



**Republic v Waithaka alias Champe (Criminal Case E004 of 2023)
[2026] KEHC 3534 (KLR) (12 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL CASE E004 OF 2023
FN MUCHEMI, J
MARCH 12, 2026**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOHN KIARIE WAITHAKA ALIAS CHAMPE ACCUSED

JUDGMENT

1. The accused person faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the night of 8th/9th October 2023 at Gatukuyu village in Gatundu North Sub-County within Kiambu County jointly with others not before the court murdered Kevin Mungai.
2. The prosecution called nine (9) witnesses in support of its case. Upon the prosecution closing its case, the Honourable Court found that the accused had a case to answer thus placing him on his defence.
3. The evidence of the prosecution was that on the night of 8th and 9th October 2023, PW5 was walking home with the deceased after watching a football match when one Musyimi met them on the road and hit the deceased with his shoulder. Musyimi further called the deceased “kihii” meaning an uncircumcised man and the two men began fighting. PW5 separated them after which he and the deceased ran towards his home in the company of Musyimi, chased them from behind and he overtook the deceased and hit him. The two started a fight. It followed that the two men one named Mbai and the accused joined in the fight and began to beat up the deceased. After sometime, the three men walked towards their homes. The following day, PW5 learnt that the deceased had been assaulted and passed away. The accused was thereafter arrested and taken for mental assessment where Dr. Sheila Mwangi declared him fit to plead.
4. Post mortem of the deceased’s body was conducted by Dr. John Mathaiya and he formed the opinion that the deceased died as a result of head injury due to blunt force trauma to the head.



5. Upon being put on his defence, the accused person elected to give sworn testimony but he did not call any witnesses. He stated that on the material night he was watching football at Wakadero Bar with Peter Muiruri and David Musyimi and when the match ended they went to the bus stage to board a matatu home. At the stage, they found Alex Wanyoro fighting with Joseph Kariuki and they were surrounded by a crowd. David Musyimi told the two men to stop fighting while the deceased urged the two men to continue fighting. The deceased, who was drunk at the time and one Musyimi began quarrelling and insulting the accused as well as Musyimi. He called an uncircumcised man. David Musyimi jumped at the deceased and they began fighting pushing the deceased to the ground. The accused stated that he and Peter Muiruri tried to separate the two men. Afterwards, the accused and Muiruri left the scene heading to the matatu stage. David Musyimi followed them to where they were standing and informed them that the deceased had hit him with a bottle. The accused and Musyimi returned to the scene and found the deceased and PW5. When the deceased and PW5 saw the accused and Musyimi approaching them they left the place. PW5 said that Davis Musyimi picked the broken bottle and followed the deceased. The accused and Peter Muiruri followed Musyimi and from a distance they heard a bang where the deceased was hit with the broken bottle. The accused and Peter left and went home and the accused was called by Njenga the following morning informing him that the deceased had passed away.
6. The prosecution and the defence filed their submissions in this case which this court has perused and considered in this judgment.
7. The prosecution cited the case of *Gusambizi Wesonga vs Republic* [1948] 15 EACA 65 and submitted the deceased was seen alive on the night of 9/10/2023 by PW5 at Gatukuyu Village. He last saw the accused together with two people at large attacking the deceased and the following morning Kelvin, was found lifeless. The prosecution argued that its case wholly depended on direct and circumstantial evidence particularly the post mortem report which provided that the deceased suffered multiple injuries on the head which could only be attributed to third parties due to the nature of the injuries and the trauma. The prosecution submitted that the evidence which carried the element of grievous harm placed this charge under Section 206(b) of the Penal Code which deals with an intention to cause grievous harm to another establishing that the death of the deceased was unlawful.
8. The prosecution further cited the cases of *Shampal Shigh vs Republic* [1960] EA; *Republic vs Tubere s/o Ochen* [1945] 12 EACA 63 and *Karani & 3 Others vs Republic* [1991] KLR 622 and submitted that it proved the element of malice aforethought beyond reasonable doubt. The post mortem revealed that the deceased sustained injuries to the head, multiple bruises, swollen face, left scalp and cervical region, multiple facial and scalp bruises, multiple bruises of both arms mainly on the elbow and dorsum of the forearms which can be classified as defensive injuries. Thus, by the assailants targeting the head, there was no other intention but to kill the deceased.
9. Relying on the cases of *Mnyele vs Republic* [2010] EA 315; *Chivatsi & Others vs Republic* [2003] 2 EA 395; *Republic vs Kipkerring arap Koskei & Another* [1949] 16 EACA 135; *Mohammed & 3 Others vs Republic* [2005] 1 KLR 722 and *Mwangi & another vs Republic* [2004] 2 KLR 32, the prosecution submitted that PW5 is the key eye witness and he stated that on the material date together with the deceased they were heading home after watching a football match at 2.2. club and on the way they met with Musyimi who brushed shoulders with the deceased and immediately a scuffle ensued between them calling each other kihii. PW5 separated the two of them and proceeded to Makwa and they stood at Jubilee feeds shop when Musyimi followed them with the intention of fighting them. The deceased fought with the accused and defeated him following which he ran towards Joms Supermarket where his friends were. One of them Mbai was wearing a blue t-shirt written Wanare Fao while the accused wore a yellow jersey. The accused came running towards where he found Mbae and deceased standing. After seeing them the two men ran to different directions, the accused ran towards the road heading to



his home as the deceased ran to the feeder road heading to Karimenu River. The next morning Kevin was found lifeless. PW5 identified the accused's yellow jersey which was produced as Pexh2.

10. The prosecution submitted that the accused's defence corroborated the evidence of PW5 save that he twisted it a bit to suit his narrative just to mislead the court. He confirmed that he was at the scene together with Musyimi and Mbai and the exhibits recovered from his house belong to him being the yellow jersey, Exhibit No.2 and the faded jeans (Exhibit 10) were blood stained. The accused did not dispute that the blood in them was that of the deceased. The prosecution further submitted that the accused's defence ought to be disregarded as he alleged that a fight broke between Alex Wangoro and Joseph Kariuki which evidence was not raised during cross examination of PW5 who was at the scene. Further he alleges that the deceased fell down and got injuries on his arms and that he assisted him and that is the reason blood stains belonging to the deceased were found on his clothes. The accused did not seek clarification from PW5 during cross examination on the injuries suffered by the deceased. Furthermore, during cross examination of PW4, he stated that the deceased had defensive injuries indicating that he was trying to defend himself from his attackers and as a result got multiple bruises on both arms mainly on the elbow and dorsum of the forearms which displaces the accused's defence that the deceased suffered injuries on the arms as a result of a fall.
11. The defence submitted that the prosecution had failed to prove its case beyond any reasonable doubt. He submitted that introducing Wangoro and Kariuki was a reference to clarify the context of the altercation and identify the persons who were at the location. A legitimate interpretative approach to the evidence and not an afterthought. The accused submitted that although the prosecution repeatedly claimed that he admitted to being at the scene of the crime, he never admitted to being at the location where the deceased's body was found or where the murder is said to have occurred nor did any prosecution witness admit to seeing him at the scene of the crime.
12. The defence submitted that PW5 did not witness the killing of the deceased but admitted that he fled the scene and the deceased and the accused ran in different directions. The deceased's body was discovered the following morning and at a different location from where PW5 last saw him, which creates a clear and fatal break in the chain of events leaving room for other intervening factors. Relying on the case of *Sawe vs Republic* [2003] KLR 364, the accused submitted that suspicion however strong cannot be the basis of a conviction.
13. The defence cited the case of *Bukenya & Others vs Uganda* [1972] EA 549 and submitted that the prosecution failed to call Steve Mwaura who stated in his written statement that the deceased was chased by three young men who had been called by Musyimi and that Musyimi was armed with a bottle at the time. The evidence by Steve Mwaura is material as it confirms the presence of multiple assailants and it highlights the role of Musyimi as an armed aggressor.
14. The defence submitted that the prosecution failed to establish common intention under Section 21 of the Penal Code. Further in *Njoroge vs Republic* [1983] KLR 197, the court held that common intention cannot be inferred from mere presence at the scene. The accused further submitted that the prosecution produced a bottle as an exhibit but failed to subject it to forensic examination. No analysis was done to establish the presence of the deceased's blood, fingerprints and the link between him and the bottle. The defence argued that the said omission is fatal as Musyimi was alleged to be armed with the bottle as confirmed by the prosecution witness Steve Mwaura. Relying on the case of *Republic vs Ahmed Mohammed Omar & 5 Others* [2014] eKLR, the defence submitted that the prosecution's explanation that the said bottle could not be subjected to forensic examination due to multiple fingerprints on it is uncertainable. The defence further argued that without the forensic linkage, the court is left to speculate as to who wielded the bottle and whether it caused the fatal injuries leaving a significant evidentiary gap.



15. The defence submitted that the presence of the deceased's blood on his clothing does not automatically translate to culpability for murder. The prosecution failed to demonstrate that the blood stains resulted from a fatal attack rather than lawful contact during an attempt to stop a fight. The defence further submitted that his conduct after the incident is inconsistent with that of a person who had committed a murder as he made no attempt to conceal, destroy or dispose of the clothes allegedly stained with blood.
16. The accused argued that there is no evidence demonstrating that he intended to kill the deceased or to cause him grievous harm. He was not armed with any weapon, did not pursue the deceased independently and did not inflict injuries upon him. The fatal confrontation was between the deceased and Musyimi who ran after the deceased while holding the bottle while he and the others followed from a distance and later disengaged altogether after hearing a bottle break. Additionally, the accused argued that no prosecution witness testified to seeing him assault the deceased, threaten him or act in a manner suggestive of an intention to kill or cause grievous harm. There is also no evidence of prior animosity, grudge or motive between him and the deceased that could support an inference of malice aforethought.
17. The defence cited the cases of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR; *Kipkering arap Koske & Another vs Republic* (1949) 16 EACA; *Sawe vs Republic* [2003] KLR 364 and *Erick Odhiambo Okumu vs Republic* [2015] eKLR and submitted that the circumstantial evidence relied upon by the prosecution falls far below the required threshold. The defence further submitted that the evidence of PW1 introduces a critical temporal and factual gap during which the deceased may have encountered other persons or suffered injuries unrelated to the earlier altercation. The presence of multiple possible assailants was never resolved by the prosecution. Thus the prosecution failed to establish a complete and unbroken chain of circumstantial evidence pointing irresistibly to his guilt.

The Law and Analysis

18. The burden of proof in criminal cases lies on the prosecution to establish that the deceased's death was a result of the unlawful act of the accused person. The prosecution must prove the primary ingredients of the offence of murder namely:-
 - a. That the deceased died as a result of the unlawful act of the accused;
 - b. That the accused person has been positively identified and placed at the scene of the crime;
 - c. That the unlawful act was actuated by malice, rather that malice aforethought existed on part of the accused person.
19. Upon the death of the deceased, PW4 Dr. John Mathaiya conducted an autopsy on the deceased. The post mortem report shows that the cause of death was head injury due to blunt force trauma to the head. The death and cause of death have been established by the prosecution herein.

Whether the accused caused the death of the deceased by either an unlawful act or omission

20. The prosecution case consisted of direct evidence and circumstantial evidence. PW5 saw the accused person fighting with the deceased and the following morning he learnt that the deceased had passed away. The circumstantial evidence relates to what actually transpired after the accused and the deceased fought and went home up to when the deceased was found dead by PW1 and the evidence of last seen together that is the deceased was last seen fighting with the accused.



21. Circumstantial evidence must be examined in light of the principles set out by the Court of Appeal in *Sawe vs Republic* [2003] KLR 364 where the court held:-

“In order to justify, on circumstantial evidence, 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 guilt. There must be other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

22. Similarly in the case of *Sylvester Mwacharo Mwakeduo & Another vs Republic* [2019] eKLR:-

“Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases for instance in the case of *Judith Achieng’ Ochieng’ vs Republic*, Criminal Appeal 128 of 2006, this Court stated the law as follows:-

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

- a. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;
- b. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- c. 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;
- d. In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any reasonable hypothesis other than that of the accused’s guilt.”

23. Precisely, the evidence of the prosecution was that on the material night around midnight, PW5 was on his way home accompanied by the deceased after watching a football match at Gatukuyu market. One Musyimi found the two walking and he brushed the deceased on the shoulder and called him “Kihii” meaning an “uncircumcised man.” The two men started fighting but PW5 separated them. The accused person namely Kiarie came to the scene accompanied by one Mbai. The two were friends of Musyimi and they came to help Musyimi in the fight against deceased. PW5 and the deceased ran away in different directions. However, PW5 got home safely and did not know the fate of the deceased until the following morning when he learnt that he had died of severe injuries possibly inflicted on him during the fight.



24. The accused herein was arrested but his companions in the material night are still at large.
25. The defence of the accused was that he witnessed the fight between Musyimi and the deceased. He said that Musyimi ran after the accused with a bottle in his hand ready to harm the deceased. He further stated that on the fateful night he was in the company of Musyimi and Peter Muiruri when they went to take a vehicle to go home and found Alex Wangoro and Joseph Kariuki fighting. Musyimi tried to break up the fight while the deceased instigated the fight. Musyimi and the deceased began to fight and the accused tried to stop them thereby getting blood stains on his jersey as the deceased had sustained injuries on his arms and was bleeding. The accused then left to take the vehicle home when Musyimi went to where accused and others were. He told them that he had hit the deceased with a bottle. The accused then stated that when he and Musyimi went back to where the fighting had taken place, the deceased and PW5 upon seeing them ran away. Musyimi then took the bottle and followed the deceased. The accused stated that he and Muiruri followed Musyimi and they heard a bang as Musyimi hit the deceased. The accused person, in his defence did not call the said Peter Muiruri as witness. The accused said he saw one Alex Wangoro and Joseph Kariuki fighting. The accused had an opportunity to cross examine PW5 about the fight between Alex and Joseph as PW5 was also at the scene when the fight broke out.
26. On the issue of identification of the accused person, PW5 gave evidence in court to the effect that he identified the accused person on the fateful night helping Musyimi who was fighting with the deceased. PW5 testified that there were streetlights on the road and visibility was clear. The witness described the clothes the accused person was wearing that is, a yellow jersey which was found in his house at the time of his arrest. The accused said his yellow jersey got blood-stains as he was separating Musyimi and the deceased during the fight. He said it was Musyimi who hit the deceased with a bottle on the head. However, PW5 in his evidence said the accused was actively involved in the fight with Musyimi against the deceased. The blood stains must have come from the deceased to the clothes of the accused. The Government Chemist report said the jersey was heavily stained with human blood. The blood on the jersey matched that of the accused as well as his nail clippings in the DNA analysis.
27. The accused argues that the prosecution did not call crucial witnesses to prove its case in particular the accused states that the prosecution ought to have called Steve Mwaura because he indicated in his witness statement that he saw Musyimi running after the deceased with a bottle in his hand.
28. It is trite law that the prosecution is required to avail to the court all relevant evidence to enable the court make an informed decision based on the evidence available. However, there is no legal requirement on the number of witnesses to prove a fact. Section 143 of the *Evidence Act* (Cap 80) Laws of Kenya provides:-
- No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.
29. In the case of *Bukenya & Others vs Uganda* [1972]EA 549 the court addressed itself thus:-
- a. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
 - b. That the Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.



30. Similarly in *Keter vs Republic* [2007] 1 EA 135 the court held inter alia thus:-

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

31. It is evident here that the prosecution did in fact call the material witnesses whose evidence as a whole it assessed to be sufficient. Furthermore, PW9 the investigating officer testified that there were three key witnesses namely PW5, Michael Ngethe and Martin Mwaura but the last two witnesses left their known places of residence and disappeared and they were never arrested to date. Furthermore on perusal of the said witnesses statements, their testimonies support the facts of the case as testified by PW5. Thus not calling the said witnesses did not prejudice the accused contrary to what the accused has alleged. It is therefore my considered opinion that the prosecution is an independent entity and ought not to consult anyone as to who to summon as a witness.

32. The post-mortem report by Dr. J.N. Mathaiya found the cause of death to have been as a result of the multiple injuries on the head, forearms, neck, with skull fractures, facial nasal and scalp bruises caused by a blunt trauma. There was evidence that the deceased was hit with a bottle on the head. But injuries were all over his upper body. This was indicative of an attack by more than one person, the accused being one of them.

33. This case consists of both direct and circumstantial evidence upon analysis of the said evidence, I am of the considered view that the prosecution have proved that the accused with others not before the court unlawfully killed the deceased.

Whether the accused had malice aforethought

34. Section 206 of the Penal Code stipulates that malice aforethought is deemed to be established by evidence when any of the following circumstances are proved:-

- a. An intention to cause the death of another.
- b. An intention to cause grievous harm to another.
- c. Knowledge that the act or omission causing death will probably cause death or grievous harm to someone, whether that is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
- d. An intent to commit a felony.
- e. An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.

35. For an offence of murder to be proved, the prosecution must prove that the accused had malice aforethought at the time of inflicting the fatal injuries. The injuries inflicted on the deceased were so grave and extensive, completely damaging the head, brain, face, upper limbs and back. For the accused to inflict such serious injuries, he had the intention of causing grievous harm and finally death of the deceased. I find that the prosecution has proved malice aforethought on part of the accused.

36. Thus from the above analysis of the evidence, I find that the prosecution has proved beyond reasonable doubt all the ingredients of the charge of murder thus displacing the accused's defence.

37. Consequently, I find the accused guilty of murder contrary to Section 203 as read with 204 of the Penal Code and convict him accordingly.



JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 12TH DAY OF MARCH 2026.

F. MUCHEMI

JUDGE

