



**Republic v Mbithi alias Kanau & another (Criminal Case 12 of 2022)
[2025] KEHC 17464 (KLR) (27 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17464 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 12 OF 2022
TM MATHEKA, J
NOVEMBER 27, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

FRANCIS MALECHA MBITHI ALIAS KANAU 1ST ACCUSED

JAMES KILUNDA KING'OO ALIAS KASA 2ND ACCUSED

RULING

1. The accused persons are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code.
2. It is alleged that Francis Malecha Mbithi alias Kanau and James Kilundo King'oo alias Kasa, between the nights of 22nd and 23rd September, 2022 at Kikima Market, Mbooni West Subcounty within Makueni County jointly murdered Gladys Ndunge Kimeu.
3. Each accused person denied the charge and the prosecution called 5 witnesses.
4. PW1 testified that she visited the deceased on 14/7/2022 at Kikima at a time when she was not feeling well - and had taken her to hospital by her friend one Faith . She said the deceased was living with one Mutuku at that time though she late left Mutuku's place. That on 22/9/2022 she received a call from her cousin that the deceased needed money for rent.
5. On 23/9/2022 she received a text from Faith – asking her whether she had heard that Ndunge had been killed. She testified that Ndunge was supposed to attend follow up clinics at Mbooni Hospital but on 31/8/2022 she learnt from the hospital that deceased was not attending clinic.
6. PW2 Joseph Muthiani Peter, a watchman at Kikima Market told the court that he was at his place of work on the night of 22/9/2022. He heard screams - and saw a girl being beaten , her blouse had been removed, she was in a white vest and a pink trouser. There were 3 men – Kasa, Kanau and Kyalo . He



said he heard her ask Kanau whether he had decided, he did not know her, she was also asking Kasa whether he had decided to finish her. He testified that he heard her call out to one Kyalo to come and rescue her. He stated that she was a he used to see passing by speaking English and Kiswahili. He said he learnt later that at 1.00am a person was found dead and he said he knew it was her. He said he could see them because there was a Mulika Mwizi light at the market

On cross-examination he said he did not know her name but he learnt that the same clothes he had seen her in ; white vest and pink trouser are the clothes the dead young woman was wearing.

He said he left work at 5.30am on 22/9/2022 and learnt about the dead person on 23/9/2022 . He said he did not see the dead person, he did not see her at the mortuary, that he did not say that she left with Kyalo, only that she wanted to go with Kyalo. Referred to his statement to the police he denied that he recorded that she left with Kyalo. He said the two young men carried the girl – he did not know where they took her. He said Kyalo was just at home and he had seen him 4 days prior to his testifying in court .

7. PW3 Irene Waeni Kimeu sister to the deceased, attended the postmortem and was told that her sister was strangled and died of asphyxia.
8. PW4 Chrispine Njeru Mburu the Government Analyst produced the government analyst report. He said they received - black pant, flowered long sleeved top, pair of maroon trousers, black top, vaginal swab, nail clippings, blood sample of the deceased.
He also received blood samples of Victor Mbithi, James Kilundo, Francis Malecha, Felix Kyalo.
9. On investigations the flowered top and black top had no blood.
The trouser was slightly stained with semen – and the DNA profile was mixed – that of Gladys Ndunge and an unknown male who was not among the accused persons/suspects.
10. On cross-examination he said none of the accused person’s DNA was found on the deceased.
11. PW5 No. 85406 CPL Allan Senyeli testified how he received a call from one Jeremiah Kioko that there was a report of a body of a person found in Milimani area, Mbooni West suspected to be dead. Together with other police officers he visited the scene - and found the body of a lady who had bruises and strangulation marks on the neck, blood in nose, a few metres away was an empty packet of ‘Sure’ condom. They processed the scene, removed the body to mortuary.
12. Investigations revealed that she had been in a club by the name Kasarani club in the company of one Victor Mbithi, Francis Malecha Kyalo, Kyalo & James Kilunda King’oo. That she left and later on one Joseph Muthiani saw Kyalo Mbithi and James Kingoo fighting over the deceased – that Kyalo removed himself leaving her with the accused persons. That post mortem was conducted revealed that she was strangled.
13. He took the deceased’s clothes.
14. He later arrested the suspects and one Victor Mbithi, took blood samples, took swabs from deceased, later charged the 2 accused persons.
15. On cross-examination he told the court nothing connected accused persons to the offence. He said he arrested 4 people because they were seen by PW2 fighting over the deceased. That she left with Kyalo Francis but he did not testify.
16. The Pathologist did not testify.
17. At the close of the case for prosecution Section 306 of Criminal Procedure Code provides for options the court can take.



The issue here is which one? It is determined by what the prosecution has established at the close of their case. The prosecution must establish that a person died, the death was unlawful, was caused by accused with malice aforethought.

18. In this case though postmortem report was not produced, it is not in doubt that Gladys Ndunge died - the evidence before court establishes that , it also establishes that the death was not lawful – she was found dead in a bush. She had strangulation marks on her neck
19. Did the accused persons cause the death of the Gladys Ndunge?
20. PW2 testified how he saw the accused persons beating a lady in a white vest and a pink pair of trousers. He told the court that the lady left with one Kyalo and the investigating officer confirmed that the deceased left with one Kyalo. The I.O said the two were seen fighting over the young woman.
21. This Kyalo did not testify despite his whereabouts being known even at the time of the testimony of PW2 who said he saw the said Kyalo in the village.
22. The investigating officer said this Kyalo did not record a statement yet he is the person who was said to have left with the deceased. So, if anyone was last seen with, it was the said Kyalo and not the two accused persons. The failure to call this Kyalo as a witness leaves the prosecution case with a dent that no witness filled and created doubt as to the credibility of that testimony.
23. The DNA report did not connect the accused persons with the murder / the scene. The DNA evidence added a twist that the prosecution did not explain, the presence of an unknown male person. Who was this person? Was it the man who left with the deceased? It would have been expected that the moment the I.O found out that the DNA evidence introduced another person who was with the deceased after the accused persons he would have conducted further investigations to catch this person and bring him to book. This person was placed at the scene. The Prosecution ought to have acted accordingly.
24. That besides , the testimony of PW2 was discredited by that of the I.O and government analyst. It was the testimony of PW2 that the girl he saw as in white vest and pink trouser and that when he heard that a person was found dead, he was certain it was the girl he had seen with the accused persons because he learnt she was in the same clothes.
25. The I.O took the deceased's clothes at the mortuary. These clothes were handed over to the government analyst. There was no white vest or pink trouser. There was a coloured blouse, a black top and maroon trouser. This witness testified that he did not see the body of the girl who was found dead and did not see the clothes she was wearing. Evidently, his testimony was discredited. This is because his identity of the deceased was based on the color of the clothes, she was wearing that night. Having been the star witness of the prosecution that created a bigger dent in the case, creating a doubt as to whether the person he claimed to have seen with the accused persons was the deceased or another or whether he actually saw the accused persons at all where he claimed to have seen them on the material night.
26. The Club scene was mentioned by the I.O. he also mentioned other persons – Victor Mbithi , and another Kyalo. These were suspects, upon release they did not testify.
27. A young woman's life was lost. However, the matter was poorly investigated and the culprit may have escaped prosecution only to go and commit other similar crimes. This unknown male whose DNA was found on the deceased ought to have been hunted down and found and brought to book. Instead, the prosecution of these two accused persons proceeded yet their alleged contact with the deceased was severed by the DNA evidence that placed an unknown male with the deceased.



28. If PW2 was to be believed that the accused persons beat the deceased, then the DNA of the accused persons would be on the deceased. If the I.O is to be believed that they fought over the deceased, then the DNA cleared them.
29. The identity of the girl PW2 saw and that of the young woman who was found dead was done through the color of clothes and they were totally different.
30. Ultimately the prosecution did not establish connection between the accused persons and the death of the deceased herein.
31. In the circumstances what is applicable at the close of the case for the prosecution is the provision of s. 306(1) of the CPC .

When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

32. I make a finding of not guilty, dismiss the charge, acquit each accused accordingly.
33. Each is to be released from custody unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH NOVEMBER 2025

MUMBUA T. MATHEKA

JUDGE

Court Assistant – Chrispol

Prosecutor - Kazungu

Accused1&2 present virtually

Counsel for the Accused - Mr. Hassan

