



REPUBLIC OF KENYA



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**Republic v Ndiwa (Criminal Case E009 of 2021)
[2026] KEHC 2695 (KLR) (4 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E009 OF 2021
MS SHARIFF, J
FEBRUARY 4, 2026**

BETWEEN

REPUBLIC PROSECUTION

AND

HARBERT KIPNUCHE NDIWA ACCUSED

JUDGMENT

A. Introduction

1. The accused person herein Harbert Kipnuche Ndiwa was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the 26th of February 2021 at Kapsoromet area, Cheptais Sub-County within Bungoma County, murdered Charity Nachali Mukie.
2. The accused pleaded not guilty to the charge. The Prosecution called ten (10) witnesses in support of its case.

B. Prosecution's Case

3. After brief voir dire, this Court established that the child witness was intelligent, but did not understand the meaning of an oath. The Court allowed him to render his unsworn testimony as PW1.
4. PW1, EMN, testified that he was 12 years old and a student at (particulars withheld) Primary School. According to him, on 26th February 2021, while he was heading to school after his lunch break while in the company of Dedan and the deceased person. He told the Court that the deceased was raped and that at some point they left her in the company of the accused person and they were walking behind them while at Malakisi bridge. He told the Court that during games break he saw people walking and heading towards the bush area near the school compound, not far from the bridge, and on rushing to investigate, he found the deceased had died. He recalled that earlier on the deceased had carried some



fruits and he did not find the fruits at the scene. He told the Court that he knows the accused person herein as he is a neighbor and he is Charity's father.

5. On cross-examination, he told the Court that the accused person herein is the father of the deceased and a neighbor. According to him, on their way back to school after lunch, they were four of them namely: the father, the deceased, Dedan and the accused person herein and that the accused was following from behind as they headed toward the bridge. He insisted that the accused caught up with them at the bridge and they left the deceased in his company and it was later that they proceeded for games that he learnt of the incident. He insisted that on that day he saw the accused person very well and he did not report to the teacher that he saw the accused person take the deceased into the bush. He was explicit that he saw the accused person rape the deceased inside the bush although he did not follow them into the bush and that the school was a bit far from the bridge.
6. On re-examination, he told the Court that he did not see the accused person take the deceased into the bush.
7. After brief voir dire, this Court established that the child witness was intelligent, but did not understand the meaning of an oath. The Court allowed him to render his unsworn testimony as PW2.
8. PW2, DM, testified that he is a student at (particulars withheld) School and he recalled on 26th February 2021, while heading back to school after a lunch break, while in the company of PW1, they met with the deceased herein and she was from their home carrying bananas and other fruits and she shared some with them. They proceeded towards the bridge when other students joined them and the deceased was with her father the accused person herein when a fellow student alerted them that they were late. In the company of PW1 they proceeded to move faster while the deceased remained with the accused person at the bridge. The deceased failed to show up at school and later in the evening as they left school, he learnt that she had died and her body was lying at Kapkoto forest that is near their school. He told the Court that he went to the scene and found the deceased's body with injuries on her private parts and confirmed it was the accused person whom he last saw with her. He told the Court that he knows the accused person as he is a neighbor.
9. On cross-examination, he told the Court that the date of the incident was on 26th February 2021, and that they were heading back to school from their lunch break. He told the Court that initially he was in the company of PW1 before the deceased joined them and that the road they took was between trees and no one could see anyone. He elaborated that it was at 1.00 p.m. when he saw the accused person following them from behind and he was coming from the direction of his house, and that they left the deceased in the company of the accused person at the bridge as they rushed back to school. He told the Court that the accused person called out to the deceased and that the incident occurred at around 1.00 p.m. He told the Court that he was not certain about what exactly happened after they rushed to school, and that the deceased and the accused person walked behind them slowly. He insisted that the accused person was the last person to be seen with the deceased and that he did not see him kill her.
10. PW3, Temko Koruswo, testified that she is the mother of the deceased herein and that the accused herein is her brother-in-law. According to her, on 26th February 2021, she prepared the deceased herein for school and the deceased came back home for lunch then left for school carrying some fruits. It was later that she learnt of the incident and rushed to the scene.
11. On cross-examination, she told the Court that the accused person herein is her brother-in-law and that on the day of the incident she was at home and she served the deceased herein lunch at around 1.00 p.m. She confirmed that when the deceased came home for lunch, the accused person was also at home busy setting up his house. She told the Court that she held no grudge against the accused herein.



12. On re-examination, she told the Court that she was at the compound of a neighbor when she was alerted of the incident and that she did not see the accused person leave when the deceased left for school.
13. PW4, Bernard Chemwile, testified that the deceased herein is his niece and the accused person is his younger brother. He recalled on 26th February 2021, while at home he received a report that the body of the deceased herein was discovered inside a bush near her school and he proceeded to the scene. He told the Court that the last time he saw the accused person it was at 1.00 p.m. as he headed towards the road and saw him come back at 2.00 p.m. and he was in the company of one of their children. He told the Court that he has no problem with the deceased.
14. On cross-examination, he told the Court that the accused person is his step-brother and could not testify to the whereabouts of the accused at the time they visited the scene.
15. PW5, Pitia Jebet Kimakany, testified that she is a headteacher at (particulars withheld) primary school and recalled on 26th February 2021, while in school checking the class four register she noted the deceased herein had not reported to school in the afternoon and later in the evening she saw some students hurdled in groups and she was later informed that they had spotted a body of a pupil lying down in the bush. She rushed to the scene and found the body of the deceased lying naked with blood oozing from her private parts, with her mouth, nose and ears stuffed with soil. She told the Court that she contacted the authorities.
16. On cross-examination, she told the Court that the school compound is fenced with a gate and it has security, and that the body of the deceased was found about 50 meters from the school.
17. PW6, Titus Ngeiywo, testified that he is the area assistant chief and recalled on 27th February 2021, he was informed of an incident that had occurred the previous day. He established that two children claimed to have seen the accused person with the deceased prior to her demise and this prompted him to proceed to the homestead of the accused and request him to report to the station and lodge his report with the police.
18. On cross-examination, he told the Court that he knows the accused person herein and that he acted on the information given to him.
19. PW7, Josph Mamboleo, testified that he is a village elder and recalled that on 26th February 2021, while he was home, he received a report that a student had been killed. In the company of PW6 and the area chief, they proceeded to the scene and found the body of the deceased and it appeared like she was strangled and her legs were apart. The police were alerted and investigations commenced. On 27th February 2021, PW6 alerted him on the identification of the suspect, the accused herein, and they proceeded to the accused person's house to apprehend him.
20. On cross-examination, he told the Court that it was established that the accused person was the last person to be seen with the deceased person.
21. PW8, No. 111245 PC John Maitha Karisa, testified that he was investigating officer in this matter and is stationed at DCI Cheptais. According to him, on 27th February 2021, he took over a murder case that had been lodged at Chesikaki Police Station. He commenced his investigations, visited the scene and apprehended a suspect that was already in custody. He told the Court that he was present during the post mortem examination and supervised the collection of a high vaginal swab from the deceased's body and a buccal swab from the accused person for analysis. He recorded the witness statements and, in the process, established that the deceased had gone back to school after lunch and that the other students last saw the accused person with the deceased. He told the Court that the items he recovered



- were: a red dress (blood stained), a white short (blood stained), a black sweater, one stone and pieces of dry grass. Also, the photographs that were taken at the scene were three in number and he availed the certificate of printing of photographs dated 8th March 2021. Lastly the sketch plan of the scene. He produced the items in Court as PEXH 4 (a)-(e), 5a, b, c & 6 and 7 respectively.
22. On cross-examination, he told the Court that he was the investigating officer and that he visited the scene on 27th February 2021 at around midday and the post mortem was conducted on 4th March 2021.
 23. On re-examination, he told the Court that he obtained oral evidence stating that the accused person was the last person to be seen with the deceased herein and that the deceased high vaginal swab was collected on 4th March 2021 and the accused person's buccal swab was collected on 5th March 2021.
 24. PW9, Dr. Ombongi Haron, testified that he is a doctor and is stationed at Bungoma Referral Hospital. He was before the Court to avail the deceased person's post mortem report conducted on 4th March 2021. According to him, he observed the deceased's body had bruises around the neck and lower jaw, presence of tear on genitalia and blood stains of the thighs. On internal examination, he observed that the deceased had a missing hymen. He opined that the cause of death was asphyxia due to lack of oxygen. He told the Court that specimens of high vaginal swab and blood were collected for DNA analysis. He produced in Court the deceased person's post mortem report dated 4th March 2021 in Court as a PEXH 1
 25. On cross-examination, he told the Court that the deceased died due to strangulation and that she was defiled as the hymen was missing.
 26. PW10, Gordwin Khamala Waliama, testified that he is a government analyst based at Kisumu Laboratory and he was before this Court to avail the DNA report which he prepared as per the request of PW8 vide a memo dated 5th March 2021, which presented the following items: a sleeveless red dress (school uniform) packaged in a blue carrier bag, a white short sleeved blouse packaged in a blue carrier bag, small black lory sleeved jumper packaged in a blue carrier bag, a stone in a brown envelope, vaginal swab from the deceased herein, blood sample from the deceased herein, buccal swab from the accused herein.
 27. According to him, upon examination he established that the stains on the vaginal swab tested positive for seminal fluid and blood of human origin that matched the DNA profile of the accused person herein. He availed the DNA report dated 19th May 2023, in Court as PEXH 3.
 28. On cross-examination, he told the Court that the accused person was physically presented at the laboratory for buccal swab and the delay in report production was due to a lot of backlog as they serve four counties.
 29. On re-examination, he told the Court that he did the analysis on 19th May 2023 and prepared the report the same day. He reiterated that the delay was occasioned by backlog from 24 counties and that have the facilities to preserve the exhibits.
 30. On recallment, PW10, was categorical that DNA does not change despite the period of preservation. He also noted that the indication of kingship by PW8 was irrelevant unless he requested analysis of the same to determine biological relation.
 31. After close of the Prosecution's case the Court found that the accused person herein had a case to answer. He was placed on his defence.



C. Defence case

32. DW1, Herbert Kipnuche Ndiwa, testified that he is the accused person herein and that the deceased herein is his niece. He denied killing the deceased person herein. He alleged that on the date of the incident he was in his house which he was constructing and his brothers Fred, Chemwire and Edwin were present when he received news from one Everlyne about the discovery the deceased's body. He told the Court that once they received the news, they proceeded to the scene and found that the deceased was indeed dead. He told the Court that on 27th February 2021, he woke up as usual to continue with the construction of his house and that was the PW6 and other 3 nyumba kumi members showed up to his house and told him to accompany them to the station to record a statement. He denied the testimonies of PW1 and PW2, and he alluded to his strained relationship with PW3 and the 1st house and his father was polygamous and he hailed from the 2nd house.
33. On cross-examination, he told the Court that on 26th February 2021, at 2.00 p.m. he was constructing his house and the distance between the deceased person's school and his home was about 800 meters, which the same distance from his house to the scene, and noted that he could get there in 10 minutes if he ran and 20-30 minutes if he walked. He insisted that he has been framed.
34. DW2, Fred Kapchanga Kipnuche, testified that the accused herein is his younger brother as he is the 1st born and that the deceased was his niece. He denied the charges levelled against his brother and stated that on 26th February 2021, he was with the accused person and one Bernard Chimwere at 3.00 p.m. when they received the news of the death of the deceased. He insisted that the accused was constructing his house about 50 meters away and could not have committed the crime. He beseeched this Court to acquit the accused person.
35. On cross-examination, he told the Court that the accused herein is his brother and he is well behaved and that on the date of the incident he was in their father's compound constructing his house and the distance between his house and the school is about 800 meters-1 km. He alluded to the possibility of a frame up due to the existence of a land dispute between the 1st and the 2nd house, and the use of witchcraft.
36. After close of the defence case, parties were directed to file and exchange submissions. At the point of writing this judgement and it is clear that from the Court record and the Court Tracking System, both parties failed to comply with the Court directive.

D. Analysis and determination

37. In consideration of the evidence of 10 Prosecution witnesses and in consideration of the defence witnesses' sworn statements, this Court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the Penal Code Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the Prosecution.
38. Section 203 and 204 of the Penal Code under which the accused persons are charged provide for the offence of murder and the punishment therefor. They require that the Prosecution must prove beyond reasonable doubt that the accused persons by an unlawful act or omission caused the death of the deceased through malice aforethought.
39. The sections read as follows:

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



204. Any person who is convicted of murder shall be sentenced to death.”

40. The said provision creates elements of the offence of murder that must be proved by the Prosecution beyond reasonable doubt as held in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR to include: -
- i. That the deceased died;
 - ii. That the death was caused by an unlawful act or omission;
 - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
 - iv. That there was malice aforethought.

a. The death of the deceased

41. The postmortem form PEXH1 filled by PW9, Dr. Ombongi Haron, on 4th March 2021, reveals that the deceased died of severe asphyxia due to strangulation. I find that the Prosecution proved this ingredient of the offence beyond reasonable doubt.

b. Death was caused by an unlawful act or omission

42. The evidence of the doctor was that the deceased died as a result of asphyxia due to strangulation. Also, PW9 testified that the deceased herein was defiled. The circumstances of this case coupled with other injuries on the body of the deceased point to a 3rd party having inflicted injuries that led to the death of the deceased. This Court therefore finds that the death of the deceased was unlawful.

c. Proof that the accused persons committed the unlawful act which caused the death of the deceased

43. PW1 and PW2 identified accused person as the person they saw the deceased with prior to her demise. The both categorically stated that when they were heading back to school after their lunch break the deceased eventually joined them, later they noticed the accused person following them from behind. Eventually the deceased remained behind with the accused person as they were walking slowly and they were trying to rush back to school before their lunch break timeline lapsed. PW1 alleged that he saw the accused person lead the deceased into the bush nearby their school not far from Malakisi bridge. They told the Court that they knew the accused person very well as he was a neighbor as he was the brother the deceased’s father.
44. The question is; what happened to the deceased child? According to PW3 the deceased came back home for lunch and left with some fruits at hand. PW1 and PW2 testifying to meeting up with her on their way back to school and they proceeded to walk together until they noticed the accused person herein following them closely from behind and the deceased walking with him slowly. Therefore, the accused was the person last seen with the deceased before her death.
45. Based on the afore, the doctrine of last seen applies. The doctrine states that the last person seen with the deceased will be presumed to have killed the deceased unless evidence to the contrary is adduced.



46. The said doctrine was discussed by the Court of Appeal in the case of; Kimani v Republic (Criminal Appeal 41 of 2022) [2023] KECA1390 (KLR)(24 November 2023)(Judgment) where the Court stated that:

“ 31.... The doctrine of ‘last seen alive’ is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened...”

33. In the Nigerian Case of *Achie v State* (1993), the Court relied on the case of *Ismeni v State* (2011) Kuktan JSC on the doctrine of ‘last seen’ and expressed itself as follows:

“In a case of culpable homicide as in the present one where the doctrine of last seen has been applied, the law presumes that the person last seen with the deceased before the death was responsible for his death and the accused is expected to provide an explanation of what happened.”

47. The last seen doctrine stands as negation or an exception to the doctrine of “presumption of innocence”, as it is the law that where the victim was last seen by the accused, and is found dead, it will be presumed that the last person that he was last seen with is responsible for his death.

48. Pursuant to the aforesaid, the burden of explaining what happened to the deceased. Pursuant to the aforesaid, the burden of explaining what happened to the deceased shifts to the accused. In response, the accused person, however, raised an alibi that he was at home at home with two other people, including, DW2, at the time the incident occurred and that they were busy constructing his house.

49. PW1 and PW2 knew the accused person well as he is the brother to the deceased person’s father. They lived together in as neighbours. There is nothing to suggest any bad blood between the accused person, PW1 and PW2. They were both explicitly clear that they saw the deceased with the accused person when they were heading back to school after their lunch break.

50. From the record, it is apparent that the defence was only raised when the accused person was put on his defence. There was no indication by the accused person during the cross examination of the Prosecution witnesses that such defence was in the offing. In *Kiarie v. Republic* [1984] KLR 739 and *Wangombe v. Republic* [1980] KLR 149, the Court of Appeal held that even if the alibi defence is raised late, the trial Court must consider it and weigh it against the Prosecution’s evidence. Weighing the alibi against the Prosecution’s evidence, particularly the testimony of PW1 and PW2, who saw the accused person walking slowly behind them before they decided to rush to school without the deceased, confirmed the accused person’s presence at the area near the scene, leaves me with no doubt at all that the accused person’s alibi defence was but than an afterthought.

51. Regardless of the fact that the alibi was not raised early in the proceedings, I have nevertheless carefully considered it alongside the Prosecution evidence. That I have done with such greatest care and to satisfy myself that in all circumstances, it is safe to act on the evidence on identification by recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of *Wamunga v Republic* (1989) KLR 426 stated as under: -

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied



that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

52. It was also held in *Nzaro v Republic* (1991) KAR 212 and *Kiarie v Republic* (1984) KLR 739 by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.
53. That notwithstanding, even if it was, applying the well settled principles of circumstantial evidence referred to elsewhere in this judgment, this still finds that the circumstantial evidence led by the evidence of PW1 and PW2, and the forensic evidence, that showed that the seminal fluid on the high vaginal swab as collected by PW9 and handed over to PW10 by PW8 matched the DNA profile of the blood of the accused person. The accused person having been directly linked to the death of the deceased, it can safely be concluded that these pieces of circumstantial evidence established the accused person's guilt beyond a reasonable doubt.
54. From the foregoing, I find that in answer to this prima facie evidence, the accused person raised an alibi defence which was dislodged by the evidence of PW1, PW2 and PW10. The manner in which the deceased met her death was unlawful. The wounds sustained during the assault can properly be said be the cause of death. This death in question was not justified or excusable. The accused person is therefore found to have committed the unlawful act that caused the death of the deceased.

d. Malice aforethought

55. Having found that the Prosecution has proved the actus reus of the offence, the issue for determination is whether malice aforethought can be inferred.
56. The offence of murder is complete when, “malice aforethought” is established if, pursuant to Section 206 of the Penal Code evidence proves 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.”
57. When none of the aforesaid elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under Section 202 Penal Code which is punishable under Section 205 of the Penal Code by a term of imprisonment extending up to life imprisonment.
58. In *Morris Aluoch v Republic* Cr. Appeal No. 47 of 1996 [1997] eKLR), the Court of Appeal cited the case of *REX v Tubere s/o Ochen* (1945) 12 EACA 63 with approval where it was in stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the



intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.”

59. Based on the afore provisions, knowledge that one’s action will likely cause death or grievous harm, even if there is indifference to the outcome, amounts to malice aforethought. Thus, to prove malice aforethought the knowledge of probable harm is equally relevant.
60. In addition, it is trite law that, every person is liable for the natural and probable consequences of his/her actions.
61. To revert back to the matter herein, the deceased was a child aged 11 years. Indeed, a child of tender age. The accused is the uncle. He had the natural, moral, legal and parental responsibility to take care of the deceased and the degree of care expected is high due to the age of the child.
62. The deceased died as a result of both physical and sexual assault. The accused is a male adult and when he defiled the deceased, he knew very well the consequences of his action. The accused’s act of defiling the deceased to death is not only inhuman, barbaric, heinous, ferocious, brutal and but extremely cruel.
63. What did the accused expect when he placed his entire body mass on a child of such age and even strangle her and injure her lower jaw in the course of the defilement? The injuries on the child’s neck and jaw tell of the torture the deceased went through. The lack of oxygen due to pressure exerted on her neck and jaw speaks volume of what painful death the deceased suffered. Such aggravating acts could only but result in the death of the deceased and only points to a person who had the intent to hurt her to death. Even then a simple question is, why would the accused defile an 11year old child?
64. I have considered the defence raised by the accused person and I find that, they hold no water. First and foremost, the fact that he hails from the second house and he alludes to an issue of land between the first and 2nd house does not exonerate him. Secondly, the fact that DNA results relating to the buccal swab taken from him positive does corroborate all the other circumstantial evidence available and linking him to the offence.
65. Based on the afore I hold the view that the accused had malice aforethought. Consequently, I find the accused, Harbert Kipnuche Ndiwa, guilty of the offence of murder and accordingly convict him pursuant to Section 322(1) Criminal Procedure Code.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 4TH DAY OF FEBRUARY 2026.

MWANAISHA .S. SHARIFF

JUDGE

In the presence of:

1st Accused

Ms Matere for Prosecution

Peter Machoni - Court Assistant

