



**Republic v Khaembambai (Criminal Case E022 of 2022)
[2026] KEHC 1084 (KLR) (28 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 1084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E022 OF 2022
MS SHARIFF, J
JANUARY 28, 2026**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID SIMIYU KHAEMBAMBAI ACCUSED

JUDGMENT

A. Introduction

1. The accused persons herein David Simiyu Khaemba Mbai 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 the 31st day of July, 2022 at Burangasi village in Bumula Sub- County within Bungoma County, he murdered Anclate Wambile Mbulano.
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. PWI was Methusela Barasa, who testified that he was a student and the deceased herein was his brother. According to him, on 31st July 2022, at around 7.00 p.m. the deceased left for the trading center to purchase some airtime when he later heard noises from outside and on investigations he saw the deceased in the middle of three people, including the accused herein. He told the Court that it was dark, but due to his proximity to them he was able to recognize them. The deceased was able to escape the three individuals and headed to the house where he fell down and he noticed blood oozing from his ribs. He noted that the deceased was stabbed with a sharp object and he quickly rushed him to the hospital. According to him, the deceased claimed that it was the accused who stabbed him with a knife before he died.



4. On cross-examination, he told the Court that the deceased had gone to the shopping center that was about 200 meters from their house. That whereas it was dark, there was an ongoing initiation ceremony, and he vividly saw the accused person insult the deceased who remained quiet. He told the Court that he saw the accused person and two others not before Court surrounding the deceased and that the accused person stabbed the deceased on the ribs with a knife. He further testified that prior to the incident there existed bad blood between the deceased and the accused person.
5. On re-examination, he told the Court that he did not see the accused person stabbing the deceased and that it was the deceased who told him the deceased stabbed him with a knife.
6. PW2 was Batista Nabwile Saenyi, who testified that the deceased herein was his son and the accused herein is his brother-in-law. According to him, on 31st July 2022, at 7.00 p.m. the deceased left the house for the shopping center to buy airtime only for PW1 to later alert him that there were noises emanating from outside wherefore he ran towards the source of the noise only for him to see the deceased running towards their home with the accused person in hot pursuit while armed with a long knife. He told the Court that when the accused person saw him, he retreated and when he caught up with the deceased he inquired on what happened only for the deceased to claim that the accused person had stabbed him using a long knife. The quickly took the deceased to the hospital where he succumbed to his injuries. He told the Court that the accused person had a sun king solar light while the deceased had on his phone torch.
7. On cross-examination, he told the Court that he did not witness the incident and he only stepped outside the moment he heard the noises, and that he learnt that the accused person had been insulting the deceased. This witness testified that he had been 50 meters away when he heard the noise. He told the Court that there was a group of people following the circumcision ceremony, but they were not near the scene of the incident. That prior to the incident they had a frosty relationship with the accused.
8. PW3 was Vincent Masinde Ndalila, testified that on 31st July 2022, at 9.0 p.m. he heard noises outside his house prompting him to reach out to his neighbor Gilber Muindi who brief him of what had happened. According to him, Gilbert claimed that the accused person had a disagreement with the deceased herein and stabbed him. He rushed to the scene and confirmed the same and established that the deceased was rushed to the hospital. He told the Court prior to the incident he participated in a land dispute involving the family of the deceased and the accused person.
9. On cross-examination, he told the Court that he was a clan elder for 5 years and he did not witness the incident as he was only briefed of what had occurred.
10. PW4 Moses Khaemba Mbulano, a brother to the deceased testified that on 29th July 2022 at 7.30 p.m. he had visited a neighbor and while heading back home he met with the accused herein and one Alexander Wafula who lit the torch on his face and assaulted him, but the villagers rescued him. On 31st July 2022, he learnt that the accused and two other people ha threatened to wipe out his family. He told the Court that the accused person has always been problematic and had been harassing the family of the deceased.
11. On cross-examination, he told the Court that his relationship with the accused has always been frosty and that on the date of the incident he saw the accused person chasing after the deceased, but did not see him stab the deceased.
12. PW5 Constant Barasa Okumu, testified that on 31st July 2022, at around 9.00 p.m. he received a report from PW3 alerting him that the accused herein had stabbed the deceased with a knife. She told the Court that she rushed to the scene and established the deceased was taken to the hospital, but the accused person was nowhere to be seen. According to her, the accused was previously convicted of



- the offence of Robbery with Violence and he was sentenced to 4 years imprisonment, and she has previously arbitrated a dispute between the accused and the family of the deceased.
13. On cross-examination, she told the Court that the issues between the accused and the family of the deceased were not over land matter, but witchcraft allegations.
 14. PW6, No. XXX SGT Victor Kaberur, who testified that on 1st August 2022, he received a report of stabbing which led to the deceased succumbing to the injuries. He placed the accused person in custody and also preserved a certain knife that had been presented as an exhibit. He told the Court that the accused person was availed to the police station by his father.
 15. On cross-examination, he told the Court that he received a small sword from the accused herein, but did not prepare an inventory on the sword and that the accused person admitted to the offence.
 16. On re-examination, he told the Court that he was not the investigating officer and that he did not visit the crime scene.
 17. PW7 Godwin Khamala Waliama, testified that he is a Government Analyst based at Kisumu Government Laboratory and that he was before the Court to produce a report prepared by his colleague who was rendering evidence before another Court. He told the Court that following the request of Sgt. Mugumo of DCI Bumula and vide an exhibit memo his colleague had been instructed to do a DNA examination and establish any comparison of the biological evidential material from the exhibits submitted. The exhibits were:
 - a. A knife with an improvised cream plastic handle in a brown envelope marked “A”.
 - b. A white sleeveless vest.
 - c. A navy blue long pair of trouser.
 - d. Blue and white long-sleeved checked shirt.
 - e. A black blazer/coat.Items 2, 3, 4 and 5 were in one brown envelope marked as “B” and all indicated as belonging to the deceased herein.
 - f. Blood samples for the accused person herein in a vacutainer tbe marked as “C”.
 18. The reported concluded that the DNA profiles generated from the blood stains from the listed in tems marked as “A” and “B” matched and belonged to the deceased herein, but the DNA profile of the accused person did not match the DNA profiles generated for the list of the items. He availed the DNA report dated 18th August 2023, as PEXH 6 A and the exhibit memo as PEXH 6 B.
 19. On cross-examination, he told the Court that the items were forwarded to the Government Chemist and the accused blood stains were not found in all the exhibits.
 20. PW8 NO. XXX P.C Kipkemboi Felix, testified that he took over the case from SGT. Harrison Mbumo who retired from the force. He told the Court that he only interacted with the accused when he presented him to Kakamega High Court
 21. PW9 Dr. Elly Kiplimo Kosgey, testified that he was based at Bungoma County Referral Hospital and he was in Court to avail the deceased person’s post mortem report dated 4th August 2022. According to him, on external and internal examination of the deceased he opined that the cause of death was as a result of hemorrhagic shock due to penetrating stab wound. He availed his post mortem report as PEXH 7.



22. PW10 was No. XXX SGT. Harrison Mbumo, who testified that he was the investigating officer in this matter and that on 31st July 2022, at 11.40 p.m. he received a murder report and in the company of his colleagues, they visited the scene wherein they established that the deceased had been stabbed with a knife and had been rushed to the hospital. On further investigations they established that the accused herein was the culprit and they proceeded to the hospital where they saw the body of the deceased and went to the mortuary to collect the clothes which had blood stains. That they recorded all the witness testimonies and on 1st August 2022, the accused herein presented himself at the station in possession of the bloodstained knife. He proceeded to forward the collected exhibits to the Government analysts Kisumu for analysis as follows: PEXH 1- one small sword, PEXH 5- a torn white sleeveless vest, PEXH 2- a black blazer, PEXH 3- a checked shirt, PEXH 4- a black trouser. He told the Court that when interrogated the accused herein he did not deny his involvement.
23. After the 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

24. DW1, David Simiyu Khaemba Mbai, accused person herein gave a sworn testimony and denied his involvement with the killing of the deceased herein. According to him, on 31st July 2022, at night he heard people fighting at a circumcision ceremony and he was informed that the deceased herein had been assaulted with a knife. He stated that he was never at the scene when the deceased was assaulted with the knife and that PW1 never saw him stab the deceased and that PW6 never arrested him with a knife despite the O.B disclosing that he was arrested with a knife.
25. On cross-examination, he told the Court that on day of the incident he was at his work place until 5 p.m. and it was around 7-8 p.m. that he heard about the death of the deceased herein, and that his neighbours PW4, PW1 and PW2 were jealous of him and the fact that his farm is 3 ½ acres. He insisted that he did not stab the deceased.
26. 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 complied with the Court directive.

D. Analysis and determination

27. In consideration of the evidence of 10 Prosecution witnesses and in consideration of the defence sworn statement, 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.
28. 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.
29. 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.”



30. 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

31. The postmortem form PEXH7 filled by PW9, Dr. Elly Kiplimo Kosgey, on 4th August 2022, opined that the cause of death was as a result of hemorrhagic shock due to penetrating stab wound. I find that the Prosecution proved this ingredient of the offence beyond reasonable doubt.

b. Death was caused by an unlawful act or omission

32. The evidence of the doctor was that the deceased died as a result of hemorrhagic shock due to penetrating stab wound coupled with recovered weapon and the evidence of PW7, the Government Analyst, stating that the said weapon had the blood stains of the deceased points 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 person committed the unlawful act which caused the death of the deceased

33. PW1 and PW2 identified accused person as the person they saw the deceased with prior to his demise. PW1 testified that he saw the deceased surrounded by the accused person and 2 other people prior to his fleeing from them and when he got to the house that was when he noticed the blood oozing from his ribs and deceased claimed that it was the accused person who stabbed him with a knife. PW2 testified that when PW1 alerted him of the noises coming from outside the house, he followed to see what was happening only for him to see the deceased running towards their home with the accused person in pursuit armed with a long knife. He told the Court when the accused person saw him, he retreated. Further, he testified that on inquiring from the deceased on what exactly happened to him, the deceased told him that the accused person stabbed him with a knife. He told the Court that he was able to identify the deceased vide the Sun King Solar light was carrying and the phone torch of the deceased that was on. In his defence, the accused denied killing the deceased and claimed that he was not at the scene of the incident and that he arrived at the scene after the deceased was already stabbed.
34. Based on the afore, as to whether the statements amounts to a dying declaration Section 33 (a) of the Evidence Act (Cap 80) states that:-

- “ 33. Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, ... are themselves admissible in the following cases—
- (a) Relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into



question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;.....”

35. The principles governing dying declarations were considered by the Court of Appeal in the case of Philip Nzaka Watu v Republic [2016] eKLR. The Court held that:-

“Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in Choge v. Republic (supra):

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

36. The Court reiterated those principles in the case of Charles Njonjo Gituro V Republic [2019] eKLR; and in the case of Moses Wanjala Ngaira V Republic [2019] eKLR where it held inter alia:-

“19. The situation in Kenya is, however, different as exemplified in section 33 of the *Evidence Act* (supra). There is a catena of authorities from this Court on the nature and the manner of receiving and considering evidence of dying declaration. We take it from Choge v Republic [1985] KLR 1, citing the predecessor of this Court in Pius Jasanga s/o Akumu R (1954) 21 EACA 331:

“In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the



awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (*Republic v Muyovya bin Msuma* (1939) 6 EACA 128. See also *Republic v Premanda* (1925) 52 Cal 987.)

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:

“The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed... The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (*Ramazani bin Mirandu* (1934) 1 EACA 107; *R v Okulu s/o Eloku* (1938) 5 EACA 39; *R v Muyovya bin Msuma* (supra). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).

It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (*R v Eligu s/o Odel and another* (1943) 10 EACA 9; *Re Guruswani* [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in *R v Eligu s/o Odel and Epongu s/o Ewunyu* (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (*R v Said Abdulla* (1945) 12 EACA 67; *R v Mgundulwa s/o Jalo* (1946) 13 EACA 169, 171).”

See also *R v Eligu s/o Odel* (1943) 10 EACA 90, *Okethi Okalo v Republic* [1965] EA 555, *Aluta v Republic* [1985] KLR 543, and *Kihara v Republic* [1986] KLR 473.

20. The law in this area is clearly articulated in the case of *Nelson Julius Karanja Irungu vs. Republic* [2010] eKLR which was cited to us by learned counsel for the appellant. It is clear however that this case does not support



counsel's contention that the deceased's statement does not qualify as a death declaration because she was not under contemplation of imminent death. We do not therefore need to discuss the details as to whether the deceased was in imminent danger of death when she made the statement in question. The statement is clearly admissible in evidence.”

37. The statements by the deceased to the PW1 and PW2 relate to the events that eventually led to his death and I am therefore satisfied that they amounted to a dying declaration. Whereas a dying declaration does not require corroboration, the deceased was very consistent in his mention of the accused as one who attacked him and it is my finding that this coupled with the evidence of PW6, PW7 and PW9, leaves no doubt that the Accused committed this offence.
38. Analyzing the above evidence that the Accused person and the deceased were together during his assault; and, PW1 and PW2 witnessing the deceased flee from the accused person and PW2 seeing the accused person pursue the deceased with a knife with the aide of the Sun King Solar light on the accused person's hand and the torch light on the deceased's phone that was on and the evidence of PW6 stating that the accused person was brought into the station with a knife as captured on the OB, leads me to the firm conclusion that it is the accused person and no one else that killed the deceased. The accused person bore a statutory burden to discharge a rebuttable presumption as envisaged in the *Evidence Act* and he failed to do so in their defence. I find the Accused person's explanation and conduct inculpatory.

d. Malice aforethought

39. Concerning malice aforethought, Section 206 of the Penal Code specifies that:
 - “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.”
40. In the locus classicus case of Republic vs Tubere S/O Ochen [1945] 12 EACA 63 it was 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 before, during and after the attack.
41. In the instant case, malice can be inferred from the circumstances of the case. PW1 and PW2 testified that the deceased told them that the accused person stabbed him with a knife because of a phone while PW6 told the Court that the accused was brought to the station with a blood-stained knife and as per PW7 DNA analysis report confirmed that the blood stains on the knife matched that of the deceased herein. PW2 further testified as the deceased was fleeing he saw the accused person with a knife pursuing him.
42. It was obvious that the act of assault on the deceased person was deliberately intended to kill him or cause him grievous harm, so that there can be no question that malice aforethought was established.



43. Consequently, given that the deceased died from hemorrhagic shock due to penetrating stab wound and the accused person was the last person seen chasing the deceased with a knife. His father presented him to the police.
44. In conclusion, this Court finds that all the ingredients of the offence of murder have been proved by the Prosecution beyond reasonable doubt. The accused person, David Simiyu Khaemba Mbai is found guilty of the offence of murder as charged and I convict him accordingly pursuant to Section 322(1) Criminal Procedure Code.
45. Sentence will be passed after receiving submissions on mitigation by the accused.
Orders accordingly.

DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 28TH DAY OF JANUARY 2026.

MWANAISHA .S. SHARIFF

JUDGE

In the presence of:

Accused

Mr Anwar for the accused person

Ms Matere for Prosecution

Peter Machoni - Court Assistant

