



Prosecution v Atufa alias Atumbwa & 3 others (Criminal Case E124 of 2021 & 21 of 2020 (Consolidated)) [2026] KEHC 5618 (KLR) (29 April 2026) (Judgment)

Neutral citation: [2026] KEHC 5618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E124 OF 2021 & 21 OF 2020 (CONSOLIDATED)**

**S MBUNGI, J
APRIL 29, 2026**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

EVANS ATUFA ALIAS ATUMBWA 1ST ACCUSED

SAMUEL KARIUKI KIMEMIA ALIAS ANEKHA 2ND ACCUSED

PATRICK SUJI 3RD ACCUSED

WELLINGTON AMOS 4TH ACCUSED

JUDGMENT

1. The Accused persons were 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 19th day of April, 2020 at Emulomonyi area in Shibuli sub-location, Kakamega Central sub-county within Kakamega county jointly with others before court murdered Kephher Tsuma
2. The accused persons took a plea and were informed of their right to have legal representation. They all pleaded not guilty, and the matter proceeded to a full hearing, during which the prosecution called 2 witnesses.
3. PW1 was Joseph Okanga aged 17 years who testified that on 19/04/2020 he was in Maungo Shimami area at her aunt's place to visit his sister at around 7 p.m. and met Mzee Kefa who appeared drunk and that he offered to help him get home safe. He stated that on his way he met Taekwondo Kimemia, Hatubwa and two other men on the way running and armed with knives and panga. He saw Kimemia having a knife, Hatubwa a panga while the other men had slashers.



4. He testified that he was hit by one of the boys on the head and both him and the old man fell and then the men started beating Mzee Kefa, threatening to kill him. He said that he saw Taekwondo, Hutubwa, Kimemia, and another man hit the deceased, claiming that the deceased had taken away their shamba.
5. He testified that Kimemia kicked him saying that “Baba today we will kill you because you took away the shamba” and they continued beating him with weapons and kicks and he saw Taekwondo bet him on the knees and ankles.
6. He further stated that he was able to recognize Kimemia, Taekwondo and Hatubwa for they had not covered their faces while the other men wore masks. Although the incident occurred at 7.40 P.M it was not so dark as there was some moonlight. After they finished beating the deceased, Hatubwa and Taekwondo carried the deceased to his boma where on the gate they met Amos. They carried him to his bedroom. In the house they continued beating him and Otubwa tied a black cloth on his eyes so he could not see what happened further but he could hear them beating the deceased.
7. He further testified that the accused persons went to the deceased's kitchen and took unga, 2 fish, tomatoes and cooking oil and they started cooking ugali and fish and that they forced him to eat and when he refused , they started beating him.
8. He claimed that afterwards, the men started cutting branches putting them at the entrance of the house up to the junction. Taekwondo threw a hammer into a different shamba near his place. Kimemia gave him Kshs. 2000/= . Hatubwa threw a panga in the forest. They spent the night at Hutubwa's house. In the morning they went to his aunt's house where he was given some medicine. They went to town to get a matatu to Busia. When he reached his aunt's place, he informed her that Hutubwa had killed Kefa. She called her sister's son Rashid who came together with Peter Keya, Joshua and 2 police officers who arrested him and took him back to Kakamega police station, where he confessed everything to the police who later took him to a children's remand facility.
9. He took the police and showed them where Hutubwa had hidden the panga in the forest, the panga was recovered.
10. He then took the police to Mzee Kefa's boma and showed them the kitchen and demonstrated to them what had happened including how the accused had beaten the old man. He then led the police to where Taekwondo had thrown the metal bar. The metal bar was not recovered. He was able to positively identify Kimemia on the screen, Amos and Taekwondo.
11. On cross examination by the 1st accused said that he knew the accused persons previously and that he had seen them almost 5 times and on that day of the incident he met them on the road .
12. He stated that he knew Hutubwa as his mother was his aunt. They did not leave in the same place.
13. He testified that he knew Mzee Kefa and that Hutubwa called mzee Kefa “baba” hence they had a family relationship. He avers that on the material day when the incident occurred there were no other people on the road. He stated that Kimemia was carrying a knife and Rungu and was able to identify the panga in court that Hatubwa carried.
14. He testified that the Hotubwa covered his eyes and tied his hands, with a rope.
15. He said that since he was blindfolded,
16. he could not see what was happening in the house.
17. PW2 Josga Aneha , an uncle to the deceased testified how he heard the death of the deceased. He went to deceased's home . he found a crowd of people. Among the crowd the accused persons were not there.



- He entered the house and saw the body of the deceased. He called the area chief and the area village elder. When they came they called the police. The body was taken to Kakamega mortuary. When I enquired from Kimemia, who used to stay with the deceased, what happened, he feigned ignorance. He said he knew the accused persons but he did not see them beat the deceased.
18. At the close of the prosecution's case, the accused persons were placed on their defence.
 19. First accused Samwel Kariuki Kimemia gave a sworn statement in his defence, he denied committing the offence. He said the deceased was his biological father. He denied PW1's evidence that he was among those who killed the deceased pointing that the said Joseph Okanga had also been charged for killing the deceased initially. He gave a defence of alibi that at the date of the alleged offence he was away in Mumias, that while coming back on 1.3.2020 he was attacked by people he did not know he was cut with pangas but he managed to escape. His father gave him first aid before he was taken to Mulama dispensary, where he was treated. His hand had been injured. Therefore, he was not able to assault anyone.
 20. He further told the court that the cause of the death of the deceased was not ascertained as the doctor did not testify as a witness.
 21. The investigating officer also never testified and on cross examination he told the court that he could not tell that the people who attacked him are the ones who killed his father.
 22. Second Accused Patrick Suji, gave sworn statement and denied committing the offence, he said that on 19.4.2020 he was at home. He denied the allegations made by Joseph Okanga PW1 that he was among those who killed the deceased.
 23. When he was arrested he found Joseph Okanga in the police vehicle already having been arrested.
 24. Third Accused Wellingtone Amos, he gave unsworn statement and denied killing the deceased.
 25. Fourth Accused Evans Atufa Alias Atubwa gave sworn statement, he denied killing the deceased. He said that the murder weapons were not produced as exhibits.

Analysis and Determination

27. With this background from both the prosecution and the defence, it is now my singular duty to assess the evidence to establish whether the prosecution has discharged the burden of proof beyond reasonable doubt to warrant conviction of the accused.
28. The prosecution's mandate is to discharge this burden of proof of establishing that the accused person in this case committed the offence of murder beyond reasonable doubt. (See section 107(1), 108 and 109 of the *Evidence Act*). In such serious cases, the evidence must carry a high degree of probative weight.
29. Section 203 of the penal code defines murder as follows:

“ Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder”
30. In the case of Anthony Ndegwa Ngari v Republic (supra), the Court of Appeal identified the following crucial ingredients of the offence of murder as essential for a conviction: -

“ For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:



- (a) the death of the deceased and the cause of that death;
- (b) that the accused committed the unlawful act which caused the death of the deceased and
- (c) that the Accused had the malice aforethought.”

31. It therefore follows that for a conviction to suffice, the prosecution ought to prove beyond reasonable doubt that the following:

- a. The death of the deceased,
- b. The death was unlawfully caused(actus rea)
- c. That in causing death of the deceased accused’s unlawfully acts were accompanied with malice aforethought. (mens rea)
- d. That additionally the accused was the person who committed the offence on the material day as against the deceased.

32. Malice aforethought, section 206 of the Penal Code defines it as follows:

“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;
- c. An intent to commit a felony; or 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.”

33. It therefore follows that for a conviction to suffice, the prosecution ought to prove beyond reasonable doubt that the following:

- a. The death of the deceased,
- b. The death was unlawfully caused(actus rea)
- c. That in causing death of the deceased accused’s unlawfully acts were accompanied with malice aforethought. (mens rea)
- d. That additionally the accused was the person who committed the offence on the material day as against the deceased.

34. The question is whether the evidence on record meets the above threshold.

35. It is not disputed that the deceased died, but the cause of the death is not known because the doctor who did the postmortem on the deceased's body was not called as a witness, secondly the postmortem report was not produced as exhibit.



36. PW1 evidence though disputed by the accused persons, points to an assault of the deceased. The court cannot tell whether the injuries caused by assault caused his death.
37. The absence of evidence on the cause of death of the deceased , this court cannot fault the accused persons for unlawfully causing the death of the deceased.
38. This unfortunate case where it is clear that the investigating officer failed to do his work to bring witnesses to court, despite the case being in court since 2021. This failure has caused miscarriage of justice for the family of the deceased and the public at large.
39. From the above analysis, I find that the prosecution has not proved its case against the four accused persons therefore, I do acquit them under Section 215 of the Criminal Procedure Code. Accused persons are set free unless lawfully held.
40. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF APRIL, 2026

S.N. MBUNGI

JUDGE

In the presence of:

Court Assistant: Elizabeth Agong'a

Ms. Kiu for the DPP present online.

Ms Mukhwana for the first, second and fourth accused persons present online and also holding brief for Mr. Amasakha for the third accused.

Accused persons present.

First and third Accused present virtually from Kakamega Prison.

Fourth and Second Accused present in court.

