



**Republic v Muthee (Criminal Case E006 of 2021)
[2025] KEHC 14759 (KLR) (16 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE E006 OF 2021
CW MEOLI, J
OCTOBER 16, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

JOSEPH GACHANJA MUTHEE ACCUSED

JUDGMENT

1. Joseph Gachanja Muthee, hereafter 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 that on 6th day of March 2021, at Chapchap Area within Ongata Rongai Town in Kajiado North Sub-County, he murdered Tyson Walombe (hereafter the deceased).
2. The Accused pleaded not guilty, and the case proceeded to full trial. The prosecution called a total of seven (7) witnesses before my predecessor Mutuku J. The prosecution case was as follows. Caroline Muthoni Benjamin (PW1) testified that she lived at Ongata Rongai where she operated a shop and that on 5.3.2021 was at her shop from 6:30m until 10pm, and that at 11:00pm while on her way home, she met one Evans who told her that he had seen an intruder enter the hotel operated by the Accused. She called the Accused and shared the information with the Accused who arrived shortly, but said he had the wrong keys, and later returned with the right keys and she heard him ask where the intruder was. Presently, she saw a white vehicle and thinking it was the police, left the scene and proceeded home. Only to learn on the next day that the intruder found at the Accused hotel had been assaulted and taken to Kenyatta National Hospital.
3. Yuvenalis Okeyo testifying as PW2 stated that on 5.3.2021 at midnight he was in Ongata Rongai at Overcomers Academy where he worked as a watchman. He heard female voices pleading with the Accused not to kill some person. Among the women was PW1. From about 100metres and under street lights, he witnessed the Accused assaulting a person, and on the next day while going to the shop he found Accused and his workers talking. He stated that he noted the presence of a man whom the



- Accused claimed to be the thief he had assaulted, and a piece of timber that he had used. He observed that the man was naked and appeared in a bad state and he later learned that the person died.
4. According to Nelson Maruti Waswa (PW3) a mechanic, on the material date, at 8:00pm he was in the company of the deceased before the duo parted ways. On the next morning Joseph Wambugu (PW4) who operated a spare shop close to his place called to inform him that the deceased had been assaulted, was naked and he needed clothes. On reaching the scene he found the deceased and he called his brother asking him to get transport to escort the deceased to hospital. Jamoi hospital in Ongata Rongai to which he and the deceased's brother first took the deceased refused to admit him, hence they travelled to Kenyatta National Hospital where despite being attended to, the deceased succumbed to his injuries.
 5. The fourth witness was Joseph Kikungu Wambugu (PW4) who testified that on 6.3.2021 at 7:00am on his way to work, he met Salim and Kimani who told him that the deceased whose name they gave as Tyson had been assaulted. Proceeding to where the said man was, PW4 saw him lying on the ground, without trousers and wearing one shoe. He then called the deceased's brother PW3 to bring him clothes. He stated that the accused was alive at the time.
 6. PC Martin Korora (PW5), a scenes of crime officer attached to Ongata Rongai Police station testified on behalf of his retired colleague Sgt George Odhiambo who documented the scene of murder reported on 23.3.2021 vide OB No 32/09/03/2021 at about 3:05 pm. The witness identified 18 photographs taken at the scene and of the body at the mortuary, which he produced alongside the report and certificate as exhibits (Exh1 and 3).
 7. The deceased's cousin Martin Maruti Waswa (PW6) testified that upon receiving a call that the deceased had been injured in an assault went to the scene and found at the Accused's café. He identified the body for the purpose of post mortem examination.
 8. Joseph Kai Lweibe (PW7) recalled that on 9/3/2021 three people including one Christine, PW3 and PW6 reported that their relative had died at Kenyatta National Hospital, following assault at Miracle hotel owned by the Accused, an incident reported as murder vide OB No. 32/9/3/2021 . He attended the post mortem examination by Dr. Midia on 10.3.2021. The outcome was that death was due to head injury resulting from blunt object trauma. He produced the postmortem report as EXh. 2.
 9. As the investigating officer, he recorded the statements of PW1 and PW2 who informed him that the deceased had been found sleeping in the Accused's hotel, and the Accused suspecting him to be a thief, assaulted him using a plank of wood.
 10. The Accused was found to have a case to answer and placed on his defence pursuant to a ruling delivered by Mutuku J on 12.06.2024. The matter proceeded for defence before me under Section 200(3) of the CPC. The Accused person gave a sworn statement to the effect that in the material period he operated a hotel at Ongata Rongai in the same compound where he lived. That having retired for the day at 5pm on 5.3. 2021 he went to his house. He was drawn out at 10:00pm by a commotion and shouts of thief! thief! outside his home and found a crowd of people outside his hotel. The people in the crowd said that an intruder who had gained entry into his hotel by cutting off a part of the iron sheet wall. He then left to collect the keys and on return, opened the door. The crowd then entered the hotel and whisked out the intruder whom they assaulted as he went back into the hotel to inspect and noted that a gas cylinder and sufurias were missing. He was later to find the missing items at the rear side where the iron sheet wall had been cut, indicating that the intention of the intruder was to steal.
 11. It was his testimony that he stopped the mob outside his hotel from lynching the intruder advising them to call the police instead. Police were called but that by 2:00am they had not arrived, hence the intruder who was still alive was left outside the hotel as the Accused went home. It was his evidence



that when he went back on the next day, the injured man had left, but he had proceeded to report to police who only visited the scene after 19 days.

12. During cross-examination the Accused said he did not know who had assaulted the deceased; that on the said night a crowd had gathered and he could not identify all of them; and that when the intruder was located, there were many people gathered outside his hotel. He stated that he reported to the police the next day vide OB no 50 of 06.03.2021 but no action was taken by the police.
13. The Accused filed submissions dated 2.6.2025. He assailed the testimonies of PW1 and PW2 regarding his involvement in the assault. Pointing out that PW1 explicitly stated she did not witness him assaulting the deceased, while PW2's account was unreliable due to the distance (approximately 100meters), obstructive trees, poor lighting, and the fact that he was peeping through a small hole in the gate—factors that severely compromised his ability to recognize anyone. He further submitted that the testimonies of PW3 to PW7 relate to events after the material date when the deceased was taken to hospital and died. He further pointed out that the prosecution did not tender the weapons used to assault the deceased. The court was urged to find that the prosecution had failed to prove the charge against the Accused.

Analysis and Determination

14. The court has reviewed the evidence on record. There is no dispute that the Accused operated a hotel at Ongata Rongai in the material period; that on 5.03.2021 an intruder was reportedly found inside the hotel after closing hours; and that a large crowd including the Accused were drawn to the scene, and suspecting him to be a thief, assaulted the deceased, occasioning him severe injuries to which he succumbed on the next day while admitted in hospital. The cause of death was blunt head injury due to blunt head trauma.
15. 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”. The burden here lay with the prosecution to prove the above ingredients of the offence, namely, the fact and cause of the death of the deceased person, and that it is the accused person whose actions or omissions led to the deceased's death, and, that the accused person had malice aforethought, as held in *Roba Galma Wario vs. Republic* [2015] eKLR. The fact of death, the cause thereof are not in dispute, and judging from the undisputed circumstances and nature of injuries sustained by the deceased, malice aforethought as defined in Section 206 of the *Penal Code* may be inferred against his assailants. The main issue in dispute is whether the Accused participated in assaulting the deceased
16. Of the seven prosecution witnesses who testified, only PW2 asserted to have witnessed the Accused assaulting the deceased. He stated that he was a watchman and that at midnight on 5/3/2021 upon hearing female voices urging the Accused, whom he referred to as Mwangi, not to assault a person at the scene, he decided not to draw near. And that from a distance he saw the Accused assaulting the deceased. He claimed to have seen the Accused and the injured man at the scene on the next morning while heading for the shop, and that the Accused said the latter man was the thief he had assaulted on the previous night. However, later he noted that the injured man had been removed.
17. In cross-examination he said he was about 100 meters from the scene and that there were trees between his position at the gate and the scene of assault. Stating that the area was illuminated by there were street lights and security lights on the building.



18. In the old English case of *R v Turnbull & Others* (1976) 3 ALL ER 549 the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. The court exhorted:

“On identification the Judge ought to examine closely the circumstances in which each witness came to identify the accused. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? had he any special reason of remembering the accused...”

19. Similarly, in *Kiarie v Republic* [1984] KLR 739, the Court of Appeal stated:-

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction”.

20. In *Wamunga v Republic* [1989] KLR 424, the Court of Appeal held that:-

“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

21. In the instant case, it was not clear whether prior to the material night PW2 knew the Accused whom he referred to as Mwangi, and how he confirmed, on the next day when he alleged to have met him, that he was the same person he had seen on the previous night. It does not appear that this was a case of recognition of the Accused by PW2, at least.

22. In *Joseph Muchangi Nyaga & Anor. -Vs- Republic* [2013] eKLR the Court of Appeal observed that:-

“Evidence of visual identification should always be approached with great care and with caution (see *Waithaka Chege -Vs- Republic* [1979] KLR 27. Greater care should be exercised where the conditions for a favourable identification are poor (*Gikonyo Karuma & Another -Vs- Republic* [1980] KLR 23. Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See *Abdalla bin Wendo & Another -Vs- Republic*, [1953] 20 EACA 166; *Wamunga -Vs- Republic*, [1989] KLR 42; and *Maitanyi -Vs- Republic*, 1986 KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him.” (Emphasis added)

23. There was no dispute that the material incident occurred at night and that a motley crowd, literally baying for the blood of the alleged thief was assembled outside the Accused’s hotel. PW1 said it was dark and she denied having witnessed any assault on the deceased by the Accused while she was at the scene, indeed much closer than PW2 who, on his part claimed that there was ample light. While PW2 who was much further claimed he could identify the Accused, he apparently could not identify the person being assaulted. He also claimed to recognized the voice of PW1 without explaining how he had become familiar with her voice. From the circumstances described by PW2 it appears doubtful that he had opportunity to identify the Accused and that in the hostile and noisy crowd gathered, he



was able to see that the Accused was the person assaulting the deceased using a plank of wood, whose dimensions PW2 even ventured to state.

24. In *Paul Etole & Another v Republic* [2001] KECA 285 (KLR) the Court of Appeal held as follows:

“All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused’s case, the danger of a mistaken identification is lessened: but the poorer the quality, the greater the danger. In the present case, neither of the two Courts below demonstrated any caution. This is a serious misdirection on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position Vis a Vis the accused would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error.”

25. In this case, the alleged sole eyewitness to the assault was far from the scene of assault with trees standing between him and the scene allegedly illuminated by street and security lights whose brightness he did not describe. In addition, there were many people at the scene shouting and eager, as many Kenyans are wont, to teach the “thief ” a lesson. According to the Accused, not only did the mob assault the deceased, they wanted to set him ablaze. It may well be that as the victim of the alleged theft, the Accused joined the mob to assault the deceased. However, in the Court’s view the identification evidence of PW2 appears as unreliable as his description of the events of the next day sounds contrived.

26. Notwithstanding the Accused’s self-serving denials, the onus of proving the charges beyond reasonable doubt rested with the prosecution. The identification evidence is not only riddled with contradictions, it is not credible and falls far short from proving that the Accused person committed the unlawful act that led to the deceased’s death, and ultimately the charge against him. In the circumstances, the court must acquit the Accused of the charge of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It is so ordered.

DELIVERED AND SIGNED AT KAJIADO ON THIS 16TH DAY OF OCTOBER 2025.

C.MEOLI

JUDGE

In the presence of:

For the State: Ms. Kihumba h/b for Mr. Kilunda

For the Accused: Mr. Alubaka

Accused: present

C/ A: Lepatei

