



**Republic v Embalabala alias Kadogo (Criminal Case E003 of 2023)
[2025] KEHC 17402 (KLR) (24 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17402 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE E003 OF 2023
JN KAMAU, J
NOVEMBER 24, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

EDITH ADISA EMBALABALA ALIAS KADOGO ACCUSED

JUDGMENT

Introduction

1. The Accused person herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the Charge were that:-

“On the 24th day of January 2023 at Home Joint Pub Restaurant at Serem Market, Serem Location in Hamisi Sub-County within Vihiga County jointly with another not before the court murdered Francis Kazungu Ngonyo”
2. The Prosecution’s case was heard on diverse dates between 11th July 2023 and 30th November 2023 when it closed its case. On 25th June 2024, this court found that the Prosecution had established a prima facie case against the Accused person and thereby put her on her defence. The defence case was heard on diverse dates between 20th November 2024 and 27th November 2025.
3. The Prosecution’s Written Submissions were dated 15th January 2025 and filed on 16th January 2025 while those of the Accused person were dated 17th April 2025 and filed on 19th April 2025. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. The issues that were put before this court for consideration were as follows:-



- a. Whether or not Francis Kazungu Ngunyo (hereinafter referred to as the “deceased”) died?
 - b. If so, was his death caused by an unlawful action(s) and/or omissions?
 - c. If so, who caused the unlawful action(s) and/or omissions?
 - d. Was there malice aforethought in the causation of the deceased’s death?
5. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

I. Proof Of Death Of The Deceased

6. The Accused person submitted that there was no dispute as to the death of the deceased as the hospital confirmed that he was dead and his brother, Bruno Simanya (hereinafter referred to as “PW 4”) confirmed that the body at the mortuary was of the deceased. On its part, the Prosecution submitted that there was no doubt as to the death of the deceased as the Health Practitioner, Serem Health Centre, Nelson Kimutai (hereinafter referred to as “PW 3”) confirmed that the deceased was unresponsive and was declared dead. It added that he informed the police of the same and they collected the body.
7. It also submitted that PW 4 and No 83212 PC Moses Kibet Biwott (hereinafter referred to as “PW 6”) testified that they attended the post-mortem where PW 4 identified the body of the deceased to the Pathologist, Dr Masika Collins Were (hereinafter referred to as “PW 5”).
8. As both the Prosecution and Defence witnesses alluded to the deceased’s death, it was not necessary to seek further proof. This court found and held that the deceased’s death was proved without an iota of doubt.

ii. Proof Of Cause Of The Deceased’s Death

9. The Accused person did not submit on this issue. On its part, the Prosecution submitted that PW 5 testified that he conducted the autopsy on the body of the deceased and opined that the cause of his death was intracranial haemorrhage secondary to trauma caused by blunt object. It added that the death was due to trauma and, therefore, unlawful.
10. The cause of the deceased’s death was a pertinent issue. PW 5 tendered a Post-mortem Report dated 26th January 2023 in respect of the deceased herein as an exhibit in this matter. After conducting the post-mortem examination, he formed an opinion that the cause of death was intracranial haemorrhage secondary to trauma caused by blunt object/penetrating injury.
11. It was therefore clear from his evidence that the deceased’s death was not as a result of natural causes. Rather, it was due to having been assaulted. It was, therefore, crucial to establish how the deceased sustained the injuries that caused his death.

iii. Identification Of Perpetrator(s) Of Deceased’s Death

12. The Accused person did not deny having been with the deceased on the material date of 24th January 2023. However, she denied injuring and/or beating him.
13. She relied on Section 107(1) of the *Evidence Act* and on the case of Republic vs Riziki Karisa Yeri [2020]eKLR where it was held that it was general principle of Kenya’s justice system that the accused person could not be held liable unless his conduct was both unlawful and his mental state concluded contemporaneously with his acts of omission to commit the murder. She also cited the case of Republic vs Subordinate Court of the First Class Magistrate at City Hall Yonginider Pall Sennuit & Another



- Retread Limited [2006] 1 EA 330 where it was held that the burden of proof remained on the State throughout to establish the case against the accused beyond reasonable doubt.
14. She pointed out that in this case, the Prosecution presented both direct and circumstantial evidence as to the cause of the deceased death. It was her contention that from the Investigation Diary, covering report, evidence by the Investigating Officer (PW 6) and Julius Kiption (hereinafter referred to as “PW 1”) prior and during arrest that the conduct of PW 6, In charge DCI and police was marred with ill intent, bad blood, flawed investigation, blame shifting and finding her as an escape goat for the lack of their due diligence and having the suspect in question escape their custody.
 15. She pointed out that it was not true that on 24th January 2023, she went to the police to surrender herself to crime as alleged by the Prosecution but that she went to record the incidence in the Occurrence Book (OB). She added that although PW 1 testified that he left the Pub while the deceased was alive and in the company of one William Kiptoo alias Shikanga, the Prosecution withdrew the said William Kiptoo alias Shikanga as a witness without adducing any reasons for doing so. She argued that the evidence of the said witness would have corroborated the Prosecution’s evidence or proved useful to defence.
 16. She further contended that PW 1 denied having made the statement used in court claiming that the same was brought to him a day or two (2) before the hearing date on 11th July 2023. She asserted that on the OB on 28th January 2023, PW 6 demanded a sum of Kshs 100,000/= from her failure to which he pinned the murder charges on her.
 17. She pointed out that during the hearing of the application, Hamisi Miscellaneous Criminal Application No E003 of 2023, it was intimated that the Investigation Officer needed extension to carry out further investigations and that she assists in tracing the suspect, one Dancan Chasaya who was her nephew. She added that the application also mentioned one Lerei Webla Musega as a suspect and that she brought up the said issue during cross-examination during the testimony of PW 6 but he could not give cogent reason.
 18. She contended that the stone that was allegedly used to hit the deceased on the stomach was not produced in court. She questioned why the same was collected at different times with the chair that was allegedly used to hit the deceased. She was emphatic that the Prosecution had failed to prove the death of the deceased, whether the same was unlawfully caused and/or caused by her. She added that the Prosecution also failed to positively identify the object that caused the death of the deceased and its connection to her and that she was the perpetrator of the offence.
 19. She further argued that from the collective evidence of the Prosecution’s direct evidence, no witness testified of her causing the death of the deceased. She asserted that Joakim Kemei (hereinafter referred to as “PW 2”), PW 3 and PW4 went to the scene after the crime.
 20. She cited the case of Stephen Kinini Wang’ondy vs The Ark Limited[2016]eKLR where it was held that like all other evidence, expert testimony had to be given appropriate weight. In that regard, she argued that PW 5 did not say who or what caused the injury leading to the death of the deceased. She added that all witnesses agreed that the deceased was hit on the chest by a stone but that that stone was not adduced. She was categorical that seven (7) crucial witnesses shown in the Covering Report as having recorded their statements were not called and/or bonded due to PW 6’s negligence.
 21. She refuted any bad blood between her and the deceased and pointed out that in fact, she assisted him to get help which included calling for an ambulance and stopping Dancan Chasaya from hitting him for the third time. She added that the identity of the chair to the offence herein was flawed as no thumbprint were taken to prove her connection to the said chair that was used to hit the deceased.



- She argued that the chair caused bleeding on the injury caused at the deceased's head and, therefore, it would have sufficed to have a DNA test, to ascertain who used the chair to hit the deceased.
22. She further placed reliance on the cases of *Sawe vs Republic*[2003] KLR 364 and *Mohamed & 3 Others vs Republic*[2005] 1 KLR 722 where the common thread was that for circumstantial evidence to find a conviction, such evidence had to be incompatible with the innocence of the accused and incapable of any other rational explanation or reasonable hypothesis than that of the accused guilty. She also relied on the case of *Republic vs Kipkering Arap Koskei & Another* 16 EACA 135 where it was held that in order to justify the inference of guilt, the inculpatory facts had to be incompatible with the innocence of the accused.
 23. She asserted that contrary to what the Prosecution had advanced that she surrendered herself to the police, all witnesses had pointed to her kindness to the deceased and that the inference was to her innocence rather than her guilt. She added that the Prosecution had cooked up facts to assist in creating indirect facts to cement circumstantial evidence as they deemed fit rather than the true happenings. She was emphatic that the Prosecution had failed to prove its case, thus the charge of murder should fail and she be acquitted.
 24. On its part, the Prosecution submitted that the Accused person was the last person to be seen with the deceased. It asserted that from the evidence of PW 1 and PW 2, the Accused person was placed at the scene of crime. It argued that although there was no eye witness to the actual assault, the circumstantial evidence clearly pointed to the Accused person as the perpetrator.
 25. The Accused person testified that on the material date of 24th January 2023, at about 9.20pm, she was at her bar, Home Joint Bar and Restaurant seated at the Counter when three (3) people, being Julius, Kinganganya and the deceased entered the bar. The deceased ordered for alcohol (Guinness) and two (2) cups of Kegs. He told her that he would pay for the same through Mpesa. She told him that her phone was not working. Julius told the deceased that he could send him the money and he would in turn give cash to the Accused person.
 26. She stated that the deceased sent Julius the sum of Kshs 400/= which he gave her as cash. Julius and Kinganganya drunk the keg and left the bar. Dancan Chesang entered the bar and told the Accused person to give him her phone. She told him that her phone was spoilt. The deceased told Dancan Chesang that his phone had a lot of credit and it could assist him with it. He asked Dancan Chesang to give him the number he wanted to call. When the deceased called, the name of one Brian appeared and he told Dancan Chesang that Brian was his friend.
 27. She further testified that the deceased asked Dancan Chesang to speak on call and Dancan Chesang asked Brian to assist him with Kshs 200/=. Brian told him that he did not have the money. The deceased then told Dancan Chesang that he would give him the money but that he should stop that habit of borrowing money. They went out to get the money. Dancan Chesang asked the deceased why he was telling him not to borrow money yet he was younger than Brian and the deceased told him that he was not used to arguing with young people and the only way he would respond to that was through a gun.
 28. She further told the court that Dancan Chesang got annoyed and he took a chair and hit the deceased. By the time she rushed to where they were, Dancan Chesang had hit the deceased again with the said chair. When the deceased stood up from where he had fallen, Dancan Chesang ran outside and locked the door from outside. Someone opened the door and she asked the deceased not to run as he was bleeding a lot. She gave him a piece of cloth to wipe himself and someone else gave him salt to stop the bleeding.



29. She further testified that the deceased went outside and stood where someone was selling petrol and demanded to know where the person who had hit him had gone. Dancan Chesang came back with a boulder and started asking for the deceased saying that he was going to finish him. He threw a stone at the deceased and injured him at the stomach.
30. The Accused person screamed asking why people were allowing someone to kill the other. The deceased never stood up again. People followed Dancan Chesang. The Accused person said that she saw an ambulance and asked the people in it to take the deceased for a first-aid. The doctor (sic) took the deceased in the ambulance after she assured them that they could call her later if any money was required.
31. The people who were present resolved that they report the matter to the Police Station before going to check on the deceased. It was around 10.00p.m. At about 11.00p.m, the doctor called the Accused person telling her that the deceased had died.
32. She stated that she went to the police station with security guards and people from the neighbouring shops. The police scolded her and put her in the police car. Together with the ambulance, they went to the hospital and confirmed that the deceased had died. The police went to the bar and collected the boulder that Dancan Chesang had used. By this time, members of the public had arrested Dancan Chesang. They handed him over to the police on patrol but the police told them to take him to hospital because they had beaten him.
33. Her further evidence was that one of her workers told her that Dancan Chesang had broken into his house and removed his blood-stained clothes and dumped them outside the house. She added that she went with police officers to her house where they collected the clothes. She pointed out that Dancan Chesang was her nephew but she had employed him to look after her cows. It was her case that she did not see the boulder or the blood-stained clothes produced as evidence in court.
34. She stated that when she went to the police station to record her statement on 27th January 2023, the police asked for a bribe but she told them that she did not have any money and they booked her in the cell.
35. Charles Obama (hereinafter referred to as “DW 2”) testified that on the material day of 24th January 2023, at about 9.45 pm, he went to get his food from a nearby hotel. He stated that he was working for the Accused person and that when he went back, he found a lot of noise outside. There was a customer who had been beaten. He said that the Accused person was screaming seeking for help and that the people who had gathered started looking for a vehicle to take the injured customer to hospital. He joined them in looking for a vehicle.
36. He further testified that he asked the Accused person who had hurt the customer and she said that it was Dan. He said that he went to look for Dan at his place in Mugavo and found him as he was about to get into his house. He handed him over to the Patrol police but as they were talking, Dan ran away.
37. Solomon Kipkorir Tuwei (hereinafter referred to as “DW 3”) testified that on the material day of 24th January 2023 at around 10.00p.m, he was at his place of work, a wholesale shop at Hari Rajis when he heard a woman screaming. He went towards the scream and at about twenty (20) metres, he saw two (2) people holding a person (the deceased) while coming out from a bar. The owner of the bar was one Mama Kadogo, the Accused person herein and she had a wet cloth with blood.
38. He stated that the deceased was bleeding from the head and the Accused person was lamenting that there were many people but they were not helping her. The person was placed near the Petrol (sic) and another person came from behind the petrol with a stone and said, “let me finish him”. He threw the



- stone which hit the deceased. He pointed out that he physically knew the person who threw the stone. When he followed up, he learned that he was called Dan. He said Dan ran away and members of the public followed him. He added that he accompanied the Accused person to the Police Station and at 11.00p.m, she got a call saying that the deceased had died.
39. Esther Milenja (hereinafter referred to as “DW 4”) testified that she was the Assistant Chief Jivovoli Sub-location, Hamisi Sub-County and was acting as an Assistant Chief at Serem when the murder incident occurred. She said that on 25th January 2023, she was at the office at about 9.00am when she got a report that there was a murder that had occurred at Serem Market at Home Joint Bar. She went to the said Bar and met the owner (the Accused person) who told her what had happened.
 40. She further said that she asked the Accused person whether she had reported the matter to the police and whether she was given an OB number. She pointed out that when she learned that the Accused person was not given an OB number, she went with her to Serem Police Station. They spoke to the Deputy OCS but he refused to give them an OB number. She pointed out that when she insisted that they be given an OB number, the police became very aggressive. It was her testimony that she always went to the police station and it was normal to be given an OB number but the denial in this case was not ordinary.
 41. She further testified that someone called the Accused person informing her that her servant quarters had been broken into and that when they went to check, they found that the door had been broken. There was a blood-stained jumper (sweater) outside the servant’s quarter. She said that she told the Accused person to go and report the incident to the Police and further asked the members of the public not to remove the clothes but to leave them for collection by the police for investigations. She added that the jumper belonged to the person that had committed the murder and that the Accused person told her that it was one Dan.
 42. Lyn Minayo Chokaa (hereinafter referred to as “DW 5”) testified that she was the daughter of the Accused person and that on the material day of 24th January 2023 at 9.30pm, she was with her mother at the Bar when the incident occurred. Her evidence corroborated that of the Accused person.
 43. Notably, PW 1 testified that on the material day of 24th January 2023, he was at his butcher selling meat when the deceased who was his friend came to buy meat. He told him that all his meat had been sold and directed him to nearby butchery. When they got to the next butchery, the same had been closed. The deceased asked to buy him a drink at Home Joint Pub. One of the deceased’s friend, Shigangania, followed them to the pub. They found the Accused person at the counter.
 44. It was his evidence that they had the drinks that night and that it was the deceased who paid for them by withdrawing Kshs 400/= from his Mpesa. He confirmed that he and Shigangania left after the drinks. He was emphatic that he left the deceased healthy and drinking. The next morning, he was shocked to learn that the deceased died.
 45. PW 2 was a business man whose business was in the same vicinity with that of the Accused person. His evidence corroborated that of the Accused person. However, he confirmed that he did not witness what happened to the deceased that caused his death.
 46. PW 6 was the Investigating Officer. His evidence corroborated that of PW 1, PW 2, PW 3, PW 4 and PW 5.
 47. Notably, circumstantial evidence, though indirect, could sustain a conviction if it satisfies certain legal thresholds. This court had due regard to the case of *Sawe vs Republic*(Supra), where it was held that in order to justify a conviction based on circumstantial evidence, the inculpatory facts must



be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

48. Going further, in the case of *Kipkering Arap Koske & Another (Supra)*, it was held that the burden of proving facts that justify the inference of guilt, to the exclusion of any reasonable hypothesis of innocence, rests on the prosecution and never shifts.
49. From evidence adduced, although the Accused person was with the deceased and communicated with him that night, the Prosecution failed to produce any evidence linking her to the deceased's assault or showing that the communication related to the murder. The chain of circumstantial evidence did not extend to her. PW 1 and PW 2 did not point at her as having been the perpetrator of the offence herein. PW 1 confirmed that as he left after the drinks, two (2) other young men that he did not know got into the Pub. This evidence corroborated the Accused person's evidence that as PW 1 and their friend, one Shigangania, left the Pub, Dancan Chesang came in.
50. The evidence of PW 2 corroborated that of the Accused person. DW 5's evidence also corroborated her evidence and that of PW 1. PW 1 confirmed that the Accused person was at the Pub with her daughter, DW 5.
51. After carefully analysing the evidence, it was clear that there was no eye witness who saw the Accused person assault the deceased. No witness pointed at the inference of guilt on her part. On the other hand, the Accused person presented a cogent defence and called witnesses who corroborated her evidence. There was no missing link that insinuated an inference of guilt on her part. The fact that she was at the scene of crime and/or was with the deceased at the material time was not enough to prove that she was the one that caused his death.
52. The way the Accused person was handled left a lot to be desired. It appeared to this court that the Police Officers who handled this case were punishing the Accused person because the deceased who was their colleague died as a result of injuries that he sustained in her bar, the person who caused his death was known to her, being her nephew and further, she did not lead them to him to be arrested. In a nutshell, she carried the burden of the person who injured the deceased after an altercation, leading to his death merely because the person who injured the deceased could not be traced. However, it was evident that the said person had been arrested by members of the public but released by police officers to seek treatment after what was referred to as mob justice was administered on him.
53. As the Accused person's defence was sustainable as she was not the perpetrator of the deceased's death, this court did not belabour to discuss the ingredient of malice aforethought in causing his death.
54. Weighed against the evidence that was adduced by both the Prosecution witnesses and the Accused person and her witnesses, this court found and held that the Prosecution did not prove its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the act of unlawful killing of the deceased herein was by the Accused person herein and that the same was with malice aforethought the ingredients that had been set out in Section 203 of the Penal Code as having been:-
 - a. Proof of the deceased's death;
 - b. Proof that the deceased's death was a result of unlawful actions and/or omissions; and
 - c. Proof of malice aforethought in the unlawful actions and/or omissions.

Disposition

55. For the foregoing reasons, the upshot of this court's decision was that the Accused person herein be and is hereby acquitted of the offence of murder contrary to Section 203 as read with Section 204 of



the Penal Code Cap 63 (Laws of Kenya) under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

56. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF NOVEMBER 2025

J. KAMAU

JUDGE

