



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Nduku (Criminal Case E146 of 2021)  
[2025] KEHC 13453 (KLR) (29 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13453 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E146 OF 2021  
AC BETT, J  
SEPTEMBER 29, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DENNIS WESA NDUKU ..... ACCUSED**

**JUDGMENT**

1. The Accused Dennis Wesa Nduku is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that the Accused on the 17<sup>th</sup> November 2017 at Sirigoi “A” village, Sirigoi Sub-location in Navakholo Sub-County within Kakamega County murdered Julius Makuto Shikuku.
2. Upon the Accused pleading not guilty, the State called six witnesses to support its case.
3. PW1 was Joseph Mboya Mwangala who testified that on the midnight of 16<sup>th</sup> and 17<sup>th</sup> November 2021, during a “Matanga” (funeral festivities) in his home as he had lost his wife, he heard a fracas and saw youths beating a person he could not identify. He saw the person ran and fall outside the gate. Among those beating the person was the Accused whom he saw stab the person with a knife. Accused was in the group that was beating the person. After the person fell, PW1 said that he went to investigate but was not able to identify the victim as it was dark. He later identified the victim as a son of his elder brother by name Julius Makuto. The victim’s intestines were out and he was taken to hospital where he succumbed to the injuries.
4. When cross-examined, PW1 said that there were many youths whom he did not count but he could see them armed with pangas, knives and rungus. He further said that he saw the tall youth with the knife and asked his children who he was and they informed him that it was Dennis. He was later told that it was Dennis who had stabbed Julius but he did not witness Dennis committing the act. It was Joseph Lumumba and Erima Shikuku who told him what Dennis had done.



5. PW2 was Givine Erima Shikuku who recalled that on 17<sup>th</sup> November 2021 as she sat next to the kitchen during a night vigil in honour of her aunt, she saw more than five youths enter the compound. She saw Dennis the Accused, and Tofa. They were armed with pangas and runigus and after joining the dance, they started fighting with Joseph Werunga. According to her, Joseph escaped, and her brother Julius also decided to run away. One of the youths threw a stick which tripped Julius and he fell. They then set upon him and assaulted him with runigus and “fimbos”. PW2 who said that she was about 2 metres away and could see with light from a generator said that after beating Julius, the assailants left. She further stated that she saw Dennis Wesa stab Julius on the stomach with a knife and after they left, they established it was her brother Julius who had been assaulted. Julius succumbed to the injuries on the way to hospital. According to PW2, there were injuries on the head but she only saw Julius being stabbed on the stomach.
6. On cross-examination by Mr. K’Ombwayo, PW2 stated that she was only able to identify two out of five youths as she only identified those who were heavily armed. She stated that she did not see anyone carrying a panga. She further stated that the group began to beat everyone around and Julius who was standing apart, attempted to run away. She said that although Tofa was in the group, she did not see him assault anyone. She said that she saw the group with runigus and “fimbos”. There were also slashers. She also said that she could not tell who was assaulting the deceased while he lay on the ground but she saw Dennis crouch and stab the deceased once. She reiterated that there were light bulbs outside.
7. PW3 was Dr. Dixon Mchana, a Consultant Pathologist who performed the post-mortem on the body of the deceased which was identified to him by two witnesses namely Boniface and Haggai Mwangaa. On examination, the body had marked peripheral and central palor. There were eight (8) stab wounds, two involving the right arm, two involving the left chest at the back, one involving the front of the abdomen below the right rib cage, two below the right buttocks and one on the right lower back. Internally, there was a penetrating injury to the chest below the 5<sup>th</sup> rib cage at the back and on the left. The left upper lobe of the lung was perforated which led to bleeding of approximately one (1) litre resulting in the collapse of the entire left lung. Further, there was perforation within the liver that led to bleeding into the abdominal cavity.
8. PW3 estimated the blood loss as three (3) litres and formed the opinion that the cause of death was internal bleeding secondary to sharp force trauma following assault. PW3 who filled Death Certificate No. 1232065 produced the post-mortem report as an exhibit.
9. On cross-examination, PW3 said that many injuries were on the back of the body. He also said that a runigu is a sharp object and can result in a sharp force injury.
10. PW4 was Agaton Oyiroy Ndeke, who said that the Accused is his uncle’s child and recalled that on 17<sup>th</sup> November 2021 at 8.00 a.m., he received a call from a relative who informed him that there was a fight at a burial disco in which one of the persons was injured and died and it was alleged that Dennis was one of them. He narrated that in a bid to secure the safety of the Accused, he picked him from his home, took him to the police and left him there.
11. PW5 was Joseph Werunga. He recounted that on 4<sup>th</sup> November 2021, at about 1 am, he was at a funeral function when he saw some people arrive and start a fracas by attacking people. He said that the Accused was among the attackers, who appeared drunk. PW5 said that he could identify the Accused as there were lights that had been put up. He said that he first saw the Accused on that day but he used to know him very well because they come from the same village and live on opposite sides of the river. According to PW5, Julius was the one who was attacked and was stabbed with a knife by the Accused. PW5 testified that his father and the deceased’s father are cousins while the Accused is a distant relative and he was not aware of any existing grudge between the Accused and the deceased.



12. During cross-examination, PW5 who had said that he could see the attack as he was about 5 metres away and there was light, said that the Accused had on a green attire. He said that he saw the Accused stab the deceased but did not know how many times the deceased was stabbed. According to him, when the Accused came, he had no knife.
13. Force No. 73722, Corporal William Ngoro Katano testified as PW6. He recalled that on 17<sup>th</sup> November 2021, while he was at the station, PW1 made a report that a scuffle had occurred at night in his home during which Julius was stabbed on the abdomen by one of the five young men who had started the scuffle and the injured person had passed away. PW6 said that he conducted investigations and recorded the statements of the witnesses and on confirming that the Accused who had been brought to the station on the same day was the one who committed the offence, arrested the Accused and caused him to be charged.
14. Upon being placed on his defence, the Accused gave a sworn statement in which he stated that on 17<sup>th</sup> November 2021, he and his friends Dennis and Nyongesa decided to go to a funeral night vigil. He stated that on arrival, they took part in the celebrations. After a while, some people invaded the place among them Philip Wekesa and Douglas. They were armed with hockey sticks and started quarrelling with the deceased. According to the accused, the deceased fell down and he saw Philip who had a knife, stab the deceased after which the attackers ran away and Philip has never been found to date. The Accused said that he tried to assist the deceased after he had been stabbed. He denied attacking the deceased.
15. At the end of trial, both parties filed their respective submissions. The State submitted that the ingredients of the offence of murder had been proven since it was able to prove that the deceased died as a result of an unlawful act. They also submitted that the Accused had been positively identified as the person who stabbed the deceased. On the question as to whether the Accused acted with malice aforethought, the State submitted that the malice is discernable from the deliberate manner in which the Accused walked upto the deceased and stabbed him at least eight times. The State relied on the case of Abanga alias Onyango v Republic Criminal Case No. 32 of 1990 and urged the court to convict the Accused as charged.
16. The defence on its part submitted that the State had not proven the elements of the charge of murder while relying on the case of Anthony Ndegwa Ngari v Republic [2014] eKLR.
17. The defence admitted that while it was not in doubt that the person named as deceased died and that his death was unlawfully caused, the question is who stabbed the deceased to death. The defence further raised the issue as to who made the multiple stab wounds and who inflicted the fatal stab. According to the Accused's Counsel, none of the prosecution witnesses saw the Accused being armed with the murder weapon and it is interesting to note that only PW2 witnessed the commotion despite there being many people at the scene.
18. The Accused further submits that his actions after the event lends credence to his innocence as he went home after the incident and presented himself to the police as he knew that he did not have anything to hide. The defence further submits that none of the witnesses who testified in court gave reliable evidence since PW2 who allegedly saw the Accused stab the deceased saw him only stab him once yet the autopsy revealed multiple injuries.



19. In the case of Anthony Ndegwa Ngari v Republic (supra), the Court of Appeal identified the following crucial ingredients of the offence of murder as essential for a conviction: -

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

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

20. Since the Accused did not dispute the death of the deceased nor the fact the deceased’s death was caused by an unlawful act as demonstrated in the postmortem produced by PW3, the court is only left with the final two ingredients of the offence of murder.

21. The question as to whether the Accused committed the unlawful act rests on the evidence of PW1, PW2 and PW5. PW1 did not witness the Accused stab the deceased but said that he saw many youths attack someone whom he later discovered to be Julius, the deceased. PW2 identified the Accused and one Tofa as among the attackers of the deceased. She gave a clear description of the attack which took place a few metres from where she was and said that there was sufficient light for her to see the attack. According to her, she saw five youths, among them, the Accused attack and assault the deceased with *rungus* and “*fimbos*” after he had fallen down. They had first attacked Joseph Werunga who ran away after which they attacked the deceased. According to PW2, she saw the Accused stab the deceased on the stomach with a knife.

22. PW2’s evidence was inconsistent with that of PW5 who also testified that he witnessed the Accused stab the deceased. The most significant inconsistency lies in PW2’s testimony that before attacking the deceased, the group first attacked PW5, who fled from the attackers whereof they descended upon the deceased and jointly assaulted him. However, PW5 while giving his evidence, never said that the group attacked him first or at all. The issue for this court to resolve is whether the omission by PW5 renders him an unreliable witness.

23. It is noteworthy that in his defence, the Accused did not state that PW5 was present at the scene nor that he took part in the assault. He attributed the assault of the deceased to one Philip. In the circumstances the submissions by the defence that PW5 had the motive to commit the offence is baseless more so because nowhere in the proceedings was it put to the witness that he had accused the deceased of having an affair with his wife.

24. It is worth noting that despite PW5 failing to testify that the group comprising the Accused and his cohort attacked him upon their arrival at the venue, the defence did not challenge him regarding his omission nor the apparent inconsistency in his evidence vis-à-vis that of PW2.

25. The defence submitted that a fight involving one group of Werunga (PW5) and the deceased broke out but on perusal of the evidence, I find that PW2 stated as follows during cross-examination:-

“The fracas began between the youths who came in and Joseph Werunga. There was so much noise so you could not tell what was being said..... Julius was nearby standing. No one was pushing him. He was not in the group or crowd.”



26. In the premises, I find that there is no evidence that PW5 was an aggressor nor that the deceased was in any of the groups that were fighting. It appears that after attacking PW5, the Accused's group ran amok and when the deceased attempted to flee, they followed him and assaulted him.
27. On analyzing the evidence of PW2 and PW5, I find that the inconsistencies in their evidence did not affect the prosecution's case materially. It may be that PW5 was so intent on giving evidence of the attack upon the deceased that he failed to narrate that he had also been attacked. There was nothing to suggest that either he or PW2 were not truthful. In the case of *Richard Munene v. Republic* [2018] KECA 186 (KLR), the Court of Appeal considered the import of inconsistencies in evidence and had this to say:-

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

I find their evidence credible. The same was not shaken in cross-examination. Both witnesses saw the Accused stab the deceased on the abdomen. The fact that the deceased was stabbed on the abdomen was attested by the Pathologist who performed the autopsy and testified that the body had a perforated right lobe of the liver. The Pathologist's evidence was never controverted.

28. Regarding the submissions that PW2 saw the Accused stab the deceased once whereas the autopsy revealed multiple injuries, there was irrefutable evidence that the Accused did not act alone. He was in a group. The evidence shows that the group acted in concert to assault the deceased, who was alone. Although no one cannot point a definite finger at who inflicted the fatal wound, it suffices that the Accused was part of the group and took part in the assault. In *Ali Salim Bahati & Another v. Republic* [2019] eKLR the court held as follows:-

“...We must say that it is difficult in the case of mob justice, such as in this case, to pin point that a blow or assault by a particular person in the group led to a victim's death. It is in such circumstances that the provisions of Section 21 of the Penal Code come into play.”

29. Section 21 of the Penal Code provides that:-

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

30. It is apparent from the evidence that the Accused formed the group of assailants that attacked the deceased and took active part in the attack. It matters not whether his cut was the final cut. His participation was proven by PW2 and PW5 who said he was related to the Accused. There was no motive for the two witnesses to wrongly implicate the Accused. The Accused's presence among the assailants was also corroborated by PW4, a relative to the Accused, who learnt about six hours after the incident, that the Accused was involved in the murder of the deceased.
31. From the sworn evidence by the Accused, it is clear that he was at the scene of the killing and that he had the opportunity to commit the offence. His defence is clearly an afterthought as it was never suggested to any of the prosecution's witnesses that Philip was the one who stabbed the deceased nor



that he, the Accused, tried to assist the deceased after he was stabbed. The only conclusion I can reach is that the Accused was among the youths that attacked the deceased during which the Accused was seen stabbing the deceased.

32. The remaining ingredient is whether it was established that the Accused had malice aforethought in attacking the deceased. Malice aforethought is defined under Section 206 of the Penal Code as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (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.”

33. It has been held that in order to infer malice, the court should consider the nature of the weapon used, the manner in which it was used, the part of the body targeted, the nature of the injuries inflicted and the conduct of the Accused before, during and after the incident. See Republic v Tubere S/O Oden [1945] 12 EACA 63.

34. Coming to the present case, the Accused, in a group of at least four others attacked the deceased while armed with rungun, “fimbos” and knives as is apparent from the autopsy report. They assaulted the deceased after he had tripped and fallen down. They inflicted multiple injuries on him. The Accused stabbed him on the abdomen with a knife. In the course of the attack, the deceased suffered multiple stab wounds. There was no suggestion that the deceased suffered subsequent assault after being attacked by the Accused and his group. The number of people who attacked the deceased and the weapons used, point to an intent to cause grievous harm on the deceased, who was unarmed and had attempted to flee. This intent is further apparent from the parts of the body that were targeted. The deep stab wounds led to massive blood loss. After the assault, the Accused and his friends fled the scene. Contrary to the Accused’s defence, it is his Cousin PW4 who took him to the police for his safety after receiving information that the Accused was a suspect in the murder of the deceased. In the circumstances, the conduct of the Accused after the offence cannot be said to have been one of innocence.

35. In the end, the court does not find any merit in the defence case and finds that the prosecution has established its case against the Accused beyond reasonable doubt. I therefore convict the Accused for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:



Ms. Chala for the Prosecution

Ms. K'Ombwayo for the Accused

Court Assistant: Polycap

