



**Republic v Musyoka (Criminal Case 17 of 2020)
[2026] KEHC 1209 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 17 OF 2020
RC RUTTO, J
FEBRUARY 5, 2026**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOHN MUTISO MUSYOKA ACCUSED

JUDGMENT

1. The Accused herein was charged with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code. The particulars are that on 9th May 2020 at Mutituni market, Mutituni Location, in Machakos sub -county within Machakos County he murdered Ann Ndunge Kiua.
2. The accused person pleaded not guilty to the charge.
3. The prosecution called a total of 13 witnesses in support of its case. Briefly, they presented their case as follows;
4. PW1, Mutala Kitheka, testified that he works at Makutano Hotel, Mutituni. He stated that in May 2020, he had employed three people: Jacinta, Anne, and Erastus Makau, who worked from 7:00 a.m. to 7:00 p.m. He further testified that on 8th May 2020, he woke up at 5:00 a.m. to open the hotel before the others arrived. Around 6:25 a.m., Erastus arrived, and PW1 instructed him to go to the kitchen. Shortly thereafter, he heard screams behind him, which he initially thought were just people in the town. A few minutes later, he heard a thud, which he assumed someone had come to deliver firewood. He then went to check and saw Erastus had come out and that someone had fallen down. PW1 stated that he asked Erastus what had happened, and at that moment, Jacinta appeared, saying that John was the one who had stabbed the victim. He observed the person lying face down, bleeding from the back and not breathing. PW1 suggested they go to help, and while Erastus and Jacinta left immediately, he followed behind to the office of the chief, which also serves as a police post, since they had been informed. On the way, they saw police officers heading to the scene, who confirmed that the victim



- was dead. Subsequently, other people and police officers arrived in a motor vehicle, and the body was taken away. PW1 added that he was later called to record his statement at Machakos Police Station. He also stated that he had employed the victim approximately two weeks before the incident.
5. On cross examination, PW1 testified that he only heard a thud and did not witness what had happened to Anne.
 6. PW2, Erastus Makau Kilima, testified that he was employed by Mutala Kitheka (PW1). He stated that in May 2020, he was present at the hotel with the deceased, Grace, and Mutala. He testified that on 9th May 2020, he arrived at the hotel at 5:00 a.m. and was with Mutala, as the other employees had not yet arrived. While working in the kitchen, he heard screams and went outside, where he saw two people running, the deceased and another person with her. They were running towards the hotel, screaming that the deceased had been attacked.
 7. PW2 stated that when he came out, Grace informed him that Anne had been stabbed. They then proceeded to the chief's office to report the incident and found two police officers, whom they accompanied back to the hotel. Upon arrival, a crowd had gathered, and the deceased was already dead. Later, police officers took the body to the mortuary.
 8. PW2 confirmed that he did not witness the deceased being stabbed.
 9. PW3, Anset Nzioki Mutua, testified that he is the Chief of Mutituni Location. He stated that on 9th May 2020, at approximately 7:00 a.m., he was at Mutituni Market, where his office is located, when he received a call from Cpl Maliku of Mutituni Police Post regarding an assault. He was informed that a lady had been attacked behind a hotel in Mutituni. Upon arriving at the scene, PW3 found a lady lying dead in a pool of blood, with blood oozing from her chest, lying on her side. He coordinated with other officers to arrange for a vehicle to take the body to the Machakos mortuary. Later that day, at about 5:30 p.m., he received information from his former village manager, Teresia, that she had seen a man at Kivutini Market heading towards Mutituni Market and recognized him from the hotel where the deceased worked. PW3 instructed her to follow the suspect at a safe distance and relayed the information to officers. He, together with the police, intercepted the suspect, who had left the main road and taken a shortcut to the market. They found that the suspect had already been apprehended by a group of people. PW3 stated that the suspect was later taken to Mutituni Police Post and subsequently to Machakos Police Station. He confirmed that he did not know the suspect prior to that day and identified the accused in court, without disagreement.
 10. On cross-examination, PW3 stated that he received the information at about 7:30 a.m. He clarified that the incident did not occur behind the shops but on a footpath. He also confirmed that Teresia, the village manager who provided the information, did not record a statement.
 11. PW4, Margaret Mwikali Ndathi, testified that she works in the Ministry of Trade, Machakos County, and owns 10 rental units. She stated that in November 2019, she rented a room to the accused, Mutiso, from 13th November 2019 to 13th April 2020. She recorded his personal details, including whether he was single or married, and he indicated that he was single. PW4 testified that on 13th April 2020, the accused came to the house with a lady. Her husband inquired who the lady was, and the accused said she was his wife. The lady, the deceased, clarified that she was not Mutiso's wife but that, having just secured employment in Machakos and seeking accommodation, she would stay with him temporarily for a week while looking for her own place. Subsequently, on 20th April 2020, she requested a room. Before allocating it, PW4's husband asked the accused whether he had any objection to the deceased being given a room. PW4 stated that they assigned the deceased a room between the accused's room



- and another, and the rooms were not directly facing each other. From that day, they cohabited without any issues. The two also used to leave for work together from the hotel where they were employed.
12. On 9th May 2020, at around 6:30 a.m., PW4 went to the toilet and heard screams. She proceeded to the scene and found the deceased, Anne, lying face down. She recognized her by the clothes she was wearing, a black trouser and white blouse but did not approach the body. She further stated that the last time she saw the accused was on 7th May 2020. Prior to renting him a room, she did not know him personally, though she had seen him working at Kwa Mukalia Hotel.
 13. On cross examination, PW4 stated that the deceased used to leave for work together with the accused and they never had any conflicts. On the day of the incident, PW4 did not speak to the deceased; she only heard that she had been killed. By the time she arrived at the scene, the deceased was already lying down. She did not see the accused that day. She stated that the deceased and the accused each had their own separate rooms.
 14. PW5, Jacinta Nzilani, testified that she resides at Kiteini and is not employed. She stated that on the morning of 9th May 2020, she left her home in Kiteini to go to work at Makutano Hotel. She took a shortcut near the residence of the deceased, Anne Ndunge, and called out to her. The deceased, who was staying in a house next to the path, told PW5 to wait for her. On their way to the hotel, they encountered a man whom PW5 did not know by name, but she recognized him from another hotel, Mukalia Hotel, where he sometimes worked or was seen. PW5 observed that he was wearing a T-shirt. The deceased told the man to give way, which he did after laughing. Shortly thereafter, the man called the deceased back, and she returned while PW5 proceeded to the hotel. Upon arriving at the hotel, PW5 heard screams coming from the direction she had just passed. She immediately went back and found the deceased alone, supporting herself on a metal barrier, screaming that she had been attacked, before she fell. PW5 was able to identify the accused in court as the person she saw with the deceased that morning. PW5 stated that she recorded her statement at Mutituni Police Station and was subsequently called to an identification parade, where she positively identified the accused by touching his shoulder. She confirmed that he did not make any comment during the parade. PW5 emphasized that the accused was the last person she saw with the deceased before the attack.
 15. On cross-examination, PW5 stated that she was called to identify the accused at an identification parade but could not recall signing any document, and had not seen her signature in court. She confirmed that she left home at 6:10 a.m. to arrive at Makutano Hotel by 7:00 a.m., taking a shortcut along a path surrounded by shamba. She noted that it was slightly dark when she left home but lighter by the time she reached the deceased's residence due to the distance traveled. PW5 testified that she encountered the accused on the road and recognized him as a friend of the deceased. She recalled that he was wearing a green and yellow T-shirt with a jacket, though she had not seen these clothes in court. She further stated that her statement was recorded but she was not given an opportunity to read it and could not recall seeing it afterward. Regarding the identification parade, PW5 explained that the participants, including the accused, wore masks due to COVID-19 precautions. She could not recall the total number of persons in the parade but confirmed that the masks were removed to facilitate identification. PW5 emphasized that the path where she met the deceased and the accused was commonly used by many people. She stated that she did not witness the stabbing incident. However, she confirmed that the accused was the last person she saw with the deceased, and there was no one else present with them at that time.
 16. On re-examination, PW5 clarified that her statement indicated that the accused was not wearing a mask on the day of the incident. She explained that the location where she left the deceased was not far from the hotel. After leaving the deceased alone, she proceeded toward the hotel and subsequently heard screams. On returning to the scene, she found the deceased bleeding. PW5 emphasized that she did



not see the accused or any other person at that time and stated that she is certain the person she had left with the deceased earlier was the accused.

17. PW6, Patrick Mutuku, testified that he resides in Meru but hails from Kibwezi and is engaged in farming. He identified the deceased, Ann Ndunge, as his wife and stated that he was responsible for her burial. PW6 explained that he was informed of the deceased's death on 17th May 2020 through a call from Wanjohi at the CID offices in Machakos. He then proceeded to the mortuary, where he confirmed the identity of the deceased for the purposes of the post-mortem examination. He acknowledged seeing his name on the post-mortem report (PMF1). PW6 stated that he had no prior knowledge of the circumstances surrounding the incident.
18. PW7, PC Rebecca Mwendu Musyoka, testified that she was attached to Makueni Police Station on general duties, but at the time of the incident she was stationed at Mutituni Police Post, Machakos. On 9th May 2020, she was at the post from 6:30 a.m. At approximately 6:55 a.m., a lady reported that her colleague, Anne Ndunge, had been stabbed. PW7 recorded the statement and contacted Cpl Francis Mutuku, who instructed her to proceed to the scene. Upon arrival, she found the deceased lying in a pool of blood, surrounded by many people. She instructed the crowd to move back and requested assistance in transporting the deceased to hospital; however, they indicated that she was already dead. PW7 confirmed that the deceased was motionless when she touched her. She relayed the information to Cpl Mutuku, who then secured the scene and contacted IP Lorna, who further relayed the information to the Scene of Crime Offices. PW7 subsequently returned to the police office. She did not witness the stabbing itself and did not inquire about the weapon used.
19. Upon cross examination, she stated that she only visited when the deceased was lying and did not find any weapon there.
20. PW8, IP Gervas Okoth testified that he was attached to Machakos Police Station and served as Deputy OCS. He stated that on 13th May 2020, he was approached by the investigating officer handling the matter, who informed him that the suspect had been taken into custody for court purposes. He prepared the members for an identification parade and included the accused among them, placing him to stand between three to four other persons. The witness called Jacinta Nzilani (PW5) to identify the suspect, and she successfully identified the accused by touching him. PW8 asked the accused if he had any remarks, but he had none. He prepared and signed the parade form, which he sought to produce as P-Exhibit 2. PW8 noted that he had only seen the accused once and could not remember him physically.
21. On cross-examination, PW8 explained that he had instructed Jacinta on her role in the parade. The parade was conducted in an open square, but Jacinta observed from the CID office, where the suspect was in custody. He stated that all participants wore masks due to COVID-19, were of similar height, and were selected to resemble the suspect's general appearance. He confirmed that the witness identified the suspect despite the mask and that only one parade was conducted because there was only one witness.
22. PW9, IP Maurice Ndunda, formerly attached to the CCIO's office and currently stationed at Regional Headquarters Embu, testified that he is a graduate of Makerere University with a Bachelor of Biochemistry and has undergone local and international forensic courses. He is a gazetted officer (ODPP Gazette No. 5348 of 31/7/2015) and his duties include crime scene documentation, forensic photography, videography, and reconstruction, acting as a link between scientific investigation and general investigation. PW9 stated that on 9th May 2020, around 10:00 a.m., he accompanied CIP Wanjohi and Sgt Kemboi to Mutituni Market and arrived at Makutano Hotel, where he documented a scene suspected to be a murder. The deceased was lying behind the hotel building. He took fifteen coloured photographs, which he described as follows:



- a. P-Exhibit 3(1–15): General view of the hotel, the deceased’s body (covered with a cloth), iron bar used for support, close-up views of the body and blood-soaked clothing, stab wounds, the suspected murder weapon (kitchen knife), the deceased’s phone, and general views of the path from the deceased’s residence to the place of attack.
 - b. P-Exhibit 4: Certificate verifying the authenticity of the photographs, signed and stamped by PW9.
23. On cross-examination, PW9 explained that P-Exhibit 12–15 depicted the path used by many people between the deceased’s residence and the hotel. He stated that no blood traces were found on this path; the blood was only present where the weapon and body were located, about three meters apart. The area of attack was open and near occupied houses, so others could have potentially seen the incident.
24. On re-examination, PW9 clarified that while the distance along the path was estimated, no formal measurements were taken. P-Exhibit 12–15 provided a general view of the path from the opposite side, showing the route leading from the deceased’s residence, and closer views were taken to capture the murder weapon and scene accurately.
25. PW10, PC Fatwell Kariuki, testified that he is currently attached to Kamunyi Police Post, Uasin Gishu, and on 9th May 2020, he was attached to Mutituni Police Station. He stated that he received a call from Cpl Matiku reporting a murder incident at Kwa Mukalya Hotel. Upon arrival, he found a crowd of people around the deceased’s body, which was lying on the ground and covered. PW10 observed that the deceased was already dead and learned from colleagues that the suspect had disappeared and was being sought by villagers. While walking around the scene, he discovered a blood-stained kitchen knife approximately 50 meters from the body, lying on grass among some rubbish. He recovered the knife using gloves and handed it over to the Scene of Crime officers upon their arrival. He noted that the location where the knife was photographed (P-Exhibit 3(14)) did not precisely reflect the position where he recovered it. The knife, with a blue handle, was produced as P-Exhibit 5.
26. PW10 further testified that later he received information that the suspect had been sighted moving from Kivutini towards Mutituni. In the company of the area Chief, IP Lorna, and PC Manyasi, he proceeded to intercept the suspect near AIC Church, Mutituni. The suspect had already been apprehended by villagers. He observed the suspect wearing a yellow jacket, black trousers, and a striped green shirt. Upon taking him into custody and searching him, PW10 found blood stains on the jacket, which was produced as P-Exhibit 6. The suspect was then taken to Machakos Police Station.
27. On cross-examination, PW10 clarified that he was not the first officer at the scene but had recovered the knife before the Scene of Crime officers arrived. He confirmed that the knife was recovered using gloves and was handed over to the Scene of Crime officers, though he did not know who later handed it to the investigating officer. He also stated that the suspect’s arrest was aided by members of the public and that he prepared an inventory of the jacket but had not seen it in court.
28. On re-examination, PW10 emphasized that the suspect was wearing P-Exhibit 6 (the jacket) at the time of arrest and affirmed that he recovered the knife personally and was not framing the accused in any way.
29. PW11, Dr. Felix Akunde, testified that he is a Medical Officer at Machakos Level 5 Hospital, holding a degree in Medicine and Surgery from Moi University (2014). He conducted a post-mortem examination on Ann Ndunge on 21st May 2020 at 11:45 am at Machakos Level 5 Hospital. The body was identified by Patrick Mutuku Malili and Francis Kanini. The deceased was alleged to have been stabbed by a known person. During the post-mortem, Dr. Akunde observed that the deceased, a well-nourished African female of middle age, was wearing a brown sweater, black jeans, a red shirt, and



brown innerwear, with the sweater stained with blood. The deceased had a stab wound on her back measuring approximately 2 cm and another on the left front chest, also about 2 cm. The internal examination revealed no fractures of the second, third, and fourth ribs, but there was approximately 2 litres of blood in the left chest cavity. He also noted a perforated heart with associated bleeding around the heart. The deceased was pregnant at the time of death. Dr. Akunde concluded that the cause of death was exsanguination secondary to penetrating chest trauma. Samples, including nails, blood, and part of the ribs, were collected for further examination. He signed the post-mortem report on 21st May 2020, which was produced in court as Exhibit 1.

30. On cross-examination, Dr. Akunde clarified that the injuries were not self-inflicted and that the incident had occurred on 9th May 2020 at approximately 8:00 am.
31. PW12, Lucy Wachira, testified that she is a Government Analyst based in Nairobi at a DNA Laboratory, with 12 years of experience and a Bachelor's degree in Analytical Chemistry from the Technical University of Kenya. On 8th July 2020, she received from Machakos DCI, Sergeant John Kemboi, three items for DNA analysis: blood, a knife, and a yellow jacket. PW12 conducted DNA analysis and confirmed that the blood on the knife and jacket matched that of the deceased, Anne Ndunge. She prepared and signed her report on 2nd July 2021, which was produced in court as Exhibit 7.
32. On cross-examination, she confirmed the items were received in khaki envelopes (blood in a container) and reiterated that she did not handle any other items or ascertain whether the items had been in the possession of the accused.
33. PW13, Sgt John Kemboi testified that he is currently stationed at Gatundu North DCI office but was formerly attached to Machakos DCI. He was the investigating officer in this matter. He stated that on 11th May 2020, he was called by Mr. Rodha Kanyi (sp) together with PC Wekesa to join CI Wanjohi, Deputy DCIO, to investigate a murder reported at Mutituni, which had occurred on 9th May 2020. The suspect had already been arrested by members of the public and the area chief and was in police custody. PW13 visited the scene with his colleague, including the house where the victim and the accused were staying on the same plot. The victim, Ann Ndunge, and the accused occupied different rooms within the plot. Investigations established that the accused had stabbed the victim on the left side of her chest and back using a knife. PW13 was given the knife (Exhibit 5) by PC Fatwell Kariuki (PW10), who had recovered it from the scene.
34. He testified that the victim had been stabbed approximately 500 meters from her residence while on her way to Makutano Hotel, where she worked, and she collapsed outside the hotel. The accused's yellow jacket (Exhibit 6), which had blood stains, was also recovered. PW13 recorded witness statements and facilitated post-mortem examinations conducted by PW11, Dr. Felix Akunde, on 21st May 2020 (Exhibit 1). DNA samples were taken from both the suspect and the victim and forwarded, together with the knife and jacket, to the Government Analyst. The DNA analyst's report was produced in court (Exhibit 7).
35. PW13 testified that the evidence, including witness statements, forensic reports, and recovered items, established the accused's involvement in the stabbing of the victim. He identified the accused in court and confirmed that Ann Ndunge died due to excessive bleeding caused by knife wounds. A memo form relating to the investigation was produced as Exhibit 8.
36. Upon cross examination, PW13 stated that he did not arrest the accused; the arrest was made by members of the public. The accused had already been booked at Machakos Police Station by other officers (OB 48/9/5/2020). He confirmed that PW5, Jacinta Nzilani, was 20 meters ahead when she



- heard the victim scream and saw the accused run away. She identified the accused as the person she last saw with the deceased. The incident occurred between 8:00 and 9:00 am on the material day. PW13 clarified that the knife was recovered from the scene, whereas the yellow jacket, which had blood stains, was recovered from the accused at the police station. He did not prepare the inventory of recovered items; that was done by the officers at the scene.
37. During re-examination, he emphasized that investigations revealed the accused was the one who stabbed the victim. He relied on the entire investigative file to support this conclusion and confirmed that the knife was recovered from the scene while the accused had the blood-stained jacket in his possession at the station.
 38. At the close of the prosecution's case, this Court found that a prima facie case had been established by the prosecution and the accused was put on his defence. He opted to tender sworn testimony.
 39. DW1, John Mutiso Musyoka, testified that prior to this case he lived in Mutituni and worked as a cook at Mukalia Hotel. He denied murdering the deceased. He stated that on the material day, he was off duty, woke up, and went to Mumbani Ward at around 6:00 a.m. At approximately 8:00 a.m., he received a call from a police officer instructing him to go to Mutituni Makutano Hotel without delay. Upon arrival, he found his cousin, Ann Ndunge, lying at the hotel entrance, bleeding. He requested the assistance of a police officer, who identified himself. When asked whether he knew the deceased and what had happened to her, DW1 confirmed that she was his cousin and that he had no knowledge of the circumstances of her injury, having been at home prior to being called. He further stated that he was instructed to load the deceased's body into a police vehicle and was subsequently taken to Machakos Police Station to record a statement before being handed over to the CID and charged. He testified that PW5, Jacinta Nzilani, saw him when he was called to the hotel but denied having seen or met her between 6:00 a.m. and 8:00 a.m. He explained that his mother and the deceased's mother are sisters, making them cousins.
 40. On cross-examination, DW1 stated that he works at Mukalia Hotel in Mutituni and has done so for seven years. He confirmed that his employer is Musyoka. He further testified that the deceased previously worked at Mukalia Hotel as a waitress for approximately one month before transferring to Makutano Hotel, where she worked for two months. He stated that he did not secure the deceased's employment. He explained that the deceased had been prevented from working at Mukalia Hotel due to the COVID-19 pandemic. DW1 further testified that the deceased lived in Mutituni with her husband, within the same plot as himself, and that PW4 was their landlady. He stated that he knew PW5 as a colleague of the deceased at Makutano Hotel but did not know the duration of her employment there and did not have a close relationship with her.
 41. DW1 reiterated that on the material day he was off duty and went home. He saw the deceased lying uncovered at the hotel entrance and was able to identify her. He noted that the deceased usually reported to work at around 7:00 a.m. He confirmed that he knew PW3 and denied the assertion that he was arrested by members of the public, stating instead that he was called by the police. He testified that he was unaware of the deceased's pregnancy and did not know her husband. DW1 stated that he had no grudges against the deceased and that he was scheduled to resume work on 12th May 2020.
 42. That marked the close of the defence. Learned counsel herein filed and exchanged written submissions. The accused submissions are dated 10th September 2025 while the Prosecution's submissions are dated 27th June 2025.



Prosecution's submissions

43. The prosecution counsel began submissions with a brief introduction of the charge against the accused person.
44. The prosecution then outlined the evidence of its 13 witnesses tendered to establish the offence. That PW1, the owner of Makutano Hotel, testified that he heard screams behind the hotel at about 6:30 a.m. and found the deceased lying on the ground bleeding. PW2 corroborated this, indicating that the deceased fell while fleeing and was reported to the authorities. PW3, the local chief, confirmed the scene and the subsequent arrest of the accused by members of the public. PW4 described the living arrangements between the accused and the deceased, noting that the deceased had recently rented a separate room but had previously stayed with the accused for a short period. PW5, a colleague of the deceased, stated that she was with the deceased when they encountered the accused, who called the deceased back before the fatal incident. She later heard the deceased cry out and found her bleeding. PW5 also identified the accused at an identification parade. PW6, the deceased's husband, confirmed the identity of the deceased. PW7 and PW10, police officers, testified regarding the scene management, recovery of a blood-stained knife and the accused's jacket, and subsequent arrest of the accused. PW8 and PW9 documented the identification parade and photographs of the scene.
45. PW11, the pathologist, conducted the autopsy and determined that the cause of death was exsanguination secondary to penetrating chest trauma. PW12, a government analyst, conducted DNA analysis confirming that the blood on the knife and jacket matched that of the deceased. PW13, the investigating officer, confirmed the chain of custody and identified the accused as the owner of the jacket.
46. Regarding the defence case, the prosecution submitted that the accused person gave sworn defence and called no witness. The Prosecution then summarized the accused testimony that he stated that in May 2020 he was living at Mutituni market and worked at Mukalia Hotel. That the accused stated that on 9th May 2020 he was on off day and left his house at 6a.m in the morning and at 8:30a.m. That he received a call from the police officer informing him to avail himself at Makutano Hotel which he did and on arrival at 9a.m, he found the deceased having died and he was told to record a statement with the police and was handed over to the DCI.
47. The prosecution submitted that in order to sustain a conviction for murder, all the ingredients of the offence must be established, as provided under Sections 203 and 204 of the Penal Code and in the case of *R v Cosmas Mutinda Muia* [2021] KEHC 9349 (KLR). While relating the ingredients to the circumstances of this case, the prosecution submitted that it was undisputed that Anne Ndunge Kiua is deceased as all witnesses, including PW1, PW2, PW3, and PW6 confirmed the death. On whether the death was unlawful, the prosecution made reference to the case of *Gusambizi Wesonga v Republic* [1948] 15 EACA 65 in submitting that all homicides are presumed unlawful unless legally excusable. Further the prosecution submitted that the death of the deceased was unlawful. The prosecution contend that it was established that the deceased died from stab wounds inflicted on her chest and back, with no justifiable or lawful reason for the killing. On malice aforethought, the prosecution argued that the accused acted with malice aforethought, evidenced by the deliberate nature of the stabbing. Further that PW5 testified that the accused was the last person seen with the deceased, called her back from her colleague and shortly thereafter the deceased cried out in pain. The prosecution submitted that the accused's knowledge of the deceased's movements and familiarity with her routines indicated premeditation and that the act of stabbing the deceased twice on the chest demonstrated intent to cause death or grievous harm.



48. The prosecution further submitted that although no witness saw the accused stab the deceased, the case is supported by circumstantial evidence and the application of the doctrine of “last seen alive.” PW5 testified that she was with the deceased shortly before the incident and that the accused was the last person to be seen in her company. She observed the accused call the deceased back while she proceeded on her way, after which the deceased cried out and was found bleeding. It was submitted that the doctrine of “last seen alive” provides that when a deceased is last seen in the company of the accused, and circumstantial evidence is strong and consistent, the accused bears the duty to provide a satisfactory explanation of the events leading to the death. In the absence of such an explanation, the law permits an inference to be drawn that the accused caused the death. The prosecution relied on several authorities to support this principle. These were *Kamau v R* (Criminal Appeal E 131 of 2022) [2024] KECA 1193 (KLR), *Kimani v Republic* (Criminal Appeal 41 of 2022) [2023] KECA 1390 (KLR), *Dida Ali Mohammed v R* (Criminal Appeal No. 178 of 2000) and *Moingo & Another v Republic* [2022] KECA 6 (KLR).
49. The prosecution submitted that the accused failed to provide any plausible explanation for the deceased’s death despite being the last person seen with her. Coupled with the circumstantial evidence, including eyewitness accounts, DNA evidence linking the accused’s jacket and knife to the deceased, and the proximity of the accused to the scene, the only reasonable inference is that the accused committed the murder.
50. In conclusion, the prosecution urged that the evidence satisfies the requirements for a conviction based on circumstantial proof and the application of the doctrine of last seen alive.

Accused’s Submissions

51. The accused person submitted on two issues for determination, that is, whether the prosecution evidence on record is sufficient enough to warrant this Court to convict the accused person on the offence of murder, and whether the accused defence is plausible and tenable.
52. On the first issue, the accused counsel made reference to the case of *Republic v Stanley Muthike Tiire* (2018) eKLR and *H.L. (E) Woolmington v DPP* (1935) A.C. 462 in submitting that the prosecution bears the burden of proving the offence beyond reasonable doubt. On the elements of murder, he made reference to the cases of *Roba Galma Wario v Republic* (2015) eKLR and *Republic v Mohammed Dadi Kokane & 7 others* (2014) eKLR in submitting that they include proof of the deceased’s death, cause of death, causation by an unlawful act or omission of the accused, and malice aforethought. He submitted that there is no doubt of the deceased’s death which was confirmed by PW6 and the postmortem report (Exh-1) indicating death due to exsanguination from penetrating chest trauma. However, the accused contended that there was no direct evidence linking him to the act that caused death and that no witness observed him committing the alleged assault.
53. Counsel highlighted gaps and inconsistencies in the prosecution’s evidence as follows: that PW1 testimony that he heard a scream behind the hotel and a thud and went to check only to find a person lying down and was informed that the accused stabbed her. That this amounts to hearsay. That PW5 admitted limited visibility at the scene and did not sign the ID parade; that PW10’s account regarding the recovery of a blood-stained knife and jacket was undermined by lack of proper inventory and absence of unique identifiers linking the exhibits to the accused. The accused relied on *Pius Arap Maina v Republic* (2013) eKLR to argue that evidential gaps raising reasonable doubt must be resolved in favour of the accused.
54. On the second issue on whether the accused defence is plausible and tenable, the accused counsel submits that he gave a detailed account of his movements on the day in question, stating he woke up



around 6:00 a.m., received a call around 8:30 a.m. and arrived at Makutano Hotel at 9:00 a.m., where he found the deceased lying in a pool of blood. That he was told to record a statement and was handed over to the DCI. He submitted that the defence was never challenged by the prosecution and therefore it remains uncontroverted.

55. The accused urged the Court to find that the prosecution had failed to prove the charge of murder beyond reasonable doubt, and that his defence was credible, plausible, and uncontroverted. He prayed for an acquittal under Section 306(1) of the Criminal Procedure Code.

Analysis and Determination

56. I have considered the evidence tendered by both prosecution and defence as well as the rival submissions. It is the duty of the prosecution to prove the guilt of the accused and which must be beyond reasonable doubt.

57. The accused person is facing a charge of murder contrary to Section 203 of the Penal Code, which section provides that:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

58. The standard of proof required is that of beyond reasonable doubt. In the case of Joseph Kimani Njau v Republic [2014] eKLR, the Court of Appeal stated that-

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond a reasonable doubt. The trial court is obliged to ensure that before any conviction is entered, both actus reus and mens rea have been proven to the required standard.”

59. In Anthony Ndegwa Ngari v Republic [2014] eKLR, the Court of Appeal identified three crucial ingredients of the offence of murder that have to be proved for a conviction to be entered as follows: -

“For the offence of murder, there are three elements that the prosecution must prove beyond a reasonable doubt to secure a conviction. They are;

- (a) the death of the deceased and the cause of that death,
- (b) that the accused committed the unlawful act which caused the death of the deceased, and
- (c) that the accused had the malice aforethought.

60. I will consider these elements of the offence to determine whether the prosecution has proved the charge against the accused beyond a reasonable doubt.

61. As regards the proof and fact of death, there is no dispute that the deceased, Ann Ndunge, died. PW6, Patrick Mutuku Mulila, the husband of the deceased, testified that he received information on 17th May 2020 that his wife had passed away. He proceeded to Machakos Level 5 Hospital Mortuary where he positively identified her body for purposes of post-mortem examination. His evidence was clear, consistent, and unchallenged. Further confirmation of death was given by PW7, PC Rebecca Mwendu Musyoka, who testified that upon arriving at the scene shortly after the incident, she found the deceased lying motionless in a pool of blood, and members of the public informed her that the deceased was already dead. Moreover, PW11, Dr. Felix Akunde, conducted the post-mortem examination on 21st



- May 2020 and confirmed that the deceased was indeed dead. The post-mortem report, produced as Prosecution Exhibit 1, conclusively established death. The defence did not contest the fact of death.
62. The Court therefore finds that the Prosecution proved beyond any doubt that the deceased died.
63. On whether the death was unlawful, by dint of Article 26 of *the Constitution*, all homicides are deemed unlawful unless authorized by law. PW11 testified that the deceased sustained penetrating stab wounds to the chest and back, resulting in massive internal bleeding, including approximately two litres of blood in the left chest cavity, and a perforated heart. He opined that the cause of death was exsanguination secondary to penetrating chest trauma. He further clarified, under cross-examination, that the injuries were not self-inflicted. PW9, IP Ndunga Maurice, documented the crime scene and produced photographic evidence showing the deceased's body lying in a pool of blood, visible stab wounds, and the suspected murder weapon, a knife, recovered near the scene. These photographs were produced as Prosecution Exhibit 3, together with the certificate under Exhibit 4. PW10, PC Farwell Kariuki, testified that he recovered a blood-stained knife near the scene, which he identified in court and which was produced as Prosecution Exhibit 5. He also recovered a yellow jacket with blood stains worn by the accused, produced as Prosecution Exhibit 6. PW12, Lucy Warukira Wachira, a forensic analyst, confirmed through DNA analysis that the blood stains found on both the knife and the jacket matched the blood profile of the deceased. Her report was produced as Prosecution Exhibit 7. The injuries inflicted on the deceased left no doubt that the same would cause his death. The assailant had no legal right or excuse to eliminate the deceased. I find that the prosecution proved this ingredient beyond any reasonable doubt.
64. As regards the third ingredient on whether the accused was the assailant, this is the central issue in contention. PW5, Jacinta Nzilani testified that she was walking with the deceased towards their place of work when they met the accused. She knew the accused prior to the incident. She excused herself and walked ahead. Moments later, she heard the deceased scream and utter words indicating she had been killed. Upon turning back, she saw the accused fleeing and found the deceased bleeding. PW8, IP Gervas Okoth, conducted an identification parade in which PW5 positively identified the Accused. The parade was conducted in accordance with established procedure and no complaint was raised by the accused at the time. Before this Court, the accused has not impugned the identification parade.
65. PW10 and PW13 testified that the accused was later apprehended by members of the public while wearing a yellow jacket stained with blood which forensic analysis confirmed belonged to the deceased. PW12's DNA evidence conclusively linked the Accused to the murder weapon and the deceased. The Prosecution having, through forensic evidence linked the blood on the accused's jacket to the deceased, the evidentiary burden shifted to the accused to explain to the satisfaction of the Court how that deceased's blood found itself on his clothes. From the record, the accused did not discharge this burden. He attempted by stating in his defence that he was asked by the police to load the deceased's body in the police vehicle, but this Court find that the totality of the prosecution evidence negates this line of defence. There is un rebutted evidence that the Accused as arrested elsewhere attempting to flee and he was thus not at the scene when the deceased's body as collected by the police. The defence further challenged the recovery of the knife and raised issues regarding the handling of exhibits and the lack of an inventory. While these procedural gaps are noted, this Court finds that they do not go to the root of the prosecution case, particularly in light of the independent forensic evidence and the consistent eyewitness testimony.
66. The accused was placed at the scene immediately before the attack, was identified by a witness who knew him well, was found shortly thereafter with the deceased's blood on his clothing and offered no plausible explanation for the same. The defence did not dislodge the Prosecution's case nor raise reasonable doubt as to the identity of the assailant.



67. This Court therefore finds that the Accused was the person who unlawfully caused the death of the deceased.
68. As regards the aspect of malice aforethought, Section 206 of the Penal Code provides that the same shall be deemed to have been established by evidence proving any one or more of circumstances inter alia; an intention to cause death or to do grievous harm to any person, whether that person is the person actually killed or not; knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the one killed or not, accompanied by indifference whether death or grievous injury occurs or not by a wish that it may not be caused; an intention to commit a felony; an intention by the act or omission to facilitate the flight or escape from lawful custody of any person who has committed or attempted to commit a felony. It is trite law that in offences of murder this ingredient is quite crucial and must be proved by the prosecution beyond any reasonable doubt. In the case of R Vs Tubere S/o Ochen [1945] 1 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused during and after the attack.
69. In the present case, the evidence establishes that the weapon used was a knife; the deceased sustained stab wounds to the chest and back, including a perforation of the heart; the attack resulted in massive bleeding and rapid death, indicating intent to cause grievous harm or death; PW5 testified that immediately after the stabbing, the deceased screamed the words “umeniua” (“you have killed me”) and the assailant fled the scene and that the accused was later found wearing a jacket stained with the deceased’s blood and did not render any assistance to the deceased after the attack.
70. The targeting of vital organs, the force used, and the choice of weapon lead this Court to the irresistible inference that the assailant acted with malice aforethought within the meaning of section 206(a) and (b) of the Penal Code. The defence did not rebut this inference nor did it suggest provocation or any mitigating circumstance that would negate malice aforethought.
71. Accordingly, I find that malice aforethought was proved beyond reasonable doubt.
72. Consequently, having carefully analysed the totality of the evidence on record, this Court is satisfied that the Prosecution has proved all the four ingredients of the offence of murder beyond reasonable doubt. The defence evidence did not shake that of the prosecution which is overwhelming against the accused. I find the accused John Mutiso Musyoka guilty of the offence of murder and he is hereby convicted accordingly.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 5TH DAY OF FEBRUARY, 2026.

RHODA RUTTO

JUDGE

In the presence of;

.....Accused

.....ODPP

Selina Court Assistant

