



**Republic v Lwangu (Criminal Case 63 of 2019)
[2026] KEHC 4988 (KLR) (20 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 4988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 63 OF 2019**

**AC BETT, J
APRIL 20, 2026**

BETWEEN

REPUBLIC PROSECUTOR

AND

ELIAKIM NAMUSENDI LWANGU ACCUSED

JUDGMENT

1. The Accused was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that on 2/10/2019, at Khayega Market in Kakamega East Sub-County of Kakamega County, he murdered Peninah Nangila Msungu.
2. The Prosecution called six witnesses while the Accused testified on oath but did not call any witnesses. The matter was heard by Hon. Lady Justice S. Chirchir who was transferred before she wrote her judgement. Subsequently, writes its judgement based on the evidence on record. Parties took directions before me and prayed that this court
3. PW1 was Eugene Anyambe Were and a brother of the deceased. He recalled that on 2/10/2019 while he was at his home in Bukura, he received a call from his girlfriend Sylvia who informed him that she had heard from Musa that his sister Peninah had died. He called Musa who confirmed the report after which he proceeded Khayega Police Station where he was directed to Kakamega Mortuary. There, he and one of his sisters were shown the body. They confirmed that the body had heavily bloodstained clothes belonged to his sister. He did not see any injuries and could not pinpoint the source of the blood. The next day, he went to his sister's house and saw blood on the floor and stuff strewn all over the place. According to him, the deceased lived alone. Later, he identified the body for purposes of post-mortem and attended the post-mortem.
4. PW2 was Carolyne Muhali, a trader who operates a bar and restaurant and who testified that the accused was her neighbour, whom she had known for 2 years. She testified that on 1/10/2019 which



was a Wednesday, the Accused came at 9.00 am and spent the day at the plot without talking to anyone. There was a new tenant called Peninah at the plot. At about 5.00 pm, Peninah called her and told her that the Accused used to be her boyfriend and she had realized that he was too young for her as she was forty two (42). She said that she moved to the plot because the Accused had threatened to burn her but she wanted to terminate her relationship with the Accused. After this, the witness parted ways with the deceased. The witness recalled that at 6.00pm the deceased said she would leave but at 7.00 pm, she came back and went into her house. Since her house was leaking, PW2 invited her over to stay the night. However, at 7:30 pm, a neighbour next to Peninah's house came and told the witness that Peninah had died. When she went to check, she found Peninah lying dead on the floor. There was blood on the floor but she did not notice any injuries. She did not see the Accused as he had left while it was raining. A neighbour called the police, who came to the scene and later arrested the Accused.

5. On cross-examination, PW2 said that the neighbour who informed her that Peninah had died was Mama Grace, who was also known as Ekira and that she informed the police that the deceased had informed her that she had received threats from the Accused.
6. PW3 was Julius Musungu Luwamu who identified the body of the deceased and witnessed the post-mortem. He testified that the deceased was the mother of his children and that the body had many stab wounds on the neck, chest thighs and other places. On cross-examination, he said he did not know the relationship between the deceased, who was not his wife, and the Accused.
7. PW4 was Dr. Dixon Mchana, a Consultant Pathologist at Kakamega County. He produced the post-mortem report and testified that on 7/10/2019, he performed an autopsy on the body of Peninah Nangila Musungu, which was identified to him by Julius. The body was of an African female in the early 40s and approximately 5 days had passed since death. Externally, the body was pale due to blood loss. There were five stab wounds; three on the left chest went below the ribs. The fourth one involved the left mid-arm and the fifth one was on the right side below the collar bone. There was a superficial slash wound across the left side of the neck. There was no evidence of recent medical intervention. Internally, there was a through-and-through perforation of the left lung with massive bleeding and lung collapse. There was a perforation of the spleen and minimal blood in the abdominal cavity with a distended stomach due to recent food but no alcoholic smell. The doctor said that as a result of the examination, he formed the opinion that the cause of death was internal bleeding secondary to sharp force trauma following assault.
8. Polycarp Lutta from the Government Chemist in Kisumu testified as PW5. He said he graduated with a Masters degree in Chemistry from JKUAT in 2006. He recalled that on 16/10/2019, he received some samples under the escort of CI Alex Njoroge from DCI Kakamega. The samples were;- a blood stained asbestos roofing collected from the scene (Marked A), blood stain sample of the deceased (Marked B), a white vest in a brown envelope (Marked C1), a pink long sleeved shirt in a brown envelope (Marked C2), a white long sleeved T-shirt in a brown envelope (Marked C3), a white long sleeved shirt in a brown envelope (Marked C4), blood sample of the Accused marked D. According to the witness, the asbestos and the vest were heavily stained with blood while the white shirt marked C4 was slightly stained. All the blood was of human origin.
9. PW5 testified that he did DNA profiling to determine the genetic relationships between the items and made a report with the following findings:- The DNA profiles generated from blood stains on the vest (C1), T-shirt (C3), and shirt (C4) all matched the DNA profile generated from the reference blood sample of the Accused; the DNA profile generated from the blood stains on the asbestos roofing item A matched the DNA profile generated from the reference blood sample of the deceased. PW5 produced the Government Analyst's report dated 7/6/2022 which was marked as PExh 2.



10. PW6 was the Investigating Officer Inspector Alex Njoroge who testified that on 2/10/2019, he accompanied the DCIO to the scene of crime at Khayega where they found some police officers had preceded them. There was blood in the house and the body had already been placed in a vehicle. They were informed by members of the public that the deceased had been killed by the boyfriend who had been seen in the vicinity of the deceased's house during the day. They picked the items marked as D4 and D5 from the deceased's house. One of the items retrieved from the deceased's home was an asbestos tile. The body was taken to Kakamega General Hospital.
11. PW6 went on to narrate that they went to the Accused's house where they found him seated on the bed with bloodstained clothes. They arrested him and took the blood-stained clothes as exhibits. The exhibits, which the witness said he registered were; a white long-sleeved shirt, a pink long-sleeved shirt, a T-shirt and a vest. The Accused, who had an injury on the finger explained that he had sustained the injury the previous day. A post-mortem was done on the deceased on 8/10/2019 and she was found to have sustained a deep cut on the head and on the neck. The witness said that someone called David had informed him that the Accused had killed the deceased. The witness produced the clothes and the asbestos tile.
12. On cross-examination, the witness said that at the scene, there were many people and the body had been removed. He said that nobody saw the Accused leaving. He denied the suggestion that he merely relied on reports from his colleagues and insisted that he also did his own investigations. However, they did not recover any weapon.
13. When placed on his defence, the Accused who gave a sworn statement but called no witness denied committing the offence. He said that he did not know the deceased nor PW2. He denied being at the deceased's house on 2/10/2019 nor being her boyfriend or husband. He said that on the material day at 8.00 pm, he was in his house. He had cut his finger and used his shirt to wipe the blood. His door was forcefully opened by police officers who handcuffed him and took his blood- stained shirt. He explained the reason for the blood-stained clothing but was still arrested.
14. On cross-examination, the Accused admitted that his clothes were blood stained. However, he insisted that he came into contact with the deceased's body when he was pushed into the same vehicle. He said that he did not know Caroline Muhati.
15. At the close of the defence case, the parties were directed to file written submissions.
16. The burden of proving that the Accused is the one responsible for the injuries that caused the death of the deceased is entirely upon the prosecution, and it is upon them to deploy direct evidence, circumstantial evidence, documentary and electronic evidence and expert testimony such as forensic evidence to establish their claim. This being a criminal case, the standard of proof is beyond reasonable doubt, which is a high degree of probability that leaves no reasonable uncertainty.
17. In *Woolmington v DPP* [1935] AC 462, court held that:-

“The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. “Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject [to the qualification involving the defence of insanity and to any statutory exception]. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the



prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained .”

18. In the case of *Miller v Minister of Pensions* [1947] 2 ALL ER 372, it was held:-

“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

19. That is the golden rule in criminal prosecutions, that where there is some reasonable level of doubt, the doubt benefits an accused person.

20. In this murder trial, the essential elements to be proven are:-Whether the death of Peninah Nangila Msungu occurred, and the cause thereof;Whether the death was caused by an unlawful act or omission;Whether the prosecution proved beyond reasonable doubt that the 1st accused caused the death of the deceased;Whether malice aforethought was established within the meaning of section 206 of the Penal Code.

21. Regarding the first element, the prosecution adduced the evidence of the brother of the deceased and the father of the deceased’s children who testified that they witnessed the post-mortem of the deceased. Dr. Mchana, the Consultant Pathologist confirmed that he performed a post-mortem. “Post-mortem” is a Latin phrase meaning “after death” and refers to the medical examination of a body to determine the cause of death. There is no doubt whatsoever that the person named Peninah Nangila Musungu died.

22. As to the cause of death, it is well settled that a killing is only justifiable when it is lawfully authorized or excused by law as *the Constitution* recognizes the sanctity of life and forbids the unlawful taking of life. In the premises, every homicide is presumed to be unlawful unless it is established to be authorized by law or justifiable as in instances of self –defence, defence of one’s property. The court in the case of *Republic v Irungu & another* [2024] KEHC 1493 (KLR) in explaining unlawful acts, cited the case of *Gusambizi Wesonga vs Republic* [1948] 15 EACA 65 where the court defined unlawful acts as follows:-

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self defence of property.”

The court further stated: -

“Pursuant to the aforesaid, excusable homicides are killings which result from accident or inadvertence, or done by persons who lack the capacity to commit crimes (such as very young children or persons who are legally insane), or in reasonable defence to self, or property.”

23. From the post-mortem report, it is evident that the deceased suffered multiple stab wounds and cuts on various parts of the body, which could only have been inflicted by an external force. In the opinion of the Doctor who conducted the autopsy, the cause of death was the result of assault. Assault is a criminal offence, hence there is no doubt that the deceased’s death was due to an unlawful act. The brutal nature of the attack also points to the existence of malice on the part of the attacker.



24. To convict the Accused, the prosecution must pass the test of causation. In its endeavor to prove that the Accused was responsible for the injuries that resulted in the death of the deceased, the prosecution relied on circumstantial and forensic evidence.
25. Regarding circumstantial evidence, it is settled that circumstantial evidence can be just as strong as direct evidence and can form a sound basis for conviction, provided it is cogent, compelling, and forms a complete chain of events that points irresistibly to the guilt of the accused and excludes any other reasonable hypothesis. The facts must be inconsistent with the innocence of the accused and unbroken incapable of any other rational explanation. The principle that is applicable to circumstantial evidence was explained in *Republic v Kipkering Arap Koske & Another* [1949] 16 EACA 135, where the court held:-
- “In order to justify a conviction based wholly on circumstantial evidence, 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 no other co-existing circumstances which would weaken or destroy the inference.”
- This principle was reiterated in *Sawe v Republic* [2003] KECA 182 (KLR) when the Court of Appeal held that for an accused to be convicted on circumstantial evidence, such evidence must:-
- a. Be incompatible with the innocence of the accused, and
 - b. Be incapable of explanation upon any other reasonable hypothesis than that of guilt.”
26. PW2, the key witness who said that she knew both the Accused and the deceased did not provide evidence linking the two together apart from hearsay evidence from the deceased, which, sadly, was not substantiated by any other witness. From her evidence, it was not clear whether the Accused, whom she said she had known for two (2) years, lived in the same plot as she and the deceased did, or whether he only operated the nearby workshop. It was her evidence that the deceased moved into their plot two (2) weeks before her murder. It did not come out clearly whether on the fateful date, the Accused was with the deceased when he spent the day in the plot or that he was in his workshop. Be that as it may, the fact that the Accused was seen in the plot the whole day after the deceased had reported that he had threatened to kill her, coupled with the fact that the deceased was found brutally murdered that evening and the Accused found with a fresh injury leads to the inference that the Accused may have been the killer. Nonetheless, the said circumstantial evidence is insufficient on its own bearing in mind the fact that it is founded on uncorroborated hearsay evidence of PW2.
27. The prosecution sought to fill the lacuna in its case with evidence from the Government Analyst. However, the DNA report was not conclusive, no DNA material from the deceased was found on the Accused’s clothing. Moreover, the investigations were confined to the Accused’s blood-stained clothes and an asbestos brick that was collected from the scene of crime. No effort was made to subject the clothes that the deceased was dressed in at the time of her murder to DNA analysis. This was a serious oversight on the part of the Investigating Officer for perhaps the killer had left traces of his DNA on the deceased’s clothes as is often the case.
28. As established by this court in *Republic v Dancan Avaye* [2025] KEHC 8270 (KLR), forensic evidence that does not directly link the Accused to the Deceased’s biological material weakens the inference of guilt.



29. Under Section 107 of the *Evidence Act*, the burden of proof remains with the prosecution throughout and never shifts. The defence statement by the Accused lacked credibility as he denied knowing PW2 whom the court had no cause to doubt. His explanation regarding the injury that he was found with was not convincing. Certainly, the court has reason to suspect him, but while the Accused's presence at the deceased's plot and the claims of prior threats raise strong suspicion, suspicion—no matter how grave—cannot be a basis for conviction. See *Elizabeth Gitari Gachanja & 7 others v. Republic* [2011] KECA 402 (KLR).
30. Upon careful consideration of the evidence in totality, it is my conclusion that the chain of circumstantial evidence is incomplete. The forensic results did not link the Accused to the victim, and there is no evidence of them being together on the material day. The Prosecution did not prove the charge of murder against the Accused.
31. The upshot is that the Accused is acquitted under Section 322 (1) of the Criminal Procedure Code. The Accused is hereby set free unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 20TH DAY OF APRIL 2026.

A. C. BETT

JUDGE

In the presence of:

Ms. Chala for the State/Prosecution

Ms. Ihachi holding brief for Ms. Mukhwana for the Accused person

Court Assistant: Polycap

