



**Republic v Akello & another (Criminal Case 18 of 2013)
[2025] KEHC 12595 (KLR) (Crim) (16 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE 18 OF 2013
K KIMONDO, J
SEPTEMBER 16, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

REUBEN SHANGI AKELLO 1ST ACCUSED

SIMON NDUNGU WAINAINA 2ND ACCUSED

JUDGMENT

1. On the night of 27th April 2011, Peter Mungai Macharia (hereafter the deceased) died in Cell No. 2 at the GK Naivasha Main Prison. There were two other inmates in the cell that night: Reuben Shanghi Akello and Simon Ndungu Wainana (hereafter the 1st and 2nd accused persons)
2. According to a witness, Constable Benson Mbula Juma (PW2), at about 19.30 hours, he and his colleague Patrick Mutai, heard a bang or loud noise emanating from the cell. When he peeped through the security holes on the wall, he saw two inmates attacking the deceased. The 1st accused was holding him by the neck while the 2nd accused was raining blows on the stomach. When the cell was finally opened, the deceased was lying down face-up in a pool of blood.
3. The Republic thus brought Information to the High Court charging the accused with murder contrary to section 203 as read with section 204 of the Penal Code.
4. The particulars were that on 27th April 2011 at the GK Naivasha Main Prison in Naivasha Municipality of the Nakuru County, they jointly murdered the deceased.
5. They both pleaded not guilty. The prosecution marshalled five witnesses who were all prison officers. It was a blend of direct and circumstantial evidence. When the accused were placed on their defence, they elected to remain silent and did not call witnesses.



6. I should point out at the earliest that due to the use of abusive language to the court, disruptive conduct and causing a serious fracas in open court, the learned judge (Muchemi J) in a considered ruling dated 11th December 2013, barred the accused from being present at their trial. They were however fully represented by counsel when the above witnesses testified. I will deal with that issue later.
7. I should also add that all the five witnesses were heard by my predecessor, Mutuku J. The learned judge found they had a case to answer. On 19th October 2022, and, as the succeeding trial judge, I explained on the record to each of the accused persons their rights under section 200 (3) as read together with section 201 of the Criminal Procedure Code.
8. The accused proposed to have the trial start de novo. In a considered ruling I held that since the prosecution's case had closed; and, both accused persons placed on their defence, it was not in the interest of a fair trial or justice, to re-open the prosecution's case. I thus ordered the trial to proceed from the point of the defence case. The accused appeared before me virtually (and on one occasion in open court for the 1st accused) when they elected to remain mute.
9. I will now return to the substance of the prosecution's evidence. PW1 was Sergeant Samson Monda who was acting as head commander on the material day. At around 7:30 p.m., he heard noises from officers manning the Reception Block. They told him that two inmates in Cell No. 2 were fighting. He reported it to the night duty senior officer, IP Amani. They broke open the canvas where the keys to the cells were stored and opened the first door. There were three barriers to the cells. When they peeped through the holes in the wall, they saw two inmates standing and one lying on the ground in a pool of blood with a visible injury on the forehead
10. He testified that the three inmates were the deceased, the 1st and 2nd accused. The latter two were standing; while the deceased was the one on the floor. PW1 returned to the report office to inform the in charge. His deputy SP Mwangangi advised them to call the clinical officer. SP Mwangangi ordered them to open the final barrier to the cell. The witness said that the accused were both furious and that the 2nd accused said they had "finished" the deceased.
11. The witness said that the clinical officer examined the deceased and confirmed he was dead. The scene was documented by the police and the body removed to Naivasha mortuary. As I will discuss later, the clinical officer did not take to the stand and no post mortem form was produced.
12. On cross examination he stated that the reception area has 15 cells and that Cell No. 2 was at end of the corridor. It had a wooden door outside and metallic bars inside. He said the three inmates were brought in "after they had committed some offence" and that they had been searched. He did not however produce the register showing the occupants of the various cells.
13. He added that they only opened the cell door after the Deputy in Charge arrived and that it took about 15 minutes before they opened the last barrier. The Deputy in Charge alerted the OCS Naivasha Police who came in together with Scenes of Crime officers. The witness did not see any weapon in the cell but saw blood stains on the wall.
14. I earlier summarized the key evidence of PW2 and need not repeat it. PW3 was Corporal Mohammed Godana. He was on duty as the second guard commander. When he got to the scene, he found one inmate lying on the ground in a pool of blood and two others standing. He could not pinpoint the injury but said it was on the head, and that the deceased had bled a lot. He said that the two standing inmates claimed that the deceased wanted to sexually assault them.



15. When cross examined, he stated that he was in the duty office, about 100 metres from reception area, and did not hear an alarm. In answer to further questions, he conceded that he arrived at the cell well after the death of the deceased and that he did not know how the death occurred.
16. PW4 was Superintendent Julius Kipsang Langat. He was on duty on the material day. The 1st and 2nd accused were brought in from another prison by Corporal Obongo. The latter said that the two had disobeyed his orders to remove their shoes. The witness said it was around 6:00 p.m. because he was about to close prison. He told Cpl Obongo to hold the two in the cells until the following day. They were placed at reception wing by Cpl Obongo in Cell No. 2 where the deceased was also held. At 7:00 p.m., PW4 handed over duties and left the prison.
17. Upon cross examination, he stated that Cpl Obongo did not document the accused persons as having been placed in Cell No. 2. The deputy officer in charge was supposed to try the two the following day for disobeying the orders. He added that inmates are locked-up in uneven numbers and that most prisoners in Naivasha were hardcore criminals. He could not however categorize the two as such because they were new to the prison.
18. PW5 was IP Benson Kiprotich Amani. He was the night duty officer on the material night. He was in the company of the night guard commander, Cpl Monda (PW1) when the alarm was raised at the Reception Block. He asked PW1 to find out the matter. He reported that two inmates in Cell No. 2 were beating another. PW5 broke the canvas and accessed the key safe. He gave it to the guard commander who opened the wicket gate. When they peeped through the security hole they saw two prisoners standing and one lying down in a pool of blood.
19. The witness did not open the final barrier to the cell. Instead, he reported the matter to SSP Musyoni who advised him to wait for SP Mwangangi before opening that door. The latter arrived at around 8:00 p.m. and opened the door. The body of the deceased was lying in a pool of blood while the accused were standing at a corner. Police were called to the scene. The documentation officer also helped in identifying the three prisoners.
20. When cross examined, he conceded that he arrived at the scene well after the attack. He said the Reception Block has few inmates and most of them are under punishment. He said there is a register showing the names and punishments but he did not have it in court. He added that although he had the key to the cell, he thought it wise to wait for the senior officer before opening the door.
21. Like I stated earlier, When the accused were placed on their defence, they elected to remain silent and did not call any witnesses.
22. Learned counsel for the 1st accused, Ms. Kimanzi, filed detailed submissions with a list of authorities dated 10th July 2025. The tenor and substance of those submissions was that the quality of evidence fell far short of the required standard of proof; and, accordingly, the accused should be acquitted. Reliance was placed on *Richard Munene v Republic* [2018] KECA 186 (KLR) and *Kaibiru v Republic* [2022] KEHC 11548 (KLR).
23. Learned counsel for the 1st accused also submitted that there was no proof of death of the deceased or his cause of death. Furthermore, there was no reliable evidence identifying the accused as the person or persons who caused his death. She contended that there was no documentary evidence placing the 1st accused in Cell No. 2 and that in any case the prosecution failed to show that he was of malice aforethought. She relied on *Joseph Kimani Njau v Republic* [2014] KECA 229 (KLR) for that proposition.



24. The submissions by learned counsel for the 2nd accused, Mr. Michuki, took a similar trajectory save for additional precedents in *Ndungu v Republic* (1985) eKLR and *Chengo Nickson Kalama v. Republic* [2015] eKLR on the duty of the prosecution to prove the death and its cause.
25. Before proceeding further, I will revisit why the accused persons were barred from attending court. The reasons are well captured in the ruling dated 11th December 2013 by Muchemi J. The material paragraphs read as follows-

“On their part, these two prisoners Reuben Shangi Akelo and Simon Ndungu Wainaina were in a foul mood as the court was mentioning their case. They kept shouting even as the court was handling other files. The two were quite defiant to any warnings to keep calm in the court room.

I have mentioned this case a few times and I have experienced the defiance of the two accused persons who are very unruly and will not take instructions to keep quiet in court even from their own advocates. The record will show that advocates have withdrawn from representing them due to their unruly behaviour.

This case was transferred from Nakuru court to Nairobi for reasons that are clear on record. My observation is that the accused persons are determined to cause trouble in court and do not want their case to be heard. There will always be a reason for having the case not take off when the prosecution is ready to proceed.

The State counsel who was present in court on 11.12.2013 has agreed to swear an affidavit to explain what she witnessed. The court clerk has done the same. These two officers may be recording statements with the police who will be investigating the case of disturbance and fracas in the court room.

I come to a conclusion that the defiance and the rowdy behavior of the accused persons is deliberate and aimed at annoying the court and making it impossible for the court to conduct its normal court business. It is also aimed at making it impossible for the court to hear the case against the accused persons. I am inclined to make the following orders.

1. That the accused persons be excluded from the court proceedings when their case is being heard or mentioned;
2. That only their legal representatives will be allowed in the court room during court proceedings.
3. That this order be communicated to the officer in charge of Nairobi Remand Prison in writing by the Deputy Registrar of this court.
4. That a copy of the letter to the officer in charge prison be given to the advocates of the accused persons. It is hereby so ordered.

26. I concur with those findings. I add that in all the circumstances of this case and the dictates of an orderly and fair trial, the accused were lawfully excluded from attending court. Furthermore, they were both represented by counsel throughout the trial. From the time I took over the trial in 2022, the accused attended the court virtually. The 1st accused also attended physical court for defence hearing on 30th April 2025 when he elected to remain mute. I cannot then say that the accused did not get a fair trial.



27. I am fortified in that finding by the express text of Article 50 (2) (f) which provides that an accused person has a right “to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed”
28. I will now return to the evidence and the law. Firstly, the burden of proof that the accused murdered the deceased lay squarely with the Republic. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.
29. Section 203 of the *Penal Code* provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
30. There are three key ingredients that must be present: first, the prosecution must prove beyond reasonable doubt the death of the deceased and the cause of that death; secondly, that the accused committed the unlawful act that led to the death; and, thirdly, that the accused was of malice aforethought.
31. The defence contends that there is no reliable evidence that the deceased “is in fact dead or even in the event the same is confirmed, the cause of death”. This matter cannot be wished away. The clinical officer referred to by PW1 and PW5 as having established the deceased was dead was not called as a witness. Again, PW1 and PW5 claimed that the scene was documented by the police and the body removed to Naivasha mortuary where a postmortem examination was conducted. No scene of crimes officer testified. Fundamentally, the results of the post mortem examination remain at large.
32. However, I am prepared to find that the lifeless body of the deceased was seen in Cell No. 2 by all the five witnesses on the material night. It had an injury on the forehead or head as per the testimony of PW1, PW2, PW3 and PW5. It was lying face-up in a pool of blood. The death was clearly unlawful.
33. There is then the critical evidence of PW2: at about 19:30 hours, he and his colleague Patrick Mutai, heard a bang or loud noise emanating from the cell. When he peeped through the security holes on the wall, he saw two inmates attacking the deceased. The 1st accused was holding him by the neck while the 2nd accused was using blows on the stomach. When the cell was finally opened, the deceased was lying down face-up in a pool of blood.
34. I thus entertain no doubt that the deceased succumbed to those injuries. Any other interpretation would be a travesty of justice. I find some support in *Ndungu v Republic* [1985] KLR 487. The Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial unless the cause of death is too obvious. The Court stated at page 493-

Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post- mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.
35. From the testimony of PW4 the 1st and 2nd accused were brought into Naivasha Prison on transfer from another prison by Corporal Obongo at about 6:00 p.m. The latter said that they disobeyed his orders to remove their shoes. PW4 instructed Cpl Obongo to hold the two in the cells at the Reception Block until the following day. I am alive that Cpl Obongo did not testify. But there is the evidence of PW5, IP Amani, who testified that the documentation officer came to the scene and identified all the three inmates in the cell.



36. The next question then is whether the Republic proved beyond reasonable doubt that the accused, of malice aforethought, killed the deceased. Interwoven with it is whether the accused were positively identified as the persons who jointly attacked the deceased.
37. The key and direct evidence on those twin issues is from PW1, PW2, PW3 and PW5. The homicide took place inside prison walls. There were only three people inside Cell No. 2: The deceased, the 1st and 2nd accused. PW2's evidence is straightforward: When he peeped through the security holes on the wall, he saw two inmates attacking the deceased. The 1st accused was holding him by the neck while the 2nd accused was raining blows on the stomach.
38. When the cell was finally opened, the deceased was lying down face-up in a pool of blood. The 1st and 2nd accused were found inside that cell by PW1, PW2, PW3 and PW5. I thus have no doubt that the accused persons were positively identified as the two persons occupying the cell and who attacked the deceased. See generally *Wamunga v Republic* [1989] KLR 424; *Maitanyi v Republic* [1986] KLR 198 at 201.
39. Regarding motive there is no clear support for the allegation by PW3 that the attack had a sexual underpinning. We shall never know the true motive behind such a vicious and brutal attack. The point to be made is that whereas presence of a motive may be useful in understanding why the accused acted in a certain manner, it is not an ingredient of the offence of murder. Fundamentally, the prosecution is not obligated to prove it. See *Nzuki v Republic*, Court of Appeal, Nairobi, Criminal Appeal 70 of 1991 [1993] eKLR.
40. But regarding the important ingredient of mens rea, the evidence of PW2 is unassailable. He saw the two accused persons attacking the deceased. The 1st accused was holding him by the neck while the 2nd accused was using blows on the stomach. When the cell was finally opened, the deceased was lying down face-up in a pool of blood. PW1 on the other hand said that the accused were both furious and that the 2nd accused said they had "finished" the deceased.
41. I thus find that both accused had malice aforethought as defined in section 206 (b) of the Penal Code. The deceased had a visible injury on the head. He was in a pool of blood and the walls were bloodstained. The 1st accused tightly held the deceased on the neck as the 2nd accused pummeled him on the stomach. By roughing up the deceased in that manner, they knew or ought to have known that it was likely to cause grievous harm or death.
42. Their conduct is completely inconsistent with the plea of innocence. There is no evidence that the deceased attacked them or that they were acting in self-defence. The deceased died as a consequence of their joint conduct. The entire corpus of direct and circumstantial evidence points irresistibly to their guilt.
43. The upshot is that the prosecution has proved the charge beyond reasonable doubt. The 1st and 2nd accused, of malice aforethought caused the death of the deceased by an unlawful act. I accordingly enter a finding of guilty and convict both of them of murder contrary to section 203 as read with section 204 of the *Penal Code*.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2025.

KANYI KIMONDO

JUDGE



Judgment read virtually on Microsoft Teams in the presence of-
Accused.

Ms. Kigira for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. Kimanzi for the 1st accused instructed by Mitau Kimanzi & Company Advocates.

Mr. Michuki for the 2nd accused instructed by K. Michuki Law Advocates.

Mr. E. Ombuna, Court Assistant.

