



**Republic v Isika (Criminal Case 21 of 2015)
[2025] KEHC 12642 (KLR) (17 September 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 21 OF 2015
FR OLEL, J
SEPTEMBER 17, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

ALEX MULU ISIKA ACCUSED

JUDGMENT

A. Introduction

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) of the Laws of Kenya. The particulars of the offence were that on the 9th day of January, 2015, at Katheka Village, Matheini location of Matungugulu sub county within Machakos Murdered Joseph Nzioka Muteti.
2. The accused person denied the charge faced and pleaded not guilty. The case proceeded to full trial with the prosecution calling eleven (11) witnesses in support of their case.

B. Prosecution Case

3. PW1 Anne Wangechi Nderitu testified that she works at the Government Chemist, Nairobi, as a government analyst and holds a master's degree in chemistry from Nairobi University. On 17.02.2015, she received an exhibit memo dated 17th February, 2015 and several items from one Mr George Kamande, attached to DCI-Kangundo Police station. The items received included;
 - a. Item 1: A blue jacket with white stripes in a khaki envelope marked A-1, indicating that it belonged to the accused herein, Alex Muluku Isika.
 - b. Item 2: A light blue shirt in a Khaki envelope marked A-2, indicated as belonging to the deceased Joseph Nzioka Muteti.



- c. Item 3: A brown lessa with light blue patterned stripes in a Khaki envelope marked as A2 indicated to belong to the deceased.
 - d. Item 4; A white vest in a khaki envelope marked as "A2" indicated to belong to the deceased.
 - e. Item 5; A blood sample in a vacutainer marked "B" indicated as that of the deceased.
 - f. Item 6; A blood sample in a Vacutainer marked "c" indicated as that of the accused person.
4. She was requested to analyze the said items and determine the presence and source of blood stains seen on the said items. Upon analysis, she determined that Item 1, which was the accused's blue jacket with white stripes, was lightly stained by human blood, while Items 2, 3, and 4 (the deceased's clothes) were heavily stained with human blood. She proceeded to generate a DNA profile from the blood samples and, upon evaluation, confirmed that the DNA profile generated from item 1(the accused jacket) matched the DNA profile generated from the blood sample item 5 (blood sample of the deceased) with a probability of a match 1 in 3.05×10^{20} .
 5. Further, the DNA profile generated from the light blue shirt (Item 2), brown lessa (Item 3), and white vest (Item 4), all of which belonged to the deceased, matched the DNA profile generated from the blood sample (Item 5) belonging to the deceased with a probability of a match 1 in 3.05×10^{20} . After her analysis, she generated her report dated 7th September, 2015, and produced the same as an exhibit before the court.
 6. Under cross-examination, she confirmed that the items were received at their office on 17th February 2015, but they only managed to undertake the examination on 7th September 2017, which was about two years later. She attributed the delay to staffing shortages, lack of biochemical reagents, and faulty equipment leading to the accumulation of several reports. Be that as it may, the time lapse did not affect the quality of her results, as the samples were dried and well preserved. She further reaffirmed that item A1, which was the accused's blue with white striped jacket, had blood stains that matched the deceased's blood.
 7. PW2 Magdalene Mwikali Nzioka testified that she was a resident of Katheka Location and worked as a bar tender at Mwembe Tayari bar. On the material day, 9th January, 2015, she opened the business at 5.00 pm and was shortly thereafter joined by the deceased, who sat alone, but did not order any alcoholic drink. After 20 or so minutes, other customers came and ordered their drinks. Since she was held up, she sent the deceased to go look for change of Kshs 1000/= and when he came back, she gave him a bottle of alcohol spirit in appreciation. Later, she again sent the deceased to buy her a bulb, for the pub's security light, and as he was fixing it, she heard him argue with the accused person, and insinuated that he was a thief.
 8. She confirmed that she stayed with the deceased at the bar for about three hours before he left at 9.00 pm, while stating that he was going to watch TV at a different place. Later, she closed her business for the day, and while asleep at about 3.00 am, she was woken up by Daniel Kendi and Kioko, who told her that Joseph (the deceased) had been murdered and they were inquiring from her what time he had left her pub. She dressed up, went to the scene, which was about 600 meters from her workplace, and was interrogated by the police at the scene of the crime.
 9. She informed them that she had seen the deceased argue with the accused the previous evening outside her bar, and further confirmed that the accused was wearing a light blue jacket with white stripes at the back (MFI 3). Under cross-examination, PW2 confirmed that the accused was well known to her as he was her regular customer at the bar Mwembe Tayari Bar and reiterated what had transpired between the two at the pub.



10. PW3 Patrick Wambua Nzivo confirmed that he was a resident of Katheka location and was a teacher by profession. On 09.01.2025, he was called by his neighbor Joshua Mulokye (PW4), who reported to him that he had been chased by a person wielding a knife and requested for his assistance to go rescue him. He took his motorbike and, while enroute, met PW4, who by then was with his son, Richard Kibondo (PW9), as they walked towards the place where PW4 had been attacked.
11. They informed him that they had met the person who attacked PW4 on the road, and when they tried to talk to him, he ran away. When they reached the spot where the incident had occurred, they saw something on the ground and, upon illuminating it using the motorcycle light, they discovered it was the deceased person, who was lying on the ground, gravely injured and was not breathing. He called the deceased sister, known as Beatrice Ndinda(PW5), and informed her of what had transpired. She too rushed to the scene and confirmed that indeed, the deceased was her brother. She then called her neighbour's, relatives and the police, who came and took over the crime scene.
12. Under cross-examination, he confirmed that PW4 called him at around 11:00 p.m. and was in shock at what had occurred. The deceased was also his neighbor, and after confirming that he was the victim, he called the deceased's sister (PW5), whose house was about 20 m away. He further confirmed that he did not see the accused at the scene of the crime during the material night, but saw him on the following morning at 7.00 am -8.00 am, when he had been arrested by members of the public, who blamed him for the murder.
13. PW4 Joshua Mulokye Muindi testified that on the material night, at about 9.00 pm, he was walking home from Katheka market, and at a junction, about 400m from the market, he met someone wielding a knife, and he asked him if he was the one who had taken his money and further directed him to sit down. Sensing danger, he started to backpedal and took off to save his life. He further testified that, though that was the first time he saw the assailant, he could recognize him, given that the full moon was up and gave adequate light. He confirmed that the person who attacked him was the accused person and positively identified him on the dock. He was also shown the accused jacket (MFI3) and confirmed that it was the same jacket that the accused wore on the material night.
14. Back to the incident, PW4 clarified that the accused chased him until they reached the home of his neighbor, known as Simon Mwanzia Muteti (PW8), before he stopped and turned back due to his continuous shout for help to his neighbors. He walked through the bushes to his son's (PW9) home, and together they returned to the scene where he had met the accused person. They found him seated by his neighbors' (Simon's) gate, and when he saw them, he got up and attempted to confront them, claiming that they had taken his money, but because they were armed, the accused retreated and ran off towards the market.
15. He then called PW3 and asked him to come with his motorcycle, as they had seen someone lying on the ground, who appeared to be gravely injured. By then, it was about 11.00 pm to 12.00 am, and when PW3 arrived, they went and woke up PW5, who came and identified the deceased as her brother. They also called the police, who also came and took over the scene of crime. Under cross-examination, PW4 reiterated his evidence and reaffirmed that he was able to identify the appellant as the full moon was up and the accused talked to him while at a close distance of about 5 meters. He was thus he was able to clearly see his face and the clothes he was wearing.
16. Once the accused had run away, he called PW3 upon realizing that there was an injured person who was lying on the ground and again saw the accused the following morning after he had been arrested, but did not participate in the said arrest and was not aware whether he had been assaulted by members of the public during the said arrest.



17. PW5 Beatrice Ndinda Muteti recalled that she was home on the material evening and at about 6.30 pm, went to her brother's home and collected her cows. As she drove the said cows back to her home, she found someone lying next to the road with a knife and a gunny bag, which was folded. She did not know the person in question and did not speak to him either. After supper, she retired to bed, but was woken up at around 11:30 pm by a phone call from PW3, who informed her that he was at her gate and requested her to go identify someone who was lying by the roadside.
18. She instinctively suspected it could be her brother, the deceased, and upon arrival at the scene, her worst fears turned out to be true. The moon was bright, and she confirmed that her deceased brother had suffered fatal stab wounds. He was wearing a light blue shirt, a white vest, and proceeded to cover him with her lessa, before going back home to inform other family members. Later that night, the police came, processed the scene, and the deceased's body was taken to Kangundo level 4 hospital mortuary for preservation.
19. The following morning, while still at Kangundo, she was called by the police and was informed that the main suspect, thought to have committed the offence, had been arrested. She went back to the scene, and when she saw the suspect, she realized that he was the same person she had seen the previous evening lying next to the road. At the time of arrest, he was wearing the same clothes he had worn the previous evening (black trouser, black shoes, and a light blue jacket with white stripes) and she positively identified the accused as the said person.
20. She further confirmed that she had bought her deceased brother a Nokia phone, which was found in the accused person's pocket during his arrest, and identified the said phone in court. Later on 12.01.2015, together with her brother PW8, they were summoned to go identify the deceased body before the post-mortem was carried out at Kangundo level 4 hospital, and they did so.
21. Under cross-examination, PW5 reiterated her earlier evidence and positively identified the accused as the person she saw lying next to the road at about 6.30 pm as she drove her cows back home, and also recalled seeing him dressed in a blue and white striped jacket, black trouser, and black shoes. She further clarified that from Kangundo hospital mortuary, they had come back to the scene using the same police vehicle that had taken the deceased body to the hospital, and as she dropped off, the accused was being bundled into the back of the said motor vehicle, and recognized him as the person she had earlier seen the previous evening.
22. She further confirmed that she had bought her deceased brother the recovered Nokia phone, which she identified based on the cracks on the phone. The said phone was recovered from the accused's pocket by one Marko during his arrest and was handed over to the police the following day. In re-examination, PW5 confirmed that there was adequate moonlight on the material night and she was able to identify her brother's body, before covering him with a lessa. PW5 was later recalled and she identified the clothes the deceased wore on the material night and her lessa.
23. PW6 Dr Munene Lautani confirmed that he worked at Kangundo Level 4 hospital as the assistant Medical Officer, and was a colleague of the late Dr E.L. Khayo, who unfortunately died in a road traffic accident, which occurred in 2016. The said doctor had conducted a post-mortem examination on the deceased and issued his report dated 12.01.2015. As per the observation made, in the said post-mortem report, the deceased had superficial abrasions on both knees, left shin, and lacerations on the back. The deceased also had stab wounds on the right and left anterior chest walls, right subscapular flank (lower back), communicating with the peritoneal cavity, and on the left buttocks. The stab wounds had caused massive internal bleeding in the chest cavity, and the cause of death was determined to have been caused by penetrating chest injury with bilateral haemothorax.



24. Under cross-examination, PW6 confirmed that he did not work with his colleague Dr E.L. Khayo(deceased), but had met him once at the hospital, when he came back to visit. Part of his work as Medical officer involved undertaking ward rounds, surgical procedures, post-mortem, and also giving evidence in court. He confirmed that his evidence was based on the post-mortem report findings, which confirmed that the deceased had suffered stab wounds that led to the internal bleeding in the chest, and that is why the cause of death was certified as penetrating chest injury leading to bleeding in the chest (bilateral haemothorax).
25. PW7 Johnson Bulemi confirmed that, as at the time of the incident, he was the Deputy DCIO, Kangundo, but had retired from police service. On the material day, he was in his office when police officers from Tala police post, Matungulu District, brought in a murder suspect (the accused), and he noticed that he had injuries to his face. The accused was wearing a blue jacket that had white strips, and they had also recovered a Techo mobile phone from him. He booked the case and referred it to a DCI officer known as Kamande for investigations, but also opted to assist him since he was busy with other assignments.
26. Later, he witnessed the post-mortem process, which confirmed that the deceased had succumbed to fatal knife stab wounds. He requested the doctor to provide him with the deceased's blood sample and also recovered his clothing, i.e., Blue shirt, white vest, and lessso, all of which were forwarded to the government chemist for analysis. Later on, while accompanied by PW5, he did visit the scene of crime and documented the same. Based on the evidence gathered, they opted to charge the accused with the offence of murder.PW7 produced the murder scene sketch plan, Exhibit memo form, both sets of clothes, Nokia phone, and Techno phone as Exhibits before the court.
27. Under cross-examination, PW7 reiterated that he did get a chance to visit the scene of crime and drew the sketch plan. Further, when the accused person was brought to the station, he had physical injuries sustained as a result of mob justice, but had received treatment for the said injuries at Matungulu sub-county hospital. He also confirmed that some of the exhibits were recovered and brought to him by the arresting officers, as he did not get a chance to go to the scene immediately after the incident had occurred.
28. Finally, PW7 also confirmed that he did record the accused statement under inquiry and had his blood samples extracted by the doctor, who kept the same under cold storage, before the samples were taken to the government chemist for analysis. As regards the phone, the Techo phone was recovered from the accused, but the Nokia was brought by person's who knew the deceased. The evidence collected from witnesses pointed a finger at the accused person as the guilty party, and that is why he was charged before court with the offence of Murder.
29. PW8 Simon Mwanzia Muteti stated that he hailed from Katheka village and was a businessman thereat. On 09.01.2015, he had arrived home late from the market and later that night was woken up by PW4, who informed him that his brother's body had been discovered by the roadside. He rushed to the scene, and found that the deceased had been stabbed severally on the body, chest, back, buttocks, legs, and his head. PW 5 (his sister), too, had arrived at the scene, and after consultation, he took a motorcycle and went to report the matter to the police.
30. At the scene, PW1 disclosed to them that on that evening, at her workplace, (Mwembe Tayari Bar), which was owned by one of his brothers, she had witnessed as the deceased disagree with the accused person, and based on this information, while accompanied by police officers, they had gone to the deceased home but did not find him. The following morning at about 8.00 am, he heard screams coming from the direction where the incident had occurred and rushed there to find out what was happening. The accused, who was putting on a blue and striped white jacket, had been arrested and



- tied with a rope. He had also suffered mob justice, and a Techno phone recovered from him was handed over to the police, when they came to rescue him.
31. On 12.01.2015, he identified the deceased body before the post-mortem was conducted and identified the accused as a person who was arrested for committing the said offence. Under cross-examination, he confirmed that the incident occurred about 500m from their home, and when he was called, he found that PW5 had already arrived at the scene. PW4 had also told them that he found the accused sitting on top of the deceased, and he took off when he saw them approach. He also did not know the circumstances under which the phone was recovered, and he also had no proof that the recovered phone (Techno) belonged to the accused person.
 32. PW9 Richard Kibondo Mulokya also testified that on the material day, he was at his home with his cousin, when at about 11.00 pm, his father (PW 4) came and knocked on his door and informed him that he had been threatened by someone wielding a knife along the road. He opted to accompany him back to the incident scene, which was next to a road junction about 300m away from their home, and when they arrived, they saw the would-be assailant seated by the roadside side, and when he saw them approach, he started to retreat and ran away.
 33. They also saw a person lying by the road, next to the rock, where the assailant had sat and on close inspection, realized that it was somebody known to them, and he had deep cuts all over his body. He affirmed that they did not have a torch, but there was moonlight, and thus they were clearly able to identify the injured person, who was bleeding severely from the injuries sustained. His father called PW4, and upon his arrival, they went and called PW5, who was the deceased sister. Other neighbours also gathered at the scene, and the police later came and took away the deceased's body.
 34. PW9 further recalled that, as they approached the assailant that night, he was seated, and he noted that he was putting on a blue and white striped jacket, which was the same jacket he was still wearing the following morning, when he was arrested. It was at this point that he got to know him and confirmed that he was the accused person before the court.
 35. Upon cross-examination, PW9 confirmed that his father (PW4) had armed himself with a panga, which he picked from his house, as they went back to determine who had chased him while holding a knife. Further, at the material time, he noted the assailant was wearing a blue and white striped jacket, which was the same jacket he wore when arrested the following morning.
 36. PW10 Andrew Nthiwa testified and stated that he was the deceased uncle, and on 12.01.2015, he accompanied the police to Kangundo level 4 hospital, where he helped identify the deceased body to the doctor before the post-mortem process was carried out. He was with PW5 and also saw the several stab wounds the deceased had sustained all over his body.
 37. PW11 PC Timothy Ntorutu testified that as at 10.01.2015, he was attached to Kinyui police post and was at the report office, when he saw a crowd of people approaching the said police post, and they informed him that they had arrested a murder suspect. He summoned their driver, PC Njagi and together with the people who had come with this information, went back to the incident scene near Katheka market. He rescued the accused from the mob, and the crowd also handed over to him the accused blood blood-stained jacket, a Kitchen knife and the deceased's phone, which they had recovered from the accused. The mob/crowd was emphatic that it was the accused who had murdered the deceased, as they had quarrelled with him the previous evening, while at the bar, after the deceased had refused to buy him alcohol.
 38. Since the accused was injured, they took him for treatment at Matungulu health centre and upon return, the OSC Tala police station directed them to hand over the suspect and the exhibits to them for



further action. They acted as instructed, and from Tala police station, the investigations were handed over to the DCI Kangundo. He confirmed that he was given a kitchen knife by members of the public who had arrested the accused person and produced it as an exhibit before the court. He also identified the accused as the person he rearrested on the material morning.

39. Under cross-examination, PW10 confirmed that he went to the scene to re-arrest the accused at about 8.00 am, the following morning after the incident and found that he had been subject to mob justice at the scene of crime. The accused's jacket, a kitchen knife and the Nokia mobile phone were handed over to him by the crowd that had arrested the accused person, and though he did not have an inventory of the recovered items, he had recorded the same on the police post OB when he returned.
40. The prosecution closed its case at that point, and the accused was placed on his defence. He opted to give sworn evidence.

C. Defence Case

41. The accused gave sworn evidence and stated that he was a businessman selling fruits within Tala market and resided with his immediate family and extended family at home in Matungulu. He recalled that on 09.01.2015, he went to work and finished at about 3.00 pm, after which he boarded a motor vehicle to come back home. He alighted at Katheka Market and entered a club, where he found other guests and called for his alcoholic drink. Later, at about 9.00 pm, he left the club already drunk and went home, where he met his mum, who offered him food, but he did not eat and went to sleep.
42. The following morning, he woke up at about 6.00 am and, after breakfast, left for his workplace. Along the road, he was accosted by a large group of people, who arrested him, tied him using a rope and started to assault him, while alleging that he had a hand in the murder of the deceased. He also saw a lot of blood at the scene and was rescued by the village elder, who stopped the assault, and called the police to come pick him.
43. While at Tala police station, the investigating officer insisted that he produces the knife he had used to stab the deceased, but he informed them that he did not have the said knife. Later on, while at the cells, two other boys were arrested and booked in for having the deceased's phone, but they were later released without being charged. The accused was categorical that the knife produced in court as an exhibit was not his knife, as he would leave his knife and fruits at his workplace. He also denied being at the murder scene that night, as he was already at home and had not stabbed the deceased.
44. He further denied meeting the deceased at the club, did not hold a grudge against him, and denied that they had fought/quarrelled on the material evening. Under cross-examination, he confirmed that he was a regular patron and the club and on the material day went to the said club at about 3.00 pm. He found about eight customers already seated, some of whom he knew, while others he could only recognize facially and not by name. He was categorical that he did not know the deceased, and if an incident had occurred within the bar, he could not recall, as he was completely drunk and went home alone at about 9.00 pm to sleep.
45. The accused further confirmed that, when he was arrested, he had worn the same clothes produced before the court as Exhibits (black trousers, blue T-shirt and blue, white striped jacket) and they were the same clothes he had worn the previous evening. He reiterated that he had nothing to do with the murder and urged the court to acquit him. On re-examination, the accused stated that he arrived home the 9.00 pm when the family was taking supper and reaffirmed that he did not leave the club with the deceased, as they were not friends and had nothing to do with his death.



46. DW2 Alice Wayua confirmed that the accused was her 4th born son, and was a fruit vendor at Tala Market. On 09.01.2015, the accused had gone to work and came back home at about 9.00 pm, completely drunk. He passed by her house and found her cooking, but refused to eat, before proceeding to black out on her sofa until about 10.30 pm, when she woke him up and advised him to go sleep in his house, which was about 100m away from her house. The following morning, she saw him leave for work and was later informed of his arrest and assault by members of the public. She proceeded to the incident scene, but did not find the accused and later traced him at Kangundo police station.
47. Under cross-examination, she confirmed that the accused came to her house at about 9.00 pm to check on how she was faring on but had not seen him during the day and did not know his itinerary and action the previous evening. She also presumed that after he left her house, the accused went to sleep and left for work the following morning. It was only after she went to see the accused person at Kangundo Police Station that she was told that he was being held on suspicion that he had a hand in the murder of the deceased.

D. Submissions

48. The accused's counsel submitted that the evidence tendered by the prosecution was weak and was not sufficient to convict the accused person. He noted that there was no eyewitness to the incident, nor was the knife, alleged to have been used to stab the deceased, which was produced before the court (Exhibit 10), taken for DNA analysis or dusting for fingerprints to connect the accused to the heinous crime he is alleged to have committed.
49. There were also further evidential gaps noted. PW1, who alleged that the deceased and the accused had quarrelled, confirmed that the deceased had left the bar at about 9.00 pm to go watch television at a different location, while PW4 also alleged to have been chased by a knife-wielding person at the same time, yet by this time, the accused had already reached home as confirmed by DW2 and thus could not have been the same person who attacked the deceased and PW4. Secondly, the evidence of PW5 that she saw the deceased at 6.30 pm could also not be right, as PW1 had also alleged that he was at her pub around the same time.
50. PW5 had also alleged that the deceased's Nokia phone was recovered from the accused's pocket by one Michael, who was a crucial witness and should have been called to come and verify this fact, but ultimately never came to testify. The veracity of the said evidence was therefore not proved. Finally, as regards the blood stains noted on the accused's blue and white striped jacket, the evidence led showed that where he was arrested had a lot of the deceased's blood. If it was true that he had stabbed the deceased, it was only logical that his jacket ought to have had blood on its sleeves or arms of the said jacket and not on its side.
51. From the set of facts adduced, the only logical explanation as to how the said jacket got stained with the deceased's blood was that, while the accused was being subjected to mob justice and lying on the ground, his jacket must have been stained with the deceased blood and/or the same must have occurred while on the police motor vehicle, which had earlier carried the deceased to the mortuary.
52. The evidence led did not reveal any motive and/or malice aforethought, nor was the evidence on identification concrete enough for the court to safely rely on the same to convict the accused person. Reliance was placed in the case of Said Karisa Kimunzu Vs Republic, Criminal Appeal No 266 of 2006, Julius Obare Angasa Vs Republic, Criminal Appeal No 271 of 2008 and Waihigeni Gatimu Vs Republic (2015) eKlR to buttress the issues raised.



53. In summary, it was their submission that the prosecution's evidence was insufficient, highly contradictory and circumstantial, raising material doubt as to the veracity of the evidence adduced. This court was therefore left with no option but to acquit the accused person. Reliance was placed on the citation of Paul Vrs Republic KLR 100, where it was held that where a case was exclusively based on circumstantial evidence, the court had a duty before deciding to convict to find that the inculpatory facts were incompatible with the innocence of the accused person and incapable of any other explanation or hypothesis other than his guilt.
54. The prosecution had failed to prove its case beyond reasonable doubt and urged the court to acquit the accused person.
55. The prosecution did not file any submissions in this matter and opted to rely on the evidence adduced during the trial.

E. Determination

56. I have read through and considered the evidence adduced by both parties and given due consideration to the submissions made by the accused's Counsel. The question that arises before this court is whether the prosecution has proved beyond reasonable doubt that the accused person herein murdered Joseph Nzioka Muteti, the deceased herein.
57. Section 203 of the Penal Code defines the offence of murder as follows:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

58. In Joseph Kimani Njau vs Republic (2014) eKLR, the Court of Appeal, in concurring with an earlier finding of that Court (but differently constituted) in Nzuki vs Republic (1993) KLR 171, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55”.

59. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR, summed up the elements of the offence of murder as follows: -



- a. the death of the deceased and its cause;
- b. that the accused committed the unlawful act which caused the death of the deceased; and
- c. that the accused had malice aforethought.

60. I will now proceed to interrogate each issue.

i. The death of the deceased and its cause.

61. It is common ground that Joseph Nzioka Muteti died on the night of 09.01.2015 at Katheka village, having suffered seven stab wounds inflicted all over his body (on the left and right anterior chest wall, right subcapular flank- lower back, left sacral area, left lower back before the hip and on the left buttocks). This was confirmed by PW6, who produced the post-mortem examination report dated 12.01.2015 (Exhibit 2), on behalf of his deceased colleague, the late Dr Munene Lautani.
62. PW2, PW3, PW4, PW5, PW7, PW8, PW9, PW10 and PW11 all confirmed seeing the deceased's body either at the scene of crime or the mortuary, and all saw the fatal injuries sustained by the deceased. Death and its cause were thus proved.

ii. Whether it has been proved that the accused committed the unlawful act which caused the death of the deceased:

63. PW1, who worked at the government chemist did analyzed the items forwarded to their office by police officer known as George Kamande of DCI Kangundo, which items included the deceased's bloodied cloths, the accused's blue and white striped jacket and blood samples extracted from both the deceased and the accused person. On examination of the DNA profile from the blood extracted from the accused's jacket (item 1), it matched the DNA profile generated from the blood sample (item 5), which was the deceased's blood sample, with a probability of a match $1 \text{ in } 3.05 \times 10^{20}$. she did sign her report on 07.09.2017 and produced the same before court an Exhibit.
64. PW2, was the barmaid at Mwembe Tayari bar, within Katheka market and confirmed that on the material evening, both the deceased and the accused were at her bar, and had exchanged harsh words at about 6.00 pm. The deceased branded the accused a thief, while the accused had retorted that " he did not know the animal he was throwing arrows at". Early on the following morning, she had been called from her house and informed of what had transpired. While at the scene, she informed members of the public what had transpired/occurred between the deceased and the accused while they were at the bar.
65. PW4 was confronted by a knife-wielding person as he walked home at night, and they came within five (5) meters of each other, when the said would-be assailant demanded that he sit's down. He took off for dear life and managed to out-sprint the would-be assailant, who slowed down due to his shout for help from neighbours. He confirmed that on the material night there was moonlight and he clearly saw the accused's face, and confirmed that indeed the person who attacked him was the accused person before the court. He was also shown the blue striped white jacket worn by the accused and further confirmed that it was the same jacket the accused was putting on when their encounter happened.
66. PW4 ran away to his son's house (PW 9), reported the incident, and together they came back to confront the accused person. They found him seated at Simone's gate (PW8), and this time round, since they were armed, the accused took off and ran away towards the market. They saw the deceased lying injured on the ground, and he immediately called PW3 and other neighbours to come assist in salvaging the situation at hand.



67. PW4 evidence was corroborated by the evidence of his son, PW9, who also confirmed that there was moonlight on the material night, and he too saw and identified the assailant by the blue, striped white jacket he was wearing, which coincidentally the accused was wearing the following morning when he was arrested at 8.00 am. PW5, the deceased sister, further corroborated this fact, as on the material day (09.01.2015) at about 6.30 pm, as she was driving her cattle home from her brother's home, she had come across the accused person lying next to the road while holding a knife and a gunny bag, which was folded. By then, she did not know him and did not talk to him.
68. Unfortunately, during the same night at about 11.30 pm she was called by PW3 and identified her late brother's body by the roadside, where he lay having sustained fatal stab wounds. The following morning, while at Kangundo police station, word came through that the murder suspect had been arrested and was given a ride back to the scene, using the same police motor vehicle that had taken the deceased to the mortuary. On arrival, she was surprised to see that the person she had seen the previous evening, lying next to the road, was the same person who had been arrested for the murder of her brother, and was still wearing the same clothes she had seen him wear the previous evening. She positively identified the person as the accused person and also identified the black trousers, black shoes, and light blue jacket, which the accused had worn on the two consecutive dates.
69. PW 11 was the arresting officer, confirmed that the accused was arrested on 10.01.2025 in the morning by members of the public, and he effected his re-arrest and took him to hospital and later to Tala police station. At the scene/ during arrest, the mob handed over to him a kitchen knife and the blue, white striped jacket, which he handed over to the DCI investigating this case. PW7, the investigating officer, also summed up the investigation carried out and produced all the exhibits recovered, including both sets of clothes, the exhibit memo form, the Techno phone, and scene of crime sketch plans into evidence.
70. In defence, the accused person admitted to passing by his local pub, (Mwembe Tayari bar) after work and enjoyed his drink from about 3.00 pm to 9.00 pm, when he left for his home. He found DW2, who offered him food, but he did not eat and went to sleep. The following morning, while enroute to work, he was confronted by a mob, who arrested him, tied him up, and administered mob justice on him as they suspected that he had a hand in the demise of the deceased. He denied having any grudge with the deceased and also insisted he had nothing to do with the murder.
71. The accused person further insisted that he was completely drunk on the material evening, and if any incident or exchange of words did occur between him and the deceased, he could not remember due to his state of inebriation. Under cross-examination, he did specifically admit that on the material morning when he was arrested, he was wearing the same clothes he had worn the previous evening and confirmed they were the same clothes produced before the court as part of the prosecution's Exhibits.
72. DW2 also defended her son and confirmed that he came home drunk at 9.00 pm, slept on her sofa until 10.30 pm, before retiring to his house, which was about 100m away from her house. She also saw him leave his house the following morning, and later was informed by a good Samaritan that he had been arrested by a mob over allegations of having been involved in the death of the deceased.
73. The prosecution's evidence places the accused person at the scene of the crime on the material night, and this fact is corroborated by the DNA evidence, which, when considered in totality, points to the unerring guilt of the accused person. On identification, the courts have consistently held that evidence relating to identification must be scrutinized and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.



74. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence and capacity for observation, reasoning, and memory, and be satisfied that the witness is a reliable witness who can observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before. See, *Charles O. Maitanyi v Republic, Kariuki Njiru & 7 others v Republic, Wamugunda Vs Republic (1989)KLR 424* at page 424 and *Nzaro Vs Republic (1991) KAR 212*, where these issues were extensively discussed.
75. From the evidence adduced, it is clear that PW4 and PW9 squarely placed the accused person and the scene of the crime, and clearly identified him through his facial features and more particularly by the clothes he was wearing. Both were emphatic that there was moonlight, and PW4 in particular confirmed that the accused came within five (5) meters of his reach, while holding a knife and threatening to harm him if he did not submit and lie down, but his flight hormones (epinephrine) took charge, and he ran away, with the accused in hot pursuit.
76. PW4 sought refuge at his son's (PW9) house, and they opted to go back to the scene, while armed, and again confronted the accused. They had the opportunity and time to observe him again and made similar observations about his dressing. PW5, who had seen the accused the previous evening at about 6.30 pm lying by the roadside while holding a knife and a folded gunny bag, saw him again upon arrest the following morning, and noted that he was wearing the same clothes he had worn the previous evening, and this evidence further corroborated the observations made by PW4 and PW9. The accused also admitted to having worn black trousers, a blue T-shirt, a blue and white striped jacket, and black shoes, all of which were produced before the court by PW7 as Exhibits.
77. To cap it all, the accused person's blue and white striped jacket was taken for DNA examination, and PW1 confirmed that the DNA profile extracted from the said jacket matched the DNA profile generated from the deceased's blood sample with a probability of a match $1 \text{ in } 3.05 \times 10^{20}$. It is also noted that in defence, the accused person failed to explain how his jacket came into contact with the deceased's blood, and while his counsel did so in their submissions, the said explanation in law is inadmissible as submissions do not form part of the evidence adduced at trial.
78. Further, the alibi defence pushed by DW2, that the accused was at home, was questionable, and this was confirmed by PW8, who testified that members of the public and the police went to search for the accused at his house and his mother's house, but did not find him. They only found DW2 and the accused sister.
79. In summation, based on the direct and the circumstantial evidence adduced, the inculpatory facts proved herein are incompatible with the innocence of the accused person and incapable of any other explanation/ reasonable hypotheses other than that of his guilt as the person who, without doubt, attacked and fatally stabbed the deceased person on the material night.



iii. Malice Aforethought

80. Having found that the prosecution has proved actus reus, the other issue for determination is whether malice aforethought can be inferred from the prosecution's evidence presented. The offence of murder is complete when "malice aforethought" is established. Section 206 of the Penal Code, provides that:

- “(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) An intent to commit a felony;
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

81. It is sufficient to say that the mental element required by section 206 of the Penal Code can be equated to broad guidelines set out in the case of *Tubere s/o Ochen vs. Republic* [1945] 12 EACA 63:

“The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted.”

82. In assessing the weight to be given to intention as an element of murder, the relevant circumstances must be considered as to whether the appellant foresaw the real or substantial risk and the consequences of targeting the part of the body that may result in the fatal injuries suffered by the deceased.

83. A similar statement of Law was made in the persuasive authority of *S. vs. Sigwahla* 1967 4 SA 566, in which the court stated:

“The expression intention to kill does not in Law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such a result. This form of intention is known as a *dolus eventualis* as distinct from *dolus directus*.”

84. PW1 saw the deceased and the accused quarrel, with the deceased pointing a finger at him and accusing him of being a thief. The accused was not happy and warned the deceased that “he did not know the animal he was throwing arrows at”. In defence, the accused put forth a defence that he was completely drunk and if such an altercation occurred, he could not remember, and further alluded to the fact that he was already at home, slightly after 9.00 pm, as confirmed by his mother, DW2. PW1 in her evidence also confirmed that it was the deceased who left the pub at 9.00 pm to go watch TV at a different location, and this was long after the accused person had left. It is therefore not true that the accused person left the pub at 9.00 pm as he alleged.

85. Further, while it is true that the accused drank alcohol on the material evening, by 6.30 pm, he had already left the pub and had blacked out by the roadside, where PW5 positively identified him.



Logically, by the time he was attacking the deceased between 9.00 pm -11.00 pm, he had already woken up from his alcohol-induced blackout. His action of confronting and chasing after PW4 and running away when they came back to confront him does not support his contention of one consumed in alcohol induced stupor.

86. It is evident that the accused and the deceased had an unresolved bone to pick, and when he got an opportunity, he inflicted seven (7) fatal stab wounds blows on the deceased. From an analysis of the injuries inflicted, it is clear that the accused did not have any other intention other than to inflict grievous harm upon the deceased. It is my finding that the accused person knew or ought to have known that his action would result in death, and it can be safely inferred from the nature of the injury inflicted on the deceased that the accused person's action was premeditated.
87. In the circumstances, I am persuaded beyond reasonable doubt that the prosecution has proved their case, and specifically, the presence of malice aforethought on the part of the accused, too, has been proved.

D. Disposition

88. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the Information of murder against the subject herein, Alex Muluku Isika, beyond reasonable doubt and convicted him accordingly under section 215 of the Criminal Procedure Code.
89. Sentencing will await the filing of a pre-sentence report by the probation and aftercare services department, within the next 21 days.
90. It is so Ordered.

JUDGMENT, SIGNED AT MARSABIT THIS 17TH DAY OF SEPTEMBER, 2025.

FRANCIS RAYOLA OLEL

JUDGE

JUDGMENT READ AND DELIVERED IN OPEN COURT ON THIS 17TH DAY OF SEPTEMBER 2025.

FRANCIS RAYOLA OLEL

JUDGE

In the presence of:-

Present from Machakos Main Prison Accused

Mr. Nderitu For O.D.P.P

JarsoCourt Assistant

Miss Kitie for accused Present

