



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njeru & another v Republic (Criminal Case E008 of 2022)  
[2025] KEHC 16335 (KLR) (12 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16335 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE E008 OF 2022  
RM MWONGO, J  
NOVEMBER 12, 2025**

**BETWEEN**

**CAROLINE MUKAMI NJERU ..... 1<sup>ST</sup> ACCUSED**

**JOYCE WAWIRA NYAGA ..... 2<sup>ND</sup> ACCUSED**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**The Charge**

1. The accused persons herein face the charge of Murder contrary to section 203 as read together with section 204 of the Penal Code. Particulars of the offence are that on 13<sup>th</sup> June 2022 at Rocash Wines and Spirits in Kangaru Trading Center, Embu West subcounty within Embu County, the accused persons, with others not before court, murdered Tom Musyoki.
2. They pleaded not guilty to the charge and the trial is underway. The prosecution called witnesses in support of its case.

**The Objection to Production of evidence**

3. PW11 was Robert Karanja of DCI Embu. He was the investigating officer (I.O) in the case. As the I.O testified, the prosecutor sought to invoke Section 33(b) of the *Evidence Act* to produce MFI 1, 11, 18 and 19 as evidence. MFI 1 and 11 are M-pesa. Statements. MFI 18 is the County Alcoholics Licence No. 0402 issued to the 1<sup>st</sup> appellant while MFI 19 is the postmortem report.
4. It is necessary to point out that PW10, the maker of the Post Mortem Report, had refused to produce it during her testimony. She had stated that the report was inconclusive because the deceased was not properly identified to her. She was therefore declared a hostile witness and during cross-examination by



the prosecution, it emerged that some details were added by others to her Post Mortem report after she had already signed it. Further, the deceased was not identified to her in compliance with the [National Coroners Service Act](#). Later, the prosecution sought to produce the postmortem report under section 77 of the [Evidence Act](#).

5. The 1<sup>st</sup> accused person objected to production of these exhibits because MFI 1 was not certified, and that she was never served with MFI 11 and 18 and hence was seeing them for the first time at that point. She said that MFI 11 was illegally acquired since she did not willingly give it to PW1. That MFI 18, the bar licence was issued on 11<sup>th</sup> September 2021 and it expired on 31<sup>st</sup> December 2021 yet the offence occurred in June 2022. That the document was not verified by the issuing body.
6. As for MFI 19, she argued that the pathologist testified that she conducted Post Mortem on one Paul Musyoki Kariuki yet the deceased in this case was stated to be Tom Musyoki. She argued that section 77 of the [Evidence Act](#) does not permit the prosecution to sneak documents into evidence when the makers of the documents have disowned them. The 2<sup>nd</sup> accused person also objected to production of the postmortem report on the same grounds as the 1<sup>st</sup> accused person since the identity of the body presented to the pathologist was in question.
7. The prosecution responded to the objections by stating that the exhibits came into the hands of the investigating officer who may produce them in accordance with section 24(e) of the [National Police Service Act](#) and section 33 of the [Evidence Act](#). The prosecution insisted on reliance upon section 77(b) of the [Evidence Act](#) for production of the Postmortem report. That in terms of section 64 of the [Evidence Act](#), the postmortem report is primary evidence.

#### **Issue for Determination**

8. The issue for determination is whether the prosecution should be allowed to produce MFI 1, 11, 18 and 19 as evidence

#### **Analysis and Determination**

9. MFI 1 is an M-pesa statement for PW3, the deceased's father. The prosecution referred to it with the intention of proving that the witness sent money to the 1<sup>st</sup> accused person's business. MFI 11 is another M-pesa statement for the 1<sup>st</sup> accused person's business known as Rocash Wines and Spirits where the alleged incident occurred. MFI 18 is the 1<sup>st</sup> accused's business permit/licence issued by the County Government of Embu. MFI 19 is the postmortem report which was disowned by its maker during her evidence in chief as PW10.
10. The accused person object to production of MFI 1 and 11 because they were not certified and discovered before the prosecution sought to produce them as evidence. It is prudent that the prosecution should have had the M-pesa statements certified by before an attempt to produce them as evidence. It is also mandatory that the defense be provided, beforehand, with any evidence intended to be used against them during the trial. Failure to discover in advance would amount to an ambush to the defence.
11. This discovery is in line with the rules of natural justice which accord an accused person the opportunity to defend themselves, if they know what they are accused of and how it will be presented. In light of Article 50(2) of [the Constitution](#) on the right of an accused person to fair trial, it is too late in the day to allow production of MFI 1 and 11 as evidence since the accused persons did not know about their existence as evidence until the time of objection.



12. They objected to production of MFI 18 because the said business licence had expired as at the time of the incident. Before arraignment, it was the duty of the prosecution to ensure that it places all its ducks in a row. The date of expiry of the licence was an important detail which the prosecution should have taken note of but it failed to do so. This affects the present murder trial despite the fact that it creates a separate offence altogether. For purposes of the trial herein, however, the licence constitutes evidence as to who was licenced at the time of its existence, whether or not it was expired. Nothing impedes its production, especially not the fact that it could have expired at the time of the incident. The licence may be produced as evidence as to who was the licensee at the time of its extancy.
13. The final objection was regarding the postmortem report which was disowned by its maker, PW10. The reasons she gave were that it was altered after she had signed it, and that the deceased person was not identified to her. She refused to produce it and she was declared a hostile witness. She was then cross-examined by the prosecution. Section 152(1)(c), (2) and (3) of the Criminal Procedure Code provides thus on refractory witnesses:

“Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence refuses or neglects to produce any document or thing which he is required to produce;

(2) If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what is so required of him.

(3) Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him, or shall prevent the court from disposing of the case in the meantime according to any other sufficient evidence taken before it.”

14. The prosecution has invoked section 33 (b) and 77 of the *Evidence Act* to have the Post Mortem Report admitted as evidence. Section 33(b) of the *Evidence Act* provides as follows:

“Section 33(b)

Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;”

15. In light of the above cited provision, declaration of PW10 as a refractory/hostile witness under section 152(1)(c), (2) and (3) of the Criminal Procedure Code does not make the hostile witness unavailable or unable to tender her evidence. In this case, PW10 testified and has already disowned her report, refusing to produce it as evidence. It follows that the prosecution cannot force production of the same Post



Mortem report under Section 33(b) of the Evidence Act since the witness is available, but has refused to produce the report as evidence with a well-grounded reason.

16. It also follows that section 77 of the Evidence Act on Reports by Government analysts and geologists that are intended to be produced as evidence cannot be applied, too, since the maker of the report has already disowned it. If it cannot be produced on the strength of section 33(b), section 77 of the Evidence Act is definitely inapplicable to enforce production.

### **Disposition**

17. In light of the foregoing discussion, the objection partially succeeds.
18. It is therefore ordered that the MFI 18 may be produced as evidence while MFI 1, 11 and 19 cannot be produced as evidence.
19. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2025.**

.....

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Accused 1& 2 both present in Court
2. Njagi holding brief for Muchangi for 1<sup>st</sup> Accused
3. M. Njiru for 2<sup>nd</sup> Accused
4. Francis Munyao - Court Assistant

