



**Republic v Mungai (Criminal Case 56 of 2017)  
[2026] KEHC 4000 (KLR) (Crim) (17 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 4000 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL CASE 56 OF 2017**

**LN MUTENDE, J**

**MARCH 17, 2026**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOSEPH NJOROGE MUNGAI ..... ACCUSED**

**RULING**

1. On the 8<sup>th</sup> December, 2017, the Director of Public Prosecution informed the court of the information against the Accused, Joseph Njoroge Mungai. It was stated that he had contravened Section 203 as read with Section 204 of the Penal Code. Particulars being that he murdered Faustine Mwandime Mandliu on 6<sup>th</sup> December, 2017 at Chiromo Lane Medical Centre.
2. Having denied the allegations, the matter proceeded to trial. The prosecution availed a total of fifteen (15) witnesses and closed its case on 20<sup>th</sup> March, 2025. It was indicated by the defence that submissions on no case to answer would be filed, and indeed there was compliance. A ruling was delivered on 4<sup>th</sup> June, 2025 where the Accused was placed on his defence pursuant to the provisions of Section 306(2) of the Criminal Procedure Code; and, the Accused notified the court that he intended to give sworn evidence on his behalf and he would be calling witnesses whose names would be furnished to court and the State. On 14<sup>th</sup> July, 2025 the matter did not proceed as scheduled following indisposition of the trial Judge. When it ultimately came up on 10<sup>th</sup> November, 2025 the learned defence counsel Mr. Kimamo Kuria informed the court that they had an application to make. Following absence of the prosecution counsel, it was not possible.
3. Subsequently, through a Notice of Motion dated 12<sup>th</sup> November, 2025, the Accused (Applicant) seeks orders thus;
  1. Spent.



2. Pending the hearing and determination of this suit, this honourable court be pleased to grant the Defendant's/Applicant's expert witness, Mr. Anthony Wahome, a qualified ballistics expert access to;
  - a. The alleged murder weapon Ceska Pistol No. B573411 marked as Exhibit 1A for the purpose of forensic examination and ballistic testing.
  - b. The Ceska magazine marked as Exhibit 1B.
  - c. The eight (8) rounds of ammunition marked as Exhibit 2.
  - d. The spent cartridge case (bullet head) marked as Exhibit 3.
  - e. One fired cartridge case marked as Exhibit 4.
  - f. The scene of crime.
  - g. Scene of crime photographs taken by the scene of crime investigators.
  - h. Pathologist X-rays and report.
3. Such other or further orders the honourable court may deem fit to grant.
4. The application is premised on grounds that;
  1. The Accused person is facing the charge of Murder contrary to Section 203 as read together with Section 204 of the Penal Code Cap 63 Laws of Kenya.
  2. The prosecution called witnesses and produced evidence in support of the case which evidence include the alleged firearm used to commit the offence, photographs and medical reports and close its case on 20<sup>th</sup> March, 2025.
  3. On the 4<sup>th</sup> June, 2025, after having heard the prosecution's witnesses and evidence in support of the case this honourable court ruled that the Accused person Joseph Njoroge Mungai has a case to answer and thereafter placed him on his defence.
  4. At the Ruling date, the Accused person elected to give sworn evidence and call witnesses at the defence hearing.
  5. In view of the foregoing, the Accused person intends to call a ballistic expert, one Mr. Anthony Wahome who is a trained and qualified ballistics expert to testify in support of the defence case.
  6. It is necessary that the ballistic expert be granted access to the physical and documentary evidence produced in court by the prosecution to enable him prepare an expert report to be filed in court in support of the defence case which is coming up for defence hearing on 10<sup>th</sup> November, 2025.
  7. It is in the interest of justice and fairness that the application be allowed as prayed.
  8. This honourable court has powers to grant the orders sought.
  9. The application herein is brought in good faith.
5. The application is supported by an affidavit deposed by the Accused who avers that further to his option to give sworn evidence he intends to call a ballistic expert witness, one Antony Wahome, a trained and qualified ballistics expert to testify in support of his case and give his expert opinion in the matter. That per the advice given by his counsel, he should have adequate time and facilities to prepare



- a defence, reasonable access to the evidence, the prosecution relied on and to adduce and challenge such evidence to enable the court make a just determination on his innocence or otherwise. And, he shall not therefore, tamper, alter or destroy such evidence and shall preserve the evidence.
6. The defence also relied on a supporting affidavit sworn by Antony Wahome Kamunyi a graduate of Moi University College and trained ballistic expert and having been identified to tender expert evidence he would require reasonable access to the evidence, the prosecution relied on in support of the case and he will not tamper, alter, or destroy the evidence.
  7. In response thereto, the State through No. 55648 Corporal Patrick Kurunga, the then Investigating Officer deposed an affidavit stating that the qualification and/or expertise of Antony Wahome who is no longer in the National Police Service and not a gazetted firearms examiner was wanting.
  8. That the application ought to have been made immediately the Accused was arraigned in court on 27<sup>th</sup> December, 2017. That, per the advice from the prosecution counsel, Article 50 of *the Constitution* provides for access to evidence and the prosecution having furnished the Accused with the list of exhibits, witness statements and list of witnesses before the hearing commenced, he had ample time to access and examine the firearm and cartridges immediately it was indicated that the firearm was used in the commission of the offence.
  9. That the firearm having not been serviced from December, 2017 to date, evidence to be generated may not give accurate results due to passage of time and storage; and, there being no guarantee that the ammunition will be handled with care.
  10. That the scene at Chiromo Lane Hospital is a private property of which the Investigating Officer has no control over. And, that the premises has undergone renovation and makeover over the years. That on 8<sup>th</sup> November, 2021 the court visited the scene in the presence of the Accused, his counsel and the court took the evidence of PW1 and PW2 at the scene where the defence counsel on behalf of the Accused was able to cross examine witnesses, and photographs have also been availed.
  11. A further affidavit was deposed by the Accused dated 24<sup>th</sup> November, 2025 where he avers that the right to a fair trial is fundamental and non derogable. That according to Article 50(2) of *the Constitution* gives him the right to be heard and to have adequate time and facilities to prepare a defence, to adduce and challenge evidence presented by the prosecution.
  12. In a further affidavit dated 24<sup>th</sup> November, 2025, Antony Wahome Kamunyi depones that he has specialized skill and knowledge in the forensic science in general and specialization in ballistics having served nine (9) years as a forensic ballistic expert at the DCI before joining the United Nations Crimes Scene Support Services.
  13. That his evidence intends to seek to challenge or shed light on mishandling of the scene of crime given that no photographs or sketch plans were taken and if so, were not produced in court. That his role is to the court and not the party summoning him.
  14. That the Investigating Officer should have taken finger prints and the clothes and hands of the Accused should have been subjected to gun powder residue tests.
  15. That his evidence will not be affected by lapse of time whether firearms were serviced or not. That the firearms and ammunition will be examined under the supervision and presence of the Investigating Officer.



16. That he requires access of the scene for a forensic ballistic reconstruction of the scene whether the premises are private or not, whether the premises have been renovated or not. That when the court visited the scene, the Accused had not engaged him and he had not been placed on his defence.
17. The application was canvassed through oral submissions. It is urged by learned counsel Mr. Kimamo Kuria that one of the witnesses, Mr. Antony Wahome that the Accused wishes to call has special training in forensic and murder and to testify he requires access to the exhibits. That although the court visited the scene, the Accused had not been placed on his defence. That the matter being one of science, the expert witness will come in to assist the court. That the application be allowed for the Accused to be accorded a fair trial under Article 50 of *the Constitution*.
18. The application is opposed by the State through learned prosecution counsel Ms. Ogwero who questions the issue of reconstructing of the scene because this is not a question of reconstruction and the purported witness has not attached evidence of cases merited for case construction.
19. On the issue of access to the scene, it is submitted that the Accused, his counsel Mr. Kimamo Kuria visited the scene from where PW1 and PW2 testified. That the incident happened on 6<sup>th</sup> and 7<sup>th</sup> December, 2017 and the Investigation Officer has deponed that the premises has undergone renovation hence the scene is not the same.
20. That firearms requested have not been serviced for eight (8) years from the time of the incident hence results will be different due to storage and time. That the photographs sought were not adduced in evidence as they got spoiled in the hands of the scene of crime personnel as deponed.
21. On the question of the extract of the gun powder, it is urged that Doctor Oduor took the gun powder from the deceased but as explained by C.I. Tenai, they did not have the laboratory to test the gun powder.
22. That the finger prints of the deceased, it would not be availed as he was buried eight (8) years ago.
23. That the application has been brought in bad faith and should be declined.
24. In reply, it is urged by Mr. Kimamo, learned counsel, that the scene being renovated is a mere statement. That the court, Accused and counsel went to the scene five (5) years later and found relevant information why would the intended witness not go to the scene 4 years after to reconstruct the scene. That the access to the firearm could be limited to firing and analysis.
25. That they would like to debunk evidence of the Investigating Officer that at the time the DCI laboratory did not have facilities capable of analyzing the swabs given to them by Dr. Oduor Johansen. Then there is no intention of taking finger prints from the deceased by the expert witness. That if allowed to testify, the witness will be seeking to fault the investigating process.
26. I have considered the application, supporting affidavits and the one in opposition as well as rival submissions. This is a case where firearms (2) and ammunition as well as the fired cartridges were produced in evidence. The defence now seeks access of the exhibit by their own ballistic expert as well as the scene of crime.
27. Article 50(2) (c) of *the Constitution* provides thus;
  - (2) Every accused person has the right to a fair trial, which includes the right—
    - (c) to have adequate time and facilities to prepare a defence.



28. The court is obligated to ensure an accused person has reasonable time to come up with a defence strategy of proving innocence on the part of the Accused. It is for this reason that an accused person must have access to the exhibits that are relevant to the case relied on by the prosecution. And, for the court to ensure there is compliance, a pre-trial conference is undertaken.
29. Article 50(2) (j) of *the Constitution* enacts that;
- (2) Every accused person has the right to a fair trial, which includes the right—
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
30. Looking at the provision of the law, it grants the Accused a right to disclosure of evidence. The prosecution is legally bound to disclose all material evidence to be relied on and the person accused of wrong doing is allowed to have access of the scene.
31. Zeroing on expert reports and/or forensic reports, it is crucial that they be provided to the Accused and his legal representative to prevent miscarriage of justice. This is done to enable the Accused to prepare to challenge the prosecution’s case as well as scrutinizing the reports independently to verify the findings.
32. This also enables the defence to not only prepare the defence but also to cross – examine the expert with the requisite technical know how. The trial by ambush has always been abhorred. In *Cholmondeley v Republic* [2008] eKLR the court citing the English decision of *R v Word* [1993] ALL 557 had this to say;
- “The prosecution’s duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure.”
33. This reinforces the requirement that all evidence to be relied upon by the prosecution must be disclosed before the trial begins.
34. With that said, the question whether the prosecution intends to rely on expert evidence was raised during pre-trial directions (conference). At the time the defence was made aware of the nature of exhibits to be relied on including the forensic examination and ballistic testing which they would be expected to demolish in cross – examination.
35. On 31<sup>st</sup> October, 2019, as part of the pre-trial, the defence counsel Mr. Kuria Kimamo applied for an order to visit the location in question, the scene of crime, Chiromo Lane Medical Centre. The application was made about two (2) years after the incident. The State was concerned about expected changes due to time that had lapsed which may reduce accuracy, but the court found that the question had not been considered during pre-trial therefore the application was allowed.



36. In the result, the scene was visited by the court and while at the scene learned counsel Kuria Kimamo stated thus;

“We are informed there has been a major construction of the scene. It is a displacement of what was the Reception/Administration office but PW1 should be able to point out the layout of what was there. Once we have the scene inspected we are in agreement that we need not have a formal hearing over here so as not to disrupt duties at the hospital.”

37. However, due to the nature of the scene layout, the court opted to have PW1 testify partly while at the scene. This also enabled the court to make a sketch of the explanation of the layout which is on record and can be accessed by the defence.

38. It therefore follows that the argument by the learned Prosecution Counsel is not without basis. Counsel urges that Chiromo Lane Hospital a private property has had renovation carried out over the years which may call upon the defence to use evidence of PW1 as a basis and the finding of the court then.

39. Regarding the quest to have the firearm re-examined 8 years later; The defence has a constitutional right to reasonable access to exhibits and to independently re-examine exhibits availed by the prosecution with the permission/order of the court so as to build their case. And, in as much as the defence has a right to explain their case having been put on defence, which may include the opportunity to challenge evidence that should have been done as it was done in the course of the prosecution’s case that would include calling of independent ballistic expert’s findings. Eight (8) years down the line considering the manner of preservation of the exhibits, the question will be whether such evidence will be apt.

40. This brings us to the question as to what the duty of an expert witness is. An expert witness like a forensic ballistic expert comes to court to adduce evidence not necessarily in support of the prosecution’s case, such a witness offers an opinion based on the expertise in the area. That is why the court undertakes to ensure that an expert witness is well qualified in his field. The witness comes to court to assist it reach a just decision. And in doing so the court must ensure the integrity of the firearm/exhibit is maintained. It behooves such a witness to always be accurate and not distort facts.

41. PW12 the firearm examiner of ten (10) years standing testified and was cross – examined by the defence counsel with a view of challenging and establishing inconsistencies, if any, and/or any apparent errors. It is urged that the witness to testify will help the court determine how much the weight to attach to testimonies. A ballistic expert’s witness who specializes in knowledge in that area would be relevant, although such evidence is not necessarily binding.

42. There is no law that requires the defence to call another ballistic expert to re-examine firearms such that each case must be considered depending on its own facts. The defence wishes to call the witness as a defence witness which is acceptable, however, per the procedure the ballistic witness will have the report furnished to the defence (Exhibit 11) as well as copies of pathologist reports which he will use to adduce evidence. For the firearms, ammunition and spent cartridges produced in evidence he will be at liberty to refer to them while in court. Similarly, he is at liberty to access the pathologist reports.

43. The upshot of the above is that the application for re-construction of the scene is declined. similarly, the application for re-examining and testing of the firearms, eight (8) years down the line in disregard of the chain of custody and storage of the same is declined.

44. The application succeeds to that extent.

45. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17<sup>TH</sup> DAY OF MARCH, 2026.

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L.N. MUTENDE

JUDGE

