



REPUBLIC OF KENYA



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**Republic v Bwana & 4 others (Criminal Case E034 of 2023)
[2026] KEHC 636 (KLR) (26 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE E034 OF 2023
TA ODERA, J
JANUARY 26, 2026**

BETWEEN

REPUBLIC PROSECUTOR

AND

FRANCIS NYABUTO BWANA 1ST ACCUSED

PERIS KERUBO KIBWAGE 2ND ACCUSED

PAUL ORENGE NYABUTO ALIAS BEN NYANCHIRI 3RD ACCUSED

BRIAN KAISER ROBERT ALIAS DAN NYANCHIRO 4TH ACCUSED

KWAMBOKA KIBWAGE ALIAS MILKA KWAMBOKA 5TH ACCUSED

JUDGMENT

INTRODUCTION

1. The accused persons herein were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 29th July 2023 at Bonyansiaga village, Nyachogochogo sub-location, Gesabakwa location within Kisii County, jointly with others not before court, they murdered Charles Kibwage Bwana (the deceased herein).
2. Accused No 1,2, 4.and 5 are duly represented by Miss Gogi advocate while accused no.3 is represented by Mr. Okemwa advocate.
3. Each of the accused herein pleaded not guilty and the case proceeded to full trial. The prosecution called five (5) witnesses, while the defence called five (5) witnesses. At the close of the prosecution case, the court found that a prima facie case had been established and placed all accused persons on their defence pursuant to section 306(2) of the Criminal Procedure Code. Each accused opted to adduce unsworn testimony.



The Prosecution Case

4. PW1 – Rose Kerubo Kibwage said she was the 3rd wife to deceased. She testified that on 26th July 2023, she was at their home with deceased when accused 4 (Brian Kaiser alias Dan Nyanchiro) threatened the deceased with a panga over a land dispute. On 29th July 2023, after church, the deceased was first assaulted by accused and accused 4. Accused 2 restrained Accused 4. He escaped and sought treatment at Nyamache Hospital. Later that evening, PW1 witnessed the accused 1, 3 and 4, in the company of accused no. 2 & 5, attack the deceased along the road near their homestead. She stated that accused 4 is the one who hit the deceased first, causing him to fall, after which the others joined in assaulting him using sticks, while accused 2 and 5 cheered them on. The deceased succumbed to the injuries at the scene.

PW2 – Albert Gwanya

5. PW2, a grandson to the deceased and he was also among the first persons PW1 informed immediately after the killing. He did not witness the incident

PW3 – Dr. Naomi Ariaga

6. PW3, a pathologist, conducted the post-mortem examination. She found multiple injuries, including:Fracture of the sternumRuptured spleenLeft radius and ulna fractureMultiple scalp lacerations

She concluded that the cause of death was abdominal injury due to blunt force trauma, specifically splenic rupture.

PW4 – Simba Moranga Joseph

7. PW4, the Senior Assistant Chief, confirmed the long-standing land disputebetween deceased and accused and testified that the deceased had previously reported threats to his life by accused 2. He received information on the incident herein on the night of the incident and found the deceased already dead.

PW5 – PC Allan Rawayo

8. PW5, the investigating officer, testified that investigations revealed that the accused persons jointly assaulted the deceased in the afternoon and later in the evening. He confirmed the arrests, post-mortem findings, and that the matter arose from a family land feud. Though he did not take photographs or witness the incident, his evidence tied together the prosecution case.

The Defence Case

9. All accused persons gave unsworn defences, raising alibi and denying involvement in the murder.Accused 2 and 5 denied being present and denied any assault.Accused 1, 3, and 4 claimed to have been away from home on the material day.

Issues for Determination

10. I have considered the evidence on record and the submissions. The following issues arise for determination;
 1. Whether the death of the deceased was caused by an unlawful act,



2. Whether the accused were placed at the scene.
3. Whether malice aforethought was established,

Analysis

Proof of Death and Cause

11. The death of Charles Kibwage Bwana is not disputed. The evidence of PW3 conclusively established the cause of death as blunt force trauma leading to splenic rupture. The death was caused by unlawful act.

Whether accused were placed at the scene

12. PW1 was the only eye witness presented by prosecution. She said she knew all accused persons well as family members being a wife to deceased. Accused no. Accused 1, Accused 3 and Accused 4 denied knowing her while Accused 1 and Accused 5 said they knew her as a 3rd wife to deceased. Accused 2 is a daughter to deceased while A5 is also wife to deceased. It cannot be true that Accused 1 and Accused 5 knew Pw1 while Accused 2, Accused 3 and Accused 3 did not know her. It is clear that pw1 was a wife to deceased but accused were not comfortable with that fact. PW1 said on 26. 7.2023 Francis Nyanchiri (Accused 1) went to the home of deceased and asked him why he had not subdivided the land for them and insulted him and threatened to cut him into pieces with a panga. On 29.7.23, at 7.00pm, Accused 2 passed outside the house of deceased and threatened to do something that they will never forget. She also said that on the same day at 1.30 PM Dan (Brian Kaiser Robert Alias Dan Nyanchiri) Accused 4, went to the home of deceased and on seeing deceased get out of the house, he lifted him up and let him fall down, stepped on his chest, picked a piece of log and hit him with it on the head. Accused 2 restrained him from further assaulting deceased. Pw1 ran away on hearing A4 asking deceased where his wife was. She later met deceased at 6.00 PM and she noticed that his head was bandaged and his shirt was blood stained he tried to convince him to remain with her in vain saying he wanted to rest. She followed deceased and when she was about 50 metres from the home then she heard Accused 2 screaming while calling her co- accused to saying deceased was back and asking them to go kill him. Deceased tried to ran but Dan (4) reached him first and hit him with a stick on his upper back. Deceased fell down and Ben (A3) and Francis (Accused 1) also hit him with sticks until he passed on. She said that Accused 2 and Accused 5 were cheering Accused 1, Accused 3, and Accused 4 on as they assaulted deceased. Accused denied the charge and said they were not at the scene at the material time. Accused 1 said he was at Mogunga, accused 2 said she was in church. Accused 3 said he was in Transmara . A4 said he was at Magena on the material day. A5 said she was sick and was at home and that she did not kill deceased.
13. Section 213 of the Penal Code states that: -"A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases:-
 - a. if he inflicts bodily injury on another person in consequence of which that other person undergoessurgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill; b. if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living; c. if by actual or threatened violence he causes such other person to perform an act which causes the death



of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused; d. if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death; e. if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons."

14. Section 20 (1) of the Penal Code defines principal offenders as follows: "(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say- a) every person who actually does the act or makes the omission which constitutes the offence;

b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

c) every person who aids or abets another person in committing the offence; d) any person who counsels or procures any other person to commit the offence; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission. (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence. (3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission." 15. On common intention, Section 21 of the Penal Code provides: "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 a 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." 45. In this case the common intention of the joint offenders, *mens rea* to be proved is an intention to cause death or knowledge that the act or omission would cause death, as stated in the definition of malice aforethought in Section 206 of the Penal Code

17. Accused denied the charge and said they were not at the scene at the material time. Accused 1 said he was at Mogunga, accused 2 said she was in church. Accused 3 said he was in Transmara. Accused 4 said he was at Magena on the material day. Accused 5 said she was sick and was at home and that she did not kill deceased. I have carefully considered the evidence of PW1 on identification and weighed it with the defences of alibi herein. She is an alleged single identifying. / Recognized the accused. The incidents herein are said to have occurred in broad day light. He said that darkness had not set in completely at the time of the 2nd attack on deceased and was firm and consistent on this even upon cross examination. PW1 said that she saw accused persons during the second incident at a distance of 50 metres away and she was able to describe the roles of each. PW1 knew the accused for about 2 years that she lived with deceased.

18. It is trite law that evidence of a single recognizing. and or identifying witness must be carefully analyzed to ensure that there was not possibility of a mistake as was held in the case of *In MAITANYI v REPUBLIC* [1986] KLR 198, this Court stated as follows:

"1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the



evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.
3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before decision is made.
4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”

In this case the evidence of Pw1 was corroborated by that of Pw4 who said that he had received reports from deceased on the threat to life from deceased over a land dispute, PW5 said he investigated several other offences arising from the land dispute between deceased and accused. The defences of alibi raised by accused first raised during defence. Prosecution still bears the burden of proof even where a defence of alibi is raised. Prosecution were not given an early opportunity to investigate the same as required by law. In the case of *Victor Mwendwa Mulinge vs. R* [2014] eKLR the court of appeal held “

It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution; see *Karanja vs. R* [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought. “

19. I have weighed the evidence lead by prosecution and that of defence, PW1 she was able to clearly narrate the sequence of the events from 26.7.23 to 29.7.23 when deceased passed on. I find the conditions at the two scenes for positive recognition were favourable. The evidence adduced by Pw1 was cogent and unshaken. She impressed me as a truthful witness Accused were properly placed at both scenes. The defence did not displace prosecution’s evidence at all in view of the overwhelming evidence of PW1. The defence did not displace prosecution’s evidence at all in view of the overwhelming evidence of pw1. Accused were properly placed at the scene. It has emerged that the motive of accused was to get accused to share his land with them. The role of each was specified by PW1. Though Accused 2 and Accused 5 did not physically assault the deceased and at some point, accused 2 restrained Dan from further assaulting the deceased during both incidences, it has emerged that before the evening attack she is the one who raised an alarm in forming her accomplices that deceased was back home and urged them to converge and kill him.
20. It is clear that accused had a common intention to kill deceased to pave way for them to take the land of deceased which they were demanding that he subdivides to them. I proceed to dismiss the defence of each an afterthought.

Malice Aforethought

21. Malice afterthought is a crucial ingredient of the offence of murder. It is trite law that *actus reus non facit reum nisi mens sit rea*. Meaning that the act its self does not constitute an offence unless it is accompanied by a guilty mind Malice afterthought is defined in Section 206 of the Penal Code is in the following terms:



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;

(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

(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;

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

(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.

22. It is clear that in this case, malice aforethought may be inferred from the fact that Pw3 found that the cause of death was abdominal injury due to blunt force trauma, specifically splenic rupture. Her evidence firmly established that death resulted from severe assault, consistent with PW1's account. Pw1 said that accused assaulted deceased in the afternoon of the material date and deceased went for treatment and on returning home, Peris Accused no. 2 called her accomplices ordering them to kill him and they further assaulted him causing the fatal injuries. This was a well-coordinated attack. Pw1 and PW4 and PW5 also testified of the prior threats to deceased by accused who were demanding that he subdivides land for them. The evidence by pw4 and pw5 independent corroboration of motive and prior threats by accused to deceased. The conduct of the accused persons before, and during, after the assault clearly demonstrates intention to cause grievous harm or death.

Conclusion

23. I have evaluated the entire evidence on record and I find prosecution proved beyond reasonable doubt that the 5 accused persons herein murdered deceased. This was a heinous and premeditated murder actuated by a land dispute between deceased and accused persons.

24. I find Francis Nyabuto Bwana, (Accused 1) Peris Kerubo Kibwage, (2) Paul Orenge Nyabuto alias Ben Nyanchiri, (Accused 3) Brian Kaiser Robert alias Dan Nyanchiro and Kwamboka Kibwage alias Milka Kwamboka (Accused 5) guilty of the murder of Charles Kibwage Bwana. I proceed to convict each of them of the said offence under Section 322 (2) of the Criminal procedure Code.

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:

T.A ODERA

JUDGE

26.1.26

All the 5 Accused, Their Counsel

Mr. Okemwa for Accused 3 holding brief for Miss Gogi for Accused 1, Accused 2, Accused 4 and Accused 5

Mr. Koima for the State

Court Assistant- Kipchirchir & Mr. Kembero Ekegusii Interpreter.

Koima: I do not have previous records for Accused 1, Accused 3, Accused 4 and Accused 5. I only have previous record for Accused 2 Peris for attempted murder. The victim is in court.



Victim Impact Statement -rose Kerubo Kibwage

I am Rose Kerubo Kibwage. The deceased was my husband. The death of deceased has adversely affected me. I seek that they be jailed for 30 years as they threatened to murder me too.

Okemwa: We are not ready for mitigations today. We seek another date and pre-sentence report first.

Order: Presentence report be availed. Mention on 25.2.26 for mitigation and the report. Remanded in custody.

