme, she saw someone running from a farm towards Nzoia River. She stated that she found the man asking one Bernard (PW5) to be aided in crossing the river. She stated that the man had no shirt and when she asked him why he had no shirt he reportedly told her that he had fought with another person over debt and had hit a police officer who fell forcing him to run away.
16. She stated that PW5 then aided the person to cross the river. She stated that he also crossed the river and that when he reached the other side the person asked them for a sweater and that Sarah volunteered to assist him with a sweater. She stated that the person then went away.
17. She testified that when he returned in the evening he learnt that a KPR officer had been killed. She stated she explained what she witnessed in the morning and recorded a statement at Kiminini police station. She said that she was later called to an identification parade where she positively identified the accused as the person she met at the River Nzoia river bank. She recalled that the accused had a tracksuit trouser and bare-chested and looked worried. She stated that she suspected that he had done something wrong. She however stated that she did not know who killed the deceased.
18. Inspector Edward Ekisa (PW7), the officer who conducted the identification parade at Kiminini police station, testified that on 10/9/22, he was asked by the investigating officer in this case CPL Eddah Naliaka to conduct an identification parade. He stated that the suspect was pointed out to him and he asked him if he was fine with the identification parade and he said he was comfortable.
19. He stated that he asked the suspect the position he wanted to take in the identification parade. He stated that in the first identification parade the accused chose position 6 and the witness who attended the parade was Bernard Wekesa (PW5). That in respect to second witness, Sarah Nanjala the accused chose position 8 and that in respect to the 3<sup>rd</sup> witness Metrin Khasambu, the accused chose position 2. The



- officer stated that the 3 witnesses all positively identified the accused. He tendered the identification parade Form as PExhibit 3.
20. Eddah Naliaka (PW8), the investigating officer in the case testified that on 18/7/22 she got a report from ACCIO Joseph Adongo that a police reservist was found dead in a sugar plantation within Amagoro Waitaluk Division and that his rifle was missing.
  21. She stated that she proceeded to the scene together with other police officers and found the deceased's body covered by dried cane. He stated that the mouth and nose were filled with mud and that the scene of crime officers had documented the scene by the time she arrived there. She stated that she recovered a wooden stick which appeared fresh. She stated that the body was collected and taken to the morgue to await post mortem examination. She stated that she began investigations by taking statements from cane cutters who were harvesting cane at the spot where the body of the deceased was found.
  22. She stated that the accused was later arrested from his hideout by DCI officers in Cherangany and she went and escorted him back to Kiminini police station. She stated that she received reports that the accused was the person last seen with the deceased before he was later found dead. She stated that when PW2 gathered cane cutters at the scene, the accused was absent and that though the accused had stated in his statement that he had gone to another farm belonging to the same employer, he did not report there.
  23. She said that the accused was positively identified by 3 witnesses and was seen looking anxious as he crossed River Nzoia. She stated that the accused had earlier been seen wearing a sweater at the farm but as he crossed River Nzoia, he had removed the sweater which in her view indicated that he was trying to camouflage.
  24. She stated that the accused was arrested 2 months after the incident wearing a jungle shirt, hat, jungle trouser, sweater, belt and jacket. She produced them as Pexhibit 4(a) to (f) respectively.
  25. The investigating officer further stated that she suspected the motive of the killing was to steal the rifle. She however stated that they did not recover the rifle. She did not produce the register showing that the deceased was issued with a rifle.
  26. When placed on his defence the accused stated on oath that he was not involved in the killing of the deceased. He stated that on the material date he joined other cane cutters but because he did not have a panga he decided to leave them and go to the river to wash his clothes. He stated that when he reached the river he found PW5 who advised him to cross the river and go wash from the other side across the river.
  27. He stated that upon crossing the river, he washed his clothes and waited until 10am and went about his business after the clothes had dried.
  28. He stated that he heard about the murder incident after a month. He stated that he knew the deceased well and had no reason to kill him because they had not differed. He stated that he did not know what happened to the deceased. He stated that when he was told by his boss that the police were looking for him, he told him he was in Cherangany where they went and arrested him.
  29. In his written submissions through counsel, the defence contends that none of the witnesses at the farm during the material date to wit PW1, PW2 and PW4 saw what happened to the deceased.
  30. He submits that the evidence of PW5 and PW6 are in conflict with respect to the colour the accused was seen wearing on the material date.



31. He faults the manner in which the identification parade was conducted contending that 5 short participants and 7 medium height participants were picked.
32. He submits that the investigations were shoddy pointing out that the suspected murder weapon was not subjected to any forensic examination to connect it with the accused.
33. He submits that the prosecution's case is entirely based on circumstantial evidence and that the threshold was not met. He cites the decisions in *Rex –vs- Kipkering Arap Koskei & Anor (1949) EACA 135* and *Simon Musoke –vs- Republic (1958) EA 715* where the courts held in order to justify a conviction based wholly on circumstantial evidence inculpatory facts must not only be incompatible with innocence of the accused but it must exclude co-existing circumstances which negate inference of guilt being drawn. He submits that the prosecution has not proved its case against him to the required standard.
34. The prosecution on the other hand submits that it has proved its case beyond reasonable doubt highlighting the evidence tendered through the eight witnesses it availed. It contends that it was aware that it was obligated to prove the following elements for the charge to stand namely;
  - i. The fact of death.
  - ii. That the cause of death was caused by the unlawful act or omission of the accused.
  - iii. That the accused had malice aforethought.
35. On the 1<sup>st</sup> element on fact of death, the State submits that the same was proved through the evidence of PW3 and that the body was identified by Patrick Juma and Domian Simiyu.
36. On the 2<sup>nd</sup> element, of actus reus, the State points out that the accused was positively identified in an identification parade. It is further submitted that PW4 saw the accused pull the deceased aside for a conversation and that they headed further into the sugar plantation and the deceased was not seen alive again.
37. It relies on the doctrine of last seen with the deceased and is relying on the decision of *Republic –vs- EKK (2018)eKLR* and *Wilson Wanjala Mkendeshwo –vs- Republic*.
38. The State further points out that PW5 and PW6 saw the accused bare-chested running to cross River Nzoia. The State submits that the evidence of the 2 witnesses regarding the anxiety exhibited by the accused indicates that he was afraid and wanted to get away from the crime scene.
39. On malice aforethought, the prosecution submits that the element can be inferred under section 206 of the *Penal Code* and that where facts are shown establishing an intention to cause grievous harm or death, the element is established. It relies on the case of *Republic –vs- Silas Magongo Onzere alias Fredrick Namema (2017)eKLR*. The State points out that what is crucial to establish is the nature of weapon used, manner it was used, the part of the body targeted and the nature of injuries inflicted. The State submits that the deceased was hit on the head several times with a blunt object which caused a skull fracture and massive intracranial bleeding. It contends that whoever caused those kind of injuries was actuated by malice. It relies on the case of *Kennedy Wesonga Kiroba –vs- Republic (2013)eKLR*.
40. This court has laid out both the prosecution's case as well as the defence case. This is a case where the accused is charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. For a charge of murder to be sustained the following elements must be established and proved beyond any reasonable doubt. the ingredients are namely;-
  - i. Fact of death.



- ii. That the death was caused by unlawful act or omission by the accused (actus reus).
- iii. Malice aforethought (mens rea).

### **The fact of death.**

41. This element was not contested in this case. The evidence of PW1, PW2 and PW8 all of who saw the body of deceased buried with sand in a sugar plantation was corroborated by the medical evidence tendered by PW3 who tendered post mortem form as Pexhibit 3. The exhibit revealed that the deceased died from a severe head injury caused by a blunt object secondary to assault. The death of the deceased was therefore caused through a deliberate unlawful action. This court is satisfied that the prosecution's case proved the 1<sup>st</sup> element of the fact of death to the required standard.

### **Actus Reus**

42. The prosecution's case on the above ingredient rests on circumstantial evidence and to some extent the doctrine of last seen with the deceased.
43. It is true going by the evidence tendered that there was no eye witness who directly saw the accused committing the offence. The circumstances laid out upon which the prosecution's case rests are as follows;
- a. The accused person was an employee or a cane cutter at the sugarcane plantation where the deceased was guarding. This fact was conceded in his defence.
  - b. He was seen in the farm that morning having a conversation with the deceased and infact he was seen by Patrick Wekesa Ekoloi (PW4) leading the deceased into the plantation from where the body of the deceased was later found buried using sand and dry leaves of sugarcane.
  - c. The accused was seen and met Benard Wekesa Nyongesa (PW5) at the crossing of River Nzoia. He asked to be assisted to cross which was normal but what stands out is the fact that he appeared nervous, anxious/worried and bare-chested. The evidence of PW5 was corroborated by PW6 Metrine Khasambu Situma. PW5 stated that in fact because of the anxiety by the accused to cross the river, he took advantage and charged him more than double the price but the accused determined to cross to the other side at all costs, paid and crossed. The accused in his defence alluded to this fact of crossing the river at the material time. The only departure in his evidence was that he was crossing the river to wash his clothes. That reasoning in my considered view does not hold water.
  - d. The accused somehow disappeared after the incident and did not report back on duty the following day and thereafter until he was arrested. What explanation did he give in his defence? He stated that he reported to work in the morning of material date joined other workers but in his own words did not "accompany other workers to the farm to cut sugarcane because they had pangas". He stated "I did not accompany them, I took my clothes and went to the river to wash them". This begs the question why did he report on duty without a tool (panga) to use and he certainly knew what he was going to cut sugarcane?
44. The prosecution always has the burden of proof whether its case rests on direct evidence or circumstantial evidence. The prosecution in this case entirely relied on circumstantial evidence which I have highlighted above. It therefore had the burden to adduce and present compelling inculpatory evidence to prove beyond reasonable doubt that the accused herein is guilty of the charge.



45. In the case of Chiragu & Anor –vs- Republic (Cr Appeal No.104 of 2018) (2021) KECA 342, the Court of Appeal delved on the question of circumstantial evidence and inter alia observed as follows;-

“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”.

The court then went ahead to lay down the following guidelines by stating thus;

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy 3 tests namely;

- i. The circumstances from which inference of guilt is sought must be cogent 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”.

46. The same court in Sawe –vs- Republic (2003) KLR took the same approach by holding as follows;

“In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon”.

47. From the facts highlighted above, this court finds that the prosecution’s case on the element of actus reus is well established and proved beyond reasonable doubt. The accused person was seen as I have observed above running away from his place of work (which place later turned out to be the crime scene). He was bare-chested, had no shoes and wanted to cross River Nzoia when he was expected in ordinary circumstances to be busy cutting cane to earn for that day. Why was he anxious and afraid when he asked PW5 to help him cross the big river? He wanted to get away and felt safer across the river. He felt a little exposed when he was asked why he was bare-chested and that is why he asked for a Good Samaritan to help him with a top in form of a sweater.

48. The above circumstances are even reinforced by the doctrine of last seen. The prosecution’s case in this doctrine rested on the evidence of PW4 who stated clearly that he last saw the deceased alive in the company of the accused.

49. The prosecution has made strong submissions based on this theory citing the decision of Republic – vs- EKK (2018)eKLR where the court referenced a Nigerian Court decision in the case of Moses Jua –vs The State (2007)LPEKR –CA(IL/42/2006 which held as follows;

“Even though the onus of proof in criminal case always rests squarely on the prosecution at all time, the last seen theory in the prosecution of murder or culpable homicide cases, is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating how the deceased met his death or her death. In the absence of any explanation, the court is justified in drawing inference that the accused killed the deceased”.



50. In short, the doctrine of last seen shifts the burden somewhat to the accused to give an account of what transpired between the time he was seen with a deceased person when he was alive to the time he was found dead. In other words he has the burden of establishing his innocence if the prosecution is able to establish through evidence that he was indeed the last person seen alive with the deceased.
51. This court is cautious of the fact that the prosecution's case on this theory of last seen is based on the evidence of a single witness which was PW4. But having taken the caution this court finds that the other correlating circumstances points to his culpability. My conclusion is based on the following factors.
52. In his own defence, the accused placed himself squarely at the scene of crime. He stated that he joined other workers but did not go to cut sugarcane so a question mark remains. What were his real intentions because certainly he showed no intention of joining other employees to cut sugarcane otherwise he could be having the necessary farming tool – a panga. In his own account he had none. This means he harboured other ulterior motives which became apparent later when he was seen talking to the deceased and leading him into a sugar plantation from where the deceased body was later found.
53. Secondly, in his defence he stated that he knew the deceased well. He was also known by PW1, PW2, PW4 and PW5. None of the prosecution witnesses had a grudge against him to try to frame. In fact in his defence he did not raise any such issue.
54. Thirdly the accused in his defence did not explain why he literally deserted duty and ran away after the incident. Why was he so afraid and anxious when he was found by PW5 and PW6? There is no doubt that he appeared and was indeed afraid because he knew he had committed a serious offence.
55. This court is satisfied that the prosecution has proved its case beyond any reasonable doubt with respect to the element of actus reus. The circumstantial evidence and the theory of last seen both points unerringly towards the guilt of the accused person.
56. While I agree with the defence submissions that suspicion alone however strong should not form a basis of conviction, in this case the case is not just based on suspicion that was expressed by PW5 and PW6 who thought that the accused appeared anxious because of maybe fighting with someone. The circumstantial evidence tendered by the prosecution is cogent and firm. It points to the guilt of the accused.

### **Mens rea**

57. It is true that there was no direct evidence tendered by the prosecution showing motive but under Section 206 of the *Penal Code*, motive can be inferred from the nature of injuries inflicted on the deceased. From the Post Mortem report (Pexhibit 1) the deceased suffered severe head injuries from which he died from. The doctor who did post mortem examination observed inter alia depressed skull fracture on occipital region and massive subgaleal haematoma. This shows that the person who caused the assault really intended to end the life of the deceased. The weapon used to cause the injury was a jembe stick (Pexhibit 2) measuring approximately 1 ½ metres in length and 2 inches in diameter. The element of mens rea has been proved beyond doubt.
58. This court is satisfied that the prosecution's case against the accused has been proved to the required standard and this court finds the accused guilty as charged. He is convicted for the offence of murder under section 215 of the *Criminal Procedure Code*.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 22<sup>ND</sup> DAY OF JULY ., 2025.**

**HON JUSTICE R.K. LIMO**



**KITALE HIGH COURT**

Judgment delivered in open court

In the presence of

Mukanda holding brief for Nakitare for accused

Mugun for the State

Duke/Chemosop- Court assistants

