



**Republic v Nabukhokho (Criminal Case E015 of 2014)  
[2025] KEHC 11085 (KLR) (16 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11085 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E015 OF 2014**

**REA OUGO, J  
JULY 16, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BILHA MUSUKUYA NABUKHOKHO ..... ACCUSED**

**JUDGMENT**

1. Bilha Musukuya Nabukhokho , the accused, is charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are; on the 28<sup>th</sup> day of February 2024 at Kikwameti, Kibichori Sub- Location, Mukunyi Location in Bungoma Central Sub-County within Bungoma County jointly with others not before the court murdered Robert Simiyu Kituyi.
2. The Prosecution called 5 witnesses to prove their case. The accused gave a sworn statement and called one witness.

**PROSECUTION CASE.**

3. Pw1, Wenusus Sibela Waukhuchi, testified that on 28/2/2024 at 5:00 pm, he received a call from Tobias Simiyu, a village elder, informing him that the deceased Robert Simiyu had died and was lying in his mother’s house. He contacted Chwele police station and reported the incident. He went to the accused’s home and found the body inside the house. The accused is the mother of the deceased. He knows the accused well and has not heard of any dispute between her and the deceased. He does not know what caused the death of the deceased.
4. Pw2, Linet Nasambu Wanyonyi, testified that on 28/2/2024 she went to work and returned home between 4 and 5.00 pm. She saw a crowd of people at the accused’s home. The accused is her mother-in-law. She went there and found the body of Robert Simiyu lying on the ground. Police later removed the body. The deceased was her husband’s brother. They lived peacefully at their home. Her husband and the accused were arrested by the police. She does not know what caused the death of the deceased.



5. Pw3, Tobias Ezekiel Simiyu, testified that on 28/2/2024 at about 6.00 am, while heading to his shamba, he passed near the accused's homestead and saw about five people there. The accused was among them. At around 12.00 pm, he heard that Robert Simiyu had died. He called Pw1 and informed him. He went to the accused's home and saw the deceased lying on the ground. They asked the accused what had happened, and she told them that the deceased had returned home and disturbed her the entire night, and that she had sent for a vehicle to take the body to the morgue. The accused and the deceased lived peacefully. The deceased's family did not cry after he died, which he found strange because, according to Bukusu culture, people cry when they lose someone. He saw no injuries on Robert's body and does not know what caused Robert's death.
6. Pw4, Doctor Ombangi Aaron, testified that on 6/3/2024, he conducted a post-mortem on the body of Robert Kituyi at Bungoma Referral Hospital. Externally, the body had multiple bruises on the front, back, and both upper limbs. There was swelling at the posterior neck. Internally, he found a bilateral lung collapse. All these findings were due to a fracture of the cervical spine. The spinal cord was compressed at the fracture level. His opinion was that the cause of death was asphyxia resulting from upper airway distraction and neurogenic shock caused by the compressed cord. During cross-examination, he stated that the deceased was either hit on the back or had his neck twisted.
7. Pw5, No. 118840 P.C. James Ekai, testified that whilst on duty at Chwele police station, he was called at 5.00 pm by the assistant DCI, Inspector Ochieng and informed to attend to a murder case. He went to the home of the accused and found the body of the deceased lying in the accused's house. They found the accused, who told them that the deceased was her son and that she was staying with him. He checked the body and found bodily injuries, scratches on the right arm and injuries on the leg too. The deceased was wearing his clothes, but they were wet. On lifting the body, he noticed that his neck was loose. He took the body to Bungoma Referral Hospital, and later, a post-mortem was done. They arrested the accused and her son, Joseph Klulako alias Rasta. He was convinced that the accused killed the deceased because the accused lived with the deceased, the accused denied seeing the bodily injuries on the deceased, the accused tried to conceal the death of the deceased so that people do not hear about it and had sent for a vehicle to take the body away, when the Chief reached the accused's home she told him not to interfere as he did not know what caused the death of the deceased and the accused and deceased son had conflict from time to time on allegations that the deceased had sold land. He also learnt that two weeks before his death, the deceased had been accused by the brothers of stealing the equipment to make kokoto. Joseph was found not mentally fit to stand trial.

## **DEFENCE CASE.**

8. The accused gave a sworn statement. She testified that she is 81 years old. The deceased was her son. The deceased used to drink heavily, and as a result, his wife left him. It has been over 20 years since she left. After she left the house, the roof collapsed. The deceased moved into her house. He used to sleep in the sitting room, and she slept in her own room. He would leave and return. He stayed with her for 17 years. She had a grandchild she was staying with. The deceased was not working; he was just wandering around. He would go drinking and come back at 11 or 12 at night. He would push the door when he returned. On 27.2.2024, the deceased left at 8:00 am and returned home at midnight. She heard the door open but did not get up to check on him. Her grandchild did not wake up to check on him either. The deceased did not wake up; she thought he was drunk. There were times he would return and sleep throughout the day. She found out at 12:00 pm that he had died. People heard of his death and began crying. The body was collected around 2 or 3.00 pm. Tobias stays in the deceased's shamba and gives him alcohol daily. She learnt the deceased had sold his shamba to Tobias when he started to build. Tobias is located in the lower part of the shamba, while she occupies the upper part.



Tobias should leave the said shamba. He is currently digging the deceased's coffee. How did people know Robert had died if she did not cry? The police did not speak to her; they went to her home and simply carried the body away. Joseph and the deceased argued over a hammer. Joseph is a sick person; he was arrested and released. He did not see any injuries on the deceased. In her home, there is a large stone that people sit on. The path has stones, and people harvest stones. She cannot tell what happened to her son. If he had spoken to her, she would have known. At her age, she cannot beat her son.

9. Dw2, Ruth Nasaba Khisa, testified that the accused is her grandmother. The deceased was her uncle and lived with them. His house had collapsed. He used to drink and sell his belongings. His wife and children had left him. The accused and the deceased had a good relationship. The deceased was unemployed. She was responsible for cooking. The deceased would leave in the mornings to go drinking and return intoxicated. He hired out his shambas to earn money; later, he sold his shamba. On 27/2/2024, the deceased left at 7:00 am and returned at 11:00 pm. He pushed the door open and entered; they do not lock their door. They did not check on him when he entered. The next day, she woke up and did her usual chores. The accused went to look after her cows. Upon her return, the deceased had not woken up. The accused went for help, and they screamed after realising he had died. The body was collected between 2 and 3 pm. Tobias is a village elder; he bought the deceased's shamba. Joseph is her uncle. Joseph had a disagreement with the deceased. He alleged the deceased sold something belonging to him. The deceased used to take things and sell them. She does not know who entered their house. The door was open. She did not see injuries on the deceased. The place they live in is hilly. The accused could not have killed the deceased, as the deceased was stronger than the accused. She did not go out after the deceased returned. She sleeps in the same room as the accused.

## **SUBMISSIONS.**

10. The Prosecution reiterated the evidence from every witness and submitted the following: the deceased's death was confirmed. They agree with the defence that it has not been proven that the accused assaulted the deceased; however, circumstantial evidence sufficiently links the accused to the deceased's death. The deceased was found dead inside the accused's house, and the cause of death was confirmed as asphyxia due to blunt force trauma. Contrary to expectations, the accused did not wail or raise an alarm, therefore, the accused was circumstantially guilty of the offence. The defence presented was a planned afterthought and DW2. The defence did not challenge the compelling evidence presented by the prosecution witnesses. The accused did not explain why she did not scream or wail as expected, leading to the conclusion that she already knew the deceased was dead.
11. The defence submitted as follows: the prosecution had failed to establish the elements of the offence of murder. Although the accused and the deceased lived in the same house, witnesses testified that they had lived peacefully for over 17 years. The prosecution relied on the evidence of Pw3 and the Investigating Officer, both of whom depended on Pw3's account, although Pw3 stated his evidence was based on what his wife (Pw2) told him. There was no direct evidence linking the accused to the murder. The defence cited the case of *R vs Mwendwa & 3 others*, criminal case No. 19 of 2020, where the court held that, "in cases where a deceased is found dead while staying with the accused in the same house, the prosecution must prove the accused's guilt beyond reasonable doubt, relying on evidence such as eyewitness testimony, forensic analysis, and the opportunity for the accused to commit the crime." It was further argued that no forensic evidence was collected at the scene, nor was there any eyewitness testimony indicating that the accused had assaulted the deceased. The prosecution's case depended on circumstantial evidence that the accused and the deceased shared the same house (see case of *Abolfathi Mohammed & Another vs Republic* (2018) eKLR). The evidence presented does not establish a connection between the accused and the offence, from which guilt could be inferred. The prosecution also needed to demonstrate that the accused was the last person seen with the deceased.



The court should consider whether the facts support the innocence of the accused or if alternative explanations are reasonable other than guilt. The defence relied on the case of Deepack Sanna vs State of Delhi, where the court developed the doctrine of last seen, stating that in murder cases with no explanation for the victim's death or disappearance, and where the accused was the last person seen with the victim, circumstantial evidence can be used to connect the accused to the death and establish guilt beyond reasonable doubt. It was the burden of the prosecution to prove its case beyond reasonable doubt. The failure of the accused to explain how the deceased sustained his injuries cannot implicate her in the murder. No witness saw the deceased alive after a certain point, making it difficult to identify who was last seen with him. These gaps should have been interpreted in favour of the accused. The defence urged the court to apply the principles regarding circumstantial evidence as outlined in the case of Musili Tulo vs Republic (2014) eKLR.

## **ANALYSIS AND DETERMINATION.**

12. Section 203 of the *Penal Code* defines murder as follows: “Any person who of malice aforethought, causes death of another person by an unlawful act or omission is guilty of murder. Section 203 requires proof of the following elements beyond a reasonable doubt: proof of death, the cause of that death, evidence that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.
13. Regarding the cause and death of the deceased, Pw1, Pw2, and Pw5 saw the body of the deceased. Pw5, who conducted a post-mortem on the deceased's body, was of the opinion that the deceased died as a result of asphyxia caused by airway obstruction and neurogenic shock due to a compressed cord.
14. The next issue to determine is whether there is evidence that the death of the deceased was unlawful and whether the accused caused the death of the deceased. Pw5 testified that the deceased was strangled. The prosecution's case is based on circumstantial evidence. In *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

The Court of Appeal further set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this court set out the conditions as follows:



“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; 9iii) 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.”

15. There is no dispute that the deceased lived with the accused, who is his mother. There is no dispute that he was found dead in the accused's house on 28 February 2024. Pw1 and Pw2 went to the accused's home and found the body of the deceased. None of the prosecution witnesses saw the accused commit the alleged murder. The prosecution has relied on the evidence of Pw3, who testified that he saw a group of five people in the accused's home as he passed by on his way to his shamba. The accused and her son, Joseph, were among the five people. The other evidence was from the investigation, which led to the decision to charge the accused. This was because she lived with the deceased. The accused denied that she had seen the injuries on the deceased; she decided to conceal the death so that people would not hear about it, and she told the chief not to interfere, as he did not know what had caused the deceased's death. It was also said that the deceased and the accused had conflicts from time to time over allegations that the deceased had sold land.
16. Pw3 did not testify that at the time he saw the accused and 4 people, he was aware that the deceased had died. He learnt of it when he returned home from the shamba. This evidence does not point to the accused as the one who strangled the deceased. The witnesses who testified stated that the accused and the deceased had a good relationship. There was evidence that the deceased had a dispute with his brother, who alleged that he had taken his tools and sold them. Could this be the person who caused the death of the deceased? They lived in the same homestead. The investigating officer also alleged that the accused wanted to conceal the death of the deceased. No evidence was adduced to prove this. Pw1, the assistant chief, did not testify that the accused told him not to interfere, as he did not know the cause of death of the deceased. There was no evidence adduced that the accused and the deceased were on bad terms. It was the accused's evidence that they would leave the door open for the deceased to access the house and that they had done the same the night before. Being in the same house with the deceased without strong circumstantial evidence pointing to the accused as the one who strangled the deceased does not prove that she killed her son. There was no evidence adduced that the accused was the last person seen with the deceased that night. The doctrine of last seen does not apply. Lastly, the prosecution has submitted that the accused's failure to wail or raise an alarm makes her guilty of the offence. Not wailing or not raising an alarm does not point to the accused as the one who killed the deceased. She remains a suspect in the matter. The evidence does not irresistibly point to the accused to the exclusion of all others. In the case of *R v Kipkering arap Koske & Another* 16 EACA 135 it held that:-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”.

17. Finally, the Court of Appeal held in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported), that suspicion, no matter how strong, cannot serve as a basis for inferring guilt, which must be established by evidence. I find that the prosecution has failed to prove its case against the accused Bilha Musukuya Nabukhokho beyond a reasonable doubt. She is acquitted of the offence of murder under Section 215 of the CPC and is free to go, unless lawfully detained.



**DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 16TH DAY OF JULY, 2025.**

**R.E.OUGO**

**JUDGE**

**In the presence of:**

**Bilha Musukuya Nahukhokho/Accused**

**Miss Matere - For State**

**Miss Natwati - For the Accused**

**Wilkister - C/A**

