



**Kamwigu v Republic (Criminal Appeal 71 of 2020)
[2026] KECA 449 (KLR) (6 March 2026) (Judgment)**

Neutral citation: [2026] KECA 449 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 71 OF 2020
K M'INOTI, S OLE KANTAI & A ALI-ARONI, JJA
MARCH 6, 2026**

BETWEEN

ERICK MAINA KAMWIGU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This is a first appeal from the judgment of the High Court of Kenya at Embu (Muchemi, J.) where the appellant, Erick Maina Kamwigu, had been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged in the Information that on 27th day of October, 2013, at Kaithege Village, Runyenjes in the then Embu North District he murdered John Kathauthi Nyaga. He pleaded not guilty; the prosecution called 7 witnesses; he was found to have a case to answer; he gave sworn testimony and called 1 witness; he was convicted and sentenced to 15 years imprisonment after the judgment which was delivered on 22nd day of January, 2020.
2. Our duty as a first appellate court is to re-appraise the evidence, to retry the case, but giving allowance for the fact that we did not have the advantage of seeing and hearing the witnesses as they testified, an advantage that the trial Judge had. This mandate was stated as follows in the oft-cited case of *Okeno vs. Republic* 1972 EA 32:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates findings should be supported. In doing so, it should make allowance for the fact that the



trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

3. Rose Wanja Ngoroi (Wanja-PW1), a banana and other fresh produce trader, told the Judge that on 27th October, 2013 she finished her work and was walking home accompanied by her father-in-law (the deceased) and another person. They used a footpath which was right in front of the appellant’s house. When they reached the appellant’s house at 8 p.m. they saw him in his kitchen with his wife. They exchanged greetings but immediately thereafter, while still in the appellant’s compound Wanja noticed that the appellant was following them while flashing a torch. The appellant’s wife then screamed claiming that the trio were cattle thieves.
4. Wanja heard the appellant say “wacha nichukue panga” (let me pick a panga) while re-entering his house. Wanja, sensing danger, removed her sandals which she abandoned at the scene and fled to her home in the neighbourhood where she reported to her husband that his father’s life and that of the third person were in danger. The next day she received information that her father-in-law had been slashed to death and the body was lying in the appellant’s compound. According to her, the appellant was a neighbour who she had known since she got married in the area when the appellant was a young man. She knew his voice having lived in the same neighbourhood for many years and according to her:

“...I heard him speak and saw him at a close range in his kitchen as we were passing his home...”

Justin Kinyua Emwau (Kinyua- PW3) ran a bar (Amani Bar) at Kathenge market. On 27th October, 2013 Wanja, the deceased and another man came to his bar at about 7.30 p.m. He knew them as residents of the area. He left them at the bar soon after their arrival and went home. He learnt the following morning at about 10 a.m. that the deceased had been killed and the body dumped in a tree plantation. He visited the scene but found that the body had been removed by the police. The scene was about 3 km from the location of his bar.
5. Patrick Nthiga Kathauthi (Nthiga-PW2) was informed on 29th October, 2013 that his father had been killed and the body found at a tea plantation in the appellant’s farm. He went home, and when he visited the tea plantation he found the body of his father and observed three deep cuts to the head; cuts on hands and legs and the clothes and shoes were full of blood. He saw a lot of blood outside the appellant’s house which was covered with soil. Police were at the scene and ordered demolition of a pit latrine in the appellant’s compound where a blood stained broken stick was recovered and he identified it in court.
6. On 11th November, 2013 Dr. Moses Maina (PW4-the doctor) who worked at Consolata Hospital, Kyeni, performed a post-mortem on the body of the deceased. The deceased was 80 years old. The doctor saw bruises on the thighs and upper arm and on the forehead. There was compound fracture on the right tibia and fracture of the right humerus; there were two deep cut wounds to the bone on the forehead caused by a sharp object; there was a comminuted skull fracture of the frontal bone and on the temporal right bone. There was an excessive fracture fragment deeply onto the brain tissue and there was excessive subdural haematoma and the doctor formed the opinion that the cause of death was head injury secondary to trauma. He produced post-mortem report into the evidence.
7. Dr. Joseph Thuo (PW5-the psychiatrist) examined the appellant on 4th November, 2013 and found him fit to plead. He produced his report into evidence.
8. Also called by the prosecution was Kenneth Kiptoo Sang (Kiptoo-PW6), a Government Analyst based at the Government Chemist, Nairobi. On 29th November, 2013 he received items for analysis which included a blood sample of the deceased; 2 pieces of sticks wrapped in a khaki paper; 3 soil samples and



a police memo form. Upon examination he found the 2 pieces of sticks were stained with human blood and no blood was detected on the soil samples. On conducting DNA he concluded that DNA profiles generated from the sticks matched the DNA of the blood sample of the deceased. He produced his report as part of the evidence in the case.

9. The last prosecution witness was Chief Inspector George Wang'ombe, formerly of Runyenjes Police Station, and who was the Investigation Officer in the case. He was in his office in the morning of 28th October, 2013 when the appellant reported to him that he had found a body lying at a footpath near his home. After recording the report he mobilized his colleagues and upon arrival at the scene they found the body of the deceased lying in a footpath about 100 metres from the appellant's house. He observed blood stains from the appellant's house to where the body was and:

“...Someone had tried to cover the blood stains using soil from elsewhere. I noticed struggle on the ground at the scene.

The body of the deceased had dragged (sic) from the house of the accused towards the foot path....”

10. Considering the appellant a suspect in the case he conducted a search and recovered 2 pieces of sticks in the latrine which he retained as exhibits; he collected soil samples which were blood stained; he recovered a pair of sandals which were identified as belonging to Wanja; he requested the doctor to obtain a blood sample from the body of the deceased which he sent to the Government Chemist for analysis. He charged the appellant with the offence of murder and produced the various items as exhibits in the case.

11. That marked the close of the prosecution case and upon being put on his defence the appellant in a sworn statement told the Judge that he worked as a hotel attendant and that on the material day, 27th October, 2013 after attending church in the morning he attended a “merry-go-round” meeting at Runyenjes after which he went to meet his friend Rose (DW2) at Miami Restaurant at Runyenjes where they remained until 11.30 p.m. when he returned home. The following morning after attending to his usual chores he was on his way to the farm when he stumbled upon a dead body of a person he did not recognize. He reported what he saw to the Assistant Chief and later at Runyenjes Police Station. Accompanied by police they returned to the scene and he found the body turned facing up and he now recognized it as that of his neighbour, the deceased. He denied seeing or threatening Wanja the previous night and stated that he had no reason to attack her or those who accompanied her. He stated that he had previously been a farmer but had to stop after 2013:

“...I had to leave home because of threats by the deceased's family. My family also moved out from the home. I had nothing against the family of the deceased... I was framed up in this case. We related well with the deceased and his family...”

12. He stated in cross-examination that there was no existing land dispute between his family and that of the deceased and:

“...I agree I did not say earlier in case that I do not live in my home now...”

13. Called as a witness by the appellant was Rose Pauline Mumbi (Mumbi-DW2) who testified that she had been his intimate friend since 2010. On 27th October, 2013 she left her Murang'a base and arrived in Runyenjes at 4 p.m. when she called the appellant and they met at Miami Restaurant where they had supper and where they remained until 11 p.m. when the appellant left for home. She received information days later about the appellant's arrest for murder.



14. The Judge analysed the evidence presented by both sides and as we have seen the appellant was convicted and sentenced.
15. There are 3 grounds of appeal in the Supplementary Memorandum of Appeal drawn for the appellant by his lawyers M/s Henry Kimani Advocates. The appeal is against conviction only. The appellant says that the prosecution did not prove the case of murder against him beyond reasonable doubt; the Judge is faulted in law and fact for not finding that identification by voice recognition was not proved by the prosecution and, lastly, that the Judge did not give due consideration to the alibi defence of the appellant. There is no prayer made in Memorandum of Appeal on what should be the outcome but that will not matter in our determination of the appeal as we shall rely on the evidence on record and the law.
16. When the appeal came up for hearing before us on 8th October, 2025 the appellant was virtually present from Embu Prison and was represented by learned counsel, Mr. Henry Kimani while learned State Counsel, Mr. Solomon Naulikha appeared for the respondent. Counsel for the appellant in a highlight of written submissions submitted that the circumstantial evidence relied on by the prosecution did not meet the threshold required in law. According to counsel, the pit latrine where the weapon was found was outside the appellant's home; the lighting was not strong enough; Wanja stated that a torch was shone on them but counsel thought that Wanja could not see who was shining the torch. Counsel wondered why the third person accompanying Wanja and the deceased was not called by the prosecution - that witness, submitted counsel, could have given evidence adverse to the prosecution's case. Counsel submitted that voice recognition was unreliable as the exact words uttered were not stated and in conclusion, counsel submitted that it was wrong for the Judge to dismiss the alibi defence raised by the appellant although he conceded that the alibi defence was brought up late in the case.
17. Mr. Naulikha did not agree. An alibi, submitted counsel, must be brought as early as possible so that it can be evaluated, and when it is brought late the Judge will be entitled to find it to be an afterthought. On voice recognition counsel submitted that Wanja stated that there was verbal communication between her and the appellant and that communication was part of identification.
18. On why the third person accompanying Wanja and the deceased was not called it was submitted by the respondent that the person would not have added any value to the testimony of Wanja. He cited section 143 of the *Evidence Act* in support of the proposition that there was no legal requirement to call any particular number of witnesses to prove a fact. Counsel concluded by submitting that the murder weapon recovered from the latrine was found to contain DNA of blood of the deceased.
19. In a brief rejoinder Mr. Kimani submitted that circumstantial evidence requires corroboration and alibi defence should not have been dismissed.
20. We have considered the record of appeal, the written submissions made as highlighted and the law and this is how we determine this appeal.
21. To prove the offence of murder the prosecution must prove three things as has been stated in many judicial pronouncements such as the case of Anthony Ndegwa Ngari vs. Republic (Criminal Appeal No. 352 of 2012) [2014] KECA 424 (KLR):

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order 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.”

Did the deceased die and what was the cause of his death?

- 22. There is no doubt that the prosecution relied purely on circumstantial evidence.
- 23. Wanja testified how, accompanied by the deceased and another, they were at a footpath at 8 p.m. which passed directly in front of the appellant’s house when she saw the appellant with his wife in the kitchen. She greeted them loudly and they acknowledged her greeting. Shortly thereafter she observed the appellant exit the house and shine a torch on them when they were still in the compound. The appellant’s wife raised alarm shouting or screaming that the trio were cattle thieves. Wanja overheard the appellant state that he was going back into his house to fetch a panga (matchete) and this prompted Wanja to fear for her life. She fled the scene after abandoning her sandals which were recovered the following morning and became part of the prosecution’s evidence.
- 24. The investigation officer received the appellant the following morning who reported that he had found a dead body at a footpath in his compound. When the investigating officer visited the scene in the presence of other officers he observed signs of a struggle next to the appellant’s house and there was a trail of blood leading from 3 metres from the appellant’s house to where the body lay. Someone had attempted to conceal that piece of evidence by covering it with soil. When the investigation officer ordered a pit latrine next to the appellant’s house to be demolished 2 sticks were recovered and it was later established by Kiptoo, the Government Analyst, that the sticks had the deceased’s blood.
- 25. In *Chiragu & Another vs. Republic* (Criminal Appeal No.104 of 2018) [2021] KECA 342 (KLR) this Court, while quoting *Abanga alias Onyango vs. Republic* Criminal Appeal No. 32 of 1990 (UR) had this to say on circumstantial evidence:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

- 26. The predecessor of this Court – The Court of Appeal for Eastern Africa had considered the same issue in the earlier case of *In R. vs. Kipkering Arap Koskei & Another* [1949] 16 EACA 135 where that Court stated:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”



28. The prosecution proved through the doctor that the deceased was killed while in a sitting position going by the nature of injuries inflicted on his hands and head. The cause of death was head injury secondary to trauma.
29. The circumstances of the deceased death were that Wanja left him alive at the scene when she fled; her seeing the appellant at the scene and having a conversation with him and his wife; her hearing the appellant uttering threatening words; her fleeing the scene after sensing danger and the dead body of the deceased being found the next morning a few metres from the appellant's house; the trail of blood from the appellant's house to where the body lay; the finding of the bloody sticks that bore the deceased's blood in the appellant's latrine all led to the inescapable conclusion that it was the appellant and no other who had attacked and killed the deceased.

Was it the appellant who caused the death of the deceased?

30. As we have seen all the circumstances obtaining on the evening of the fateful night left no other reasonable hypothesis other than that it was the appellant who attacked the deceased. After his wife shouted or screamed saying that Wanja, the deceased and the other party were cattle thieves, the appellant who had followed them stated, to Wanja's hearing, that he was going back to the house to fetch a panga. Wanja fled the scene fearing for her life. The dead body of the deceased was found the next morning near the appellant's house. The murder weapon, sticks with sharp ends, was recovered that very morning when the appellant's latrine was demolished. They contained the deceased's blood. We find, as did the trial Judge, that it was the appellant who attacked the deceased right outside his house and then dragged the body some metres away leaving a tell-tale trail of blood which was found the next morning by the investigation officer and other witnesses.
31. The appellant complains that the Judge erred by finding that Wanja identified him by voice recognition.

This is what Wanja told the Judge at the trial:

“The accused is our neighbour. I have known him since I married in the home Kathauthu. That is in 1993 and he was a young man. I know the voice of the accused having lived with him in the neighbourhood for many years. I heard him speak and saw him at a close range in his kitchen as we were passing his home.”

32. So, not only did she see him in his kitchen; she greeted him and heard him utter the words “let me pick a panga” in Kiswahili language. Wanja had known the appellant since his youth and she was sure that it was him that she had seen and heard that evening at 8 p.m. as they passed through the footpath right in front of his house. This is what this Court stated on the issue of voice recognition and identification in *George Mwaura Kinyita vs. Republic* [2020] KECA 269 (KLR) quoting *Mbelle vs. Republic* [1984] KLR 626:

“In dealing with evidence of identification by voice, the court should ensure that:

- a. The voice was that of the accused.
 - b. The witness was familiar with the voice and recognized it.
 - c. The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.”
33. Wanja heard the appellant speaking, she knew his voice and recognized it and the conditions were such that she saw him and heard him speaking. There was no possibility of mistaken identity at all.



34. The appellant complains that his alibi defence was not considered by the trial Judge. That alibi defence was raised at the tail end of the defence where the appellant alleged, as supported by his witness, that the two had supper at a restaurant and parted ways at around 11 p.m. and that, therefore, the appellant was not at the crime scene at 8 p.m.
35. The trial Judge found that the alibi defence raised by the appellant was untruthful and not plausible as weighed against the evidence of Wanja and the other prosecution witnesses particularly where Wanja had fled the scene after fearing for her life after the appellant stated loudly that he was going to fetch a panga; the fact that the body of the deceased was found at the scene the next morning; there was a trail of blood from the appellant's house to where the body of the deceased was recovered and the sticks recovered from the appellant's latrine were stained with the blood of the deceased.
36. It is true as held in *Ssentale vs. Uganda* [1968] EA 36 that once an accused person raised an alibi defence he has no duty to prove it; it is the prosecution's duty to disprove it. But it is also true that the accused should raise that alibi at the earliest opportunity to afford the prosecution time to investigate it - in *In R. vs. Sukha Singh s/o Wazir Singh & Others* [1939] 6 EACA 145, the predecessor of this Court upheld the decision of the High Court where it was held:
- “If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”
37. The trial Judge in dismissing the alibi defence, and we agree, also relied on the case of *Festo Androa Asenua vs. Uganda*, Criminal Appeal No. 1 of 1998 where it was stated:
- “We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.”
38. The appellant was charged with the offence of murder and the prosecution was required to prove beyond reasonable doubt that he committed the act with malice aforethought.
39. Malice aforethought is defined in section 206 of the Penal Code as:
- “Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
- 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;
 - 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 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;

- 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.”

40. The evidence on record is that Wanja, the deceased and another were at a footpath that passed next to the appellant’s house when his wife raised alarm that they were cattle thieves. He had followed them flashing a torch and he stated that he was going back to his house to fetch a panga.

41. As we have seen through the testimony of the doctor the appellant attacked the deceased, a defenceless 80 year old man, and inflicted multiple injuries to the head, face, lower and upper limbs using a sharp object killing him on the spot. In Republic vs. Tubere S/O Ochen, [1945] EACA, 63, the predecessor of this Court set out the following factors to be considered in determining whether malice aforethought has been established:

“The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”

42. All those factors were satisfied and we find that there was malice aforethought.

43. There is no merit in this appeal against conviction and we dismiss it in its entirety.

DATED AND DELIVERED IN NYERI THIS 6TH DAY OF MARCH, 2026.

K. M’INOTI

JUDGE OF APPEAL

.....

S. ole KANTAI

JUDGE OF APPEAL

.....

ALI- ARONI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

