



REPUBLIC OF KENYA



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**Republic v Khaihira & another (Criminal Case 3 of 2021)
[2025] KEHC 10388 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 3 OF 2021**

**JN KAMAU, J
JULY 17, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

PATRICK CHENGO KHAIHIRA 1ST ACCUSED

JUSTON AYODI KEYA 2ND ACCUSED

JUDGMENT

Introduction

1. The 1st and 2nd Accused persons herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) Cap 63 (Laws of Kenya). The particulars of the Charge were that:-

“On the night of 5th and 6th day of November 2019 at Saosi Village, Serem Sub-location, Shamakhokho Location in Hamisi Sub-County within Vihiga County, jointly murdered Humphrey Swekenye Khachira.”
2. The Prosecution’s case was heard on diverse dates between 4th July 2023 and 1st November 2023 when it closed its case. On 28th February 2024, this court found that the Prosecution had established a prima facie case against the Accused persons and thereby put them on their defence. The defence case was heard on 30th July 2024 and 14th November 2024.
3. This matter was partly heard by Musyoka and P.J Otieno JJ. This court became seized of the same on 21st March 2023 on which day the Accused persons and the State asked this court to proceed from where it had reached.



4. The Prosecution's Written Submissions were dated 11th December 2024 and filed on 16th December 2024 while those of the 1st and 2nd Accused persons were dated and filed on 17th December 2024. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

5. The issues that were put before this court for consideration were as follows:-
 - a. Whether or not Humphrey Swekenye Khachira (hereinafter referred to as the "deceased") died?
 - b. If so, was his death caused by an unlawful action(s) and/or omissions?
 - c. If so, who caused the unlawful action(s) and/or omissions?
 - d. Was there malice aforethought in the causation of the deceased's death?
6. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

I. Proof of Death of the Deceased

7. The Accused persons did not submit on this issue. On its part, the Respondent submitted that there was no doubt that the deceased died.
8. As both the Prosecution and Defence witnesses alluded to the deceased's death, it was not necessary to seek further proof. This court found and held that the deceased's death was proved without an iota of doubt.

II. Proof of Cause of the Deceased's Death

9. The Accused persons did not submit on this issue. The Respondent submitted that Robert Lungu (hereinafter referred to as "PW 3") testified that he attended the postmortem of the deceased and identified his body. It added that Dr David Akaliche Adori (hereinafter referred to as "PW 5") conducted the postmortem on the deceased and opined that the cause of his death was excessive loss of blood secondary to major neck vessel injury with assault.
10. The cause of the deceased's death was a pertinent issue. PW 5 tendered a Postmortem Report dated 29th November 2019 in respect of the deceased herein as an exhibit in this matter. After conducting the postmortem examination, he formed an opinion that the cause of death was exsanguination due to major neck vessel injury secondary to associated 90%-95% burns.
11. It was clear from his evidence that the deceased's death was not as a result of natural causes. It was therefore crucial to establish how the deceased sustained the injuries that caused his death.

III. Identification of Perpetrator(s) of Deceased's Death

12. The Accused persons did not deny having been with the deceased on the material date/night of 5th November 2019 going to 6th November 2019. However, they denied injuring and/or beating and/or killing him.
13. It was their case that the Prosecution's case was full of contradictions and inconsistencies. They submitted that whereas Eric Mmaiti (hereinafter referred to as "PW 1") testified that the 1st Accused person hit the deceased with a heavy rod, Sharon Khatioli (hereinafter referred to as "PW 4") testified



- that the 1st Accused person hit the deceased using a stick. They added that whereas PW 1 told the Trial Court that one Likoti had a slasher which he used to beat the deceased, Rebecca Khajeya (hereinafter referred to as “PW 2”) testified that it was the 2nd Accused person who had the slasher which he used to beat the deceased.
14. They further pointed out that whereas, PW 1 told the Trial Court that the 1st Accused person had petrol which he poured on the deceased, PW 4 testified that the 1st Accused lit fire on the deceased using a match box, which was contradicting with PW 1’s evidence that one Simbalu had a match box and lit fire on the deceased. They added that whereas PW 1 testified that the 2nd Accused person was at the scene and that he too beat the deceased, PW 2 stated that the 2nd Accused person was not at the scene.
 15. It was their contention that the evidence of PW 4 was imaginary, far-fetched and framed and that as she claimed that there was no land disputes between the families of the 1st Accused person and the deceased, the Assistant Chief, Liyenzero Hesbon (hereinafter referred to as “PW 6”) confirmed that there was a long standing land dispute which was the reason for framing the 1st Accused person.
 16. They pointed out that PW 6’s evidence was so clear that the 2nd Accused person was the one that notified him of the incident and kept in communication and that it was impossible that he could be in constant communication while in the act of beating the deceased alongside the mob. They were emphatic that PW 6 had absolved them from the incident.
 17. They faulted No 233861 Inspector Simon Kipkemboi (hereinafter referred to as “PW 7”) for failing to carry out proper investigations. They argued that he only recorded information told by few villagers and that of importance was that the neighbours were the ones that chased the deceased as a thief, arrested him and burnt him.
 18. They asserted that their alibi defence was unchallenged as they proved that they did not beat the deceased nor were present at the scene where the deceased was burnt. They pointed out that it was trite law that the burden of proving the falsity at all of an accused’s defence of alibi laid with the prosecution. In this regard, they placed reliance on the case of *Karanja vs Republic 1983 KLR 501* where it was held that a trial court in testing a defence of alibi and in weighing it with all other evidence to see if the accused’s guilt was established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the cause so that it could be tested by those responsible for investigations and therefore prevent any suggestion that the defense was an afterthought.
 19. They placed reliance on the cases of *Republic vs Kennedy Otieno Mien & 3 Others Criminal Case No 29 of 2015* (eKLR citation not given) where it was held that the accused who offers a defence of alibi was not supposed to prove his innocence but it was enough to cause some doubt in the court’s mind and *Republic vs Sanny Njagi Mbogo & Another Criminal Case No 1 of 2019* (eKLR citation was not given) where it was held that where two (2) persons triggered and participated actively in lynching of the deceased, but the intent to kill him or cause him grievous harm was not proved, the charge of murder could not hold. They were emphatic that they were innocent and urged the court to acquit them.
 20. On its part, the Prosecution submitted that PW 1, PW 2 and PW 4 testified to have witnessed the incident that led to the death of the deceased and clearly identified the Accused persons at the scene with the help of the security light from the 1st Accused person’s house. It pointed out that they were all neighbours and therefore the Accused persons were well known to them. It added that PW 1 and PW 2 also pleaded with the Accused persons to stop the assault and take the deceased to the police station.



21. The 1st Accused person testified that on the material date of 6th November 2019, he was sleeping in his house when he heard noises on the iron sheets above the house. When he woke up he realised that the door to the cowshed was open and his hens were missing from where they used to lay on their eggs. His wooden frames on the roof were also missing. The cow had left its cowshed and was pacing along the fence.
22. It was his evidence that he sensed that there could be a thief who had come to steal from him. When he switched on his torch on his phone, he saw someone he could not identify and he raised an alarm. People came as he shouted, “mwizi, mwizi” (“thief”, “thief”). The mob caught him, removed him from where he was hiding at the back of the house and brought him to the front. He said that he thought that the people took the person to their place or to the police station and that he knew the person would be safe and therefore did not follow where they went. He started looking around the compound to see what else was missing but found out that only the hens and the wooden frames were missing.
23. He further testified that he later came to know that the person was his brother from Samia Clan when the mob brought him to the front of the house. He stated that he had stayed with him for long and that he was a habitual thief in the area. He said that he knew PW 1 but he did not see him on the material day and that his father and PW 1’s father had a land dispute. He also said that he knew PW 4. He denied their allegations that he beat the deceased.
24. He also said that he knew Likoti but did not see him that material night. He stated that the deceased left his compound walking and that he was burned about a hundred (100) meters from his house. He called his wife, Caroline Chengo (hereinafter referred to as “DW 3”), who corroborated his testimony.
25. The 2nd Accused person testified that on the material night of 5th November 2019 going to 6th November 2019, he heard screams from outside and heard people saying that they had arrested a thief. He stated that he called the Assistant Chief, PW 6 but did not follow the crowd. He later went to the scene and found a burnt body.
26. Notably, PW 1 testified that on the material night of 6th November 2019 at 3.00a.m, he was asleep when he heard noises from a far. He woke up and followed where the noise was coming from as it was about a hundred (100) and fifty (50) meters away. He found a crowd of people and a man had been made to sit down and he was being beaten. He was crying out loudly and the ones beating him were using heavy clubs (fimbo nzito). He asked to be forgiven but they continued to beat him.
27. It was his evidence that the 1st and 2nd Accused person were among the people who were beating him (pointed at the 1st and 2nd Accused persons in the dock). He pointed out that there were others namely, Nambisia, Douglas Rikoti, Pamela and Alice who were not before the court but also beat the man. He identified the man as Humprey Swegenyi, the deceased herein. He said that the 1st and 2nd Accused persons and the people he had mentioned carried the deceased and the crowd followed them and they took him uphill.
28. It was his further evidence that they put the man in an open field near the 2nd Accused’s house and Douglas Rikoti’s house. He stated that Rikoti tied the deceased hands and legs together using a wire and that he was able to see as the scene was well lit with light from the houses around. He pleaded with them to stop assaulting the deceased but that the Accused persons threatened to give him the same treatment if he did not shut up.
29. He further testified that the 1st Accused person beat the deceased with a heavy club, the 2nd Accused person hit him with three (3) foot metal construction rod normally called Y8. He said that Douglas Rikoti had a slasher which was sharpened both sides and which he used to slit the deceased’s neck.



- The crowd collected dry leaves and placed on the deceased, the 1st Accused person had a container with petrol. He sprinkled on the deceased and one called Simbalu struck a match and threw it on the deceased who burned without assistance. He added that the 1st Accused person was calling him a thief and that there were two (2) construction frames next to him that he was said to have stolen from the 1st Accused person. He stated that the 1st Accused person and the deceased were cousins and had disputes relating to land and lived fifty (50) meters apart.
30. PW 2 testified that on the material night of 6th November 2019, she was woken up with noise and someone was screaming, “they are killing me, please come and help me” and when she went to see what was happening, she found the deceased was seated on the ground at the 1st Accused person’s house. She screamed and asked the 1st Accused person what had happened and the 1st Accused person told her that the deceased was a thief.
 31. It was her further evidence that she told them that they should have taken him to Serem Police Station. She said that they had beaten him very much and he had been undressed and had only an underwear. She informed the court that the deceased was bleeding all over the body.
 32. She pointed out that she did not see the 2nd Accused person at the scene. She left to inform the deceased’s mother and when she went back, she found the deceased had been slaughtered and burned. He was lying on the tree branches and was bleeding. She said that she knew the 1st Accused person and the deceased were cousins and that she never knew whether or not there were disputes between them as they had co-existed peaceably and that she did not know what happened that material day.
 33. PW 5’s evidence corroborated that of PW 1. She stated that on the material night of 6th November 2019 going to morning at around 5.00am, she heard screams and she followed until she reached the 1st Accused person’s house. She stated that she found the 1st and 2nd Accused persons and Nambisia and Pamela beating the deceased. The 1st Accused person said that they take the deceased somewhere else and they took him near the 2nd Accused person’s house. The 1st Accused person dropped a frame for a house on the deceased. She added that they were beating him with stones.
 34. It was her evidence that Rikoti strangled the deceased with a slasher and that the 1st Accused person told another person to bring petrol and he poured it on the deceased and put dry leaves on him. He had a match box which he gave to someone she did not know by name to strike it. She left to tell the deceased’s mother. She was emphatic that she saw the 1st and 2nd Accused person beat the deceased. She stated that the 1st Accused person and the deceased were enemies.
 35. PW 6 evidence corroborated that of the 2nd Accused person. He admitted that on the material date, he was informed of the incident by the 2nd Accused person and that he did not believe that it was possible that the 2nd Accused person would call him to inform him of the incident while he involved in the beating of the deceased alongside the mob. He confirmed that there was a land dispute between the 1st Accused person and the deceased which brought bad blood between them.
 36. PW 7 was the Investigating Officer. His evidence corroborated that of PW 1, PW 2, PW 3, PW 4, PW 5 and PW 6. He produced the photographs of the deceased and the scene of crime as exhibits in this court.
 37. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 1 and PW 4 saw the 1st and 2nd Accused persons beat the deceased on the material date. PW 2 was able to see him bleeding and his body full of injuries. PW 1 and PW 4 also saw the crude weapons the Accused persons were using at the material time. PW 1 saw the heavy club and the metal



construction rod that the 1st and 2nd Accused persons used to hit the deceased. PW 4 saw the 1st Accused person drop a frame for a house on the deceased.

38. PW 1 and PW 4 also saw the 1st Accused person pour petrol on the deceased and placed dry leaves on him. They added that he handed over the match box to another person to strike the match and the deceased burned without assistance. PW 1 and PW 2 pleaded with them to stop assaulting the deceased but no positive response was exhibited.
39. Both PW 1 and PW 4 placed the Accused persons at the scene of crime. The incident happened during early morning hours but PW 1, PW 2 and PW 4 indicated that the scene was well illuminated with lights from the surrounding houses. There was, therefore, sufficient light that was favourable for the positive identification of the 1st and 2nd Accused persons.
40. The Accused persons did not demonstrate that there was any motive for PW 1 and PW 4 to have colluded to frame them as the people who unlawfully caused the deceased's death on that material date. Their assertions that the Prosecution witnesses' evidence was full of inconsistencies were therefore rendered moot. Indeed, the contradictions if any did not go to the root of the case.
41. The Accused persons did not demonstrate that there was any motive for PW 1 and PW 4 to have colluded to frame them as the people who unlawfully caused the deceased's death on that material date. Their assertions that the Prosecution witnesses' evidence was full of inconsistencies were therefore rendered moot. The contradictions if any did not go to the root of the case.
42. They raised an alibi defence claiming that they were not at the scene where the deceased was beaten and burned. In ascertaining whether the Accused persons' defence of alibi had value, this court had due regard to the definition of "alibi" in the Black's Law Dictionary, 10th Edition. It was defined as:-

"A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".
43. It was also trite law that once a respondent raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of Victor Mwendwa Mulinge vs Republic [2014] eKLR.
44. In this case, the defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) that provides that:-

"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."
45. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Accused persons' alibi evidence to have been watertight enough to have weakened the inference of guilt on their part. It found and held that the defence by the Accused persons was mere denial and did not displace and/or dislodge the consistent and cogent evidence that was adduced by PW 1, PW 2, PW 3, PW 4, PW 5, PW 6 and PW 7.



IV. Malice Aforethought

46. Having found and held that the Accused persons' defence was not sustainable as they were positively identified as the perpetrators of the deceased's death, the next pertinent question that arose was whether or not they had malice aforethought in causing his death.
47. The Accused persons invoked Section 206 of the Penal Code and submitted that the Prosecution did not prove malice on their part. In this regard, they relied on the case of *Roba Galma Warro vs Republic*[2015]KLR where it was held that for the conviction of murder to be sustained, it was imperative to prove that the death of the deceased was caused by the Appellant and that he had the required aforethought.
48. They cited Section 21 of the Penal Code and submitted that no common intention to prosecute an unlawful purpose was there at the home of the 1st Accused person as the deceased was found stealing and that it could not therefore be said that they or anybody who responded to the 1st Accused person's distress call planned the murder of the deceased.
49. On its part, the Prosecution invoked Section 206 of the Penal Code and placed reliance on the case of *Republic vs Tubere s/o Ochen* [1945]12 EACA 63 where it was held that an inference of malice aforethought could be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
50. It asserted that it had adduced evidence showing that the aim of the Accused persons was to cause grievous harm as that was seen in the nature of injuries they inflicted on the deceased. It was emphatic that the cut on the deceased's neck was an attack on his life and that the injuries and the weapon used spoke malice.
51. It added that it relied on direct evidence which clearly pointed to the Accused persons as the persons who assaulted the deceased leading to his death.
52. This court had due regard to the case of *Morris Aluoch vs Republic* [1997] eKLR which cited the case of *Rex vs Tubere s/o Ochen*[1945] 12 EACA 63 where the East Africa Court of Appeal held that malice aforethought could be presumed where repeated blows were inflicted.
53. PW 1 and PW 4 testified that the Accused persons were beating the deceased repeatedly. PW 2 told this court that the deceased was covered with blood all over his body and he only had an underwear. She was emphatic that they had beaten him very much. PW 1 said that the 1st Accused person hit the deceased with a heavy club while the 2nd Accused person hit him with a three (3) foot metallic construction rod.
54. The 1st Accused person confirmed in his evidence that his hens and frames were missing and as such had been stolen. From PW 6's investigations, PW 1 and PW 4 connected the Accused persons to the deceased's death. The thorough beating they meted on the deceased could only have been intended to kill him for the theft.
55. The seriousness of the injuries the deceased sustained was confirmed by PW 5. Upon conducting the postmortem examination, he observed that the deceased had a deep anterior neck cut wound that was half circumference and was almost decapitating the neck, multiple cuts on the head and the right shoulder and a mixture of ninety percent (90%) and ninety five percent (95%) of burns.
56. The extensive injuries all over the deceased's body were evident that he suffered greatly before he died. The beatings the deceased suffered at their hands were not only unlawful but they could not be said to



have been bereft of malice aforethought on their part. It was clear that they acted in concert with each other and hence had common intention to cause the deceased harm which led to his death.

57. It was immaterial that the deceased was a thief as the Accused persons had alleged. They took the law into their hands instead of taking him to the police so that the due process of the law could be followed.
58. Having analysed the evidence that was adduced by both the Prosecution and 1st and 2nd Accused persons and DW 3 together with their respective Written Submissions, this court came to the firm conclusion that the Prosecution established to the required standard, which in criminal cases, was proof beyond reasonable doubt that the act of unlawful killing of the deceased herein was by the 1st and 2nd Accused persons herein and that the same was with malice aforethought the ingredients that had been set out in Section 203 of the *Penal Code* as having been:-
- a. Proof of the deceased's death
 - b. Proof that the deceased's death was a result of unlawful actions and/or omissions; and
 - c. Proof of malice aforethought in the unlawful actions and/or omissions.

Disposition

59. For the foregoing reasons, the upshot of this court's decision was that the 1st and 2nd Accused persons herein be and are hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 (Laws of Kenya) under Section 215 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
60. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 17TH DAY OF JULY 2025

J. KAMAU
JUDGE

