

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. E012 OF 2021**

REPUBLIC.....PROSECUTOR

**VERSUS**

JOSEPH WAWERU KAFUTE.....1<sup>ST</sup> ACCUSED

EAVINE SUMBA alias BLACKY.....2<sup>ND</sup> ACCUSED

**JUDGMENT**

1. On the night of 4<sup>th</sup> February 2021, *Brian Sore Khalisa* (hereafter *the deceased*) was walking in Babadogo area when he was attacked and stabbed to death. His assailants escaped. His girlfriend, *Lilian Achieng*, told the village elder and the police that the two accused persons were among the killers.
2. The Director of Public Prosecutions charged them with *murder* contrary to section 203 as read with section 204 of the **Penal Code**. The particulars are that on the material night at about 20:40 hours at Glucola Babadogo area in Ruaraka within Nairobi County, jointly with others not before the court, they murdered the deceased.
3. The prosecution managed to call *five* witnesses. The first was *Dickson Karisia* (PW1), a brother to the deceased. On 8<sup>th</sup> February 2021, he identified the blood-stained body at the City

Mortuary. It had a visible stab-wound on the left side of the stomach.

4. The autopsy was conducted by *Dr. Peter Ndegwa* (PW2). According to the post-mortem report (exhibit 1), the cause of death was “*exsanguination secondary to chest injury due to penetrating force trauma*”.
5. PW3 was the village elder, *Amos Njeru Ireri*. He was informed by a “lady” that the deceased was stabbed. He saw three stab wounds on the body. He alerted the police who arrived at the scene about 20 minutes later. According to the witness, a girlfriend to the deceased adversely mentioned the 1<sup>st</sup> and 2<sup>nd</sup> accused persons, among others, as the assailants. The police arrested the 1<sup>st</sup> accused from his house and the 2<sup>nd</sup> accused “who was hiding in the plot”.
6. PW4 was PC *Paul Nyoro*. He and his colleague, *Christopher Samoei*, were tasked to investigate the murder. By that time, both accused were in police custody at Ruaraka Police Station. He said that it was CPL *Samoei* who interrogated *Lilian Achieng*.
7. PW4 escorted the accused persons for a psychiatric test at Mathari Teaching & Referral Hospital. They were both found fit

to plead as per the medical reports produced as exhibits 2 (a) and (b).

8. According to Corporal *Evans Bowen* (PW5), *Lilian Achieng* named three attackers: *Stevo* alias *Last Born*, *Kafute* alias *Rasta* and *Blacky*. He and his colleagues found *Kafute* in his house “changing clothes” while *Blacky* was arrested “hiding in the bathroom under some garbage”.
9. The 1<sup>st</sup> accused (DW1) gave sworn testimony. He said that he works as a matatu tout and that on the material date, he left work at 7:00 or 8:00 p.m. and went straight to his mother’s house. He had tea and some mandazi and then retired to his house which was on the 1<sup>st</sup> floor of the same block. He added as follows-

*Later, I heard my gate being banged. I lived on 1<sup>st</sup> floor. When I opened the door, they (police) arrested me. They started beating me and took me outside to the scene, put me on the ground and continued with the beatings. The police did not recover any weapon from me or any item of interest. I was finally put in a police vehicle and taken to the police station. I only learnt at Makadara Court of the death of Brian. I do not know him. I never attacked anyone. I do not know Lilian*

*Achieng. I did not know A2 before this case. My mother died during this case.*

10. The 2<sup>nd</sup> accused (DW2) also denied committing the offence.

He gave sworn evidence and called his brother and sister as witnesses. The substance of his defence was that at the time of the alleged killing, he was in his sister's (DW4) house from 7:00 p.m. where he had dinner, revised his school work and then went to sleep.

11. When cross-examined by *Ms. Kigira*, he answered-

*The persons knocking/banging the gate came at 10:00 p.m. Caretaker opened the gate. I do not know Lilian Achieng. I never saw the village elder. I was not removed or arrested from the "bathroom". I am not the "Blacky" who was arrested in the bathroom. My sister's house is a single room. The bathrooms are outside but inside the plot.*

12. The 2<sup>nd</sup> accused's brother, *Ronald Obere* (DW3) and sister, *Harriete Obere* (DW4) claimed that he is not known known as *Blacky* and was not at the scene of the crime. She added that *Blacky* is a different character who resides on the opposite plot.

13. Learned counsel for the 1<sup>st</sup> accused, *Mr. Mundia*, filed final submissions dated 2<sup>nd</sup> February 2026. Learned counsel for the

2<sup>nd</sup> accused, *Mr. Kinara*, also lodged submissions dated 9<sup>th</sup> March 2026.

14. The pith of the submissions by both accused persons is that the republic failed to call a key witness, *Lilian Achieng*, with the result that there is no positive identification; and, the remainder of the evidence does not meet the required standard of proof. In view of the *alibi* set up by both accused, they submitted that the court should acquit the accused.
15. They both relied on the decisions in ***Issa Jomo Sewedi v Republic*** [2016] eKLR, ***Joseph Kimani Njau v Republic*** [2014] eKLR, ***Bhatt v Republic*** [1957] E.A. 332, ***Anthony Njue v Republic***, [2006] KECA 339 (KLR), ***Republic v Njeru & 3 others*** [2020] eKLR, ***Erick Otieno Meda v Republic*** [2019] eKLR and among others.
16. I take the following view of the matter. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*
17. There are three key ingredients that *must* be present: first, the prosecution must prove beyond reasonable doubt the

*death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*.

18. There is no doubt about the death of the deceased. His brother, *Dickson Karisia* (PW1) identified the remains at the City Mortuary. The body had a visible stab-wound on the left side of the stomach. According to the post-mortem report (exhibit 1), the cause of death was “*exsanguination secondary to chest injury due to penetrating force trauma*”.

19. I thus readily find that the death was *unlawful*. The key question then is whether the Republic proved that the accused, *of malice aforethought*, killed the deceased.

20. None of the five witnesses saw any of the accused attack the deceased. The prosecution failed to call the eye-witness, *Lilian Achieng*. It was alleged that she was a girlfriend of the deceased and that they were walking together when he was attacked by *Stevo* alias *Last Born*, *Kafute* alias *Rasta* and *Blacky*.

21. The prosecution is *not* entirely to blame: The court had

issued summons for that witness and some other civilian witnesses as far back as 9<sup>th</sup> July 2024. When they failed to appear, the court issued warrants of arrest on 10<sup>th</sup> February 2025. By the time the prosecution closed its case, none of those witnesses had been arrested.

22. The point to be made is that without that evidence; and, in view of the rebuttal by the accused, there is no positive identification of either of the accused. See generally, ***Wamunga v Republic*** [1989] KLR 424; ***Maitanyi v Republic*** [1986] KLR 198 at 201.

23. I have kept in mind three important matters: Firstly, that the attack occurred at night; secondly, that the deceased's girlfriend, *Lilian*, and Corporal *Christopher Samoei* (who interrogated her) did *not* take to the stand; and, lastly, that the identification parade forms were never produced.

24. *Not* that I believed the *alibi* set up by the two accused persons. No, it all sounded well-rehearsed and too convenient. The evidence of DW3 and DW4 was highly choreographed and selective. The accused were in the general location at the time the murder occurred. Fingers pointed in their direction. But the

accused were *not* obligated to assist the prosecution or incriminate themselves. The burden of proof lay squarely with the Republic. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.

25. In the end, the prosecution's case is built purely on *circumstantial* evidence. In **R v Kipkering arap Koske & another** 16 EACA 135 (1949) the court held-

*In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.*

26. So much so that the accused *may* have had something to do with the death. But it remains only a strong suspicion. They may not have been honest about the matter. But there is no reliable evidence connecting the accused to the *actus reus* or showing an *intention* to kill the deceased. The circumstantial evidence remains tenuous. The suspicions are strong but unadorned with concrete evidence to sustain the charge.

27. I have thus reached the conclusion that the entire corpus of *circumstantial* evidence does not *irresistibly* and *exclusively* point to the guilt of the accused. I accordingly enter a finding

of *not guilty*. Both accused persons are hereby *acquitted*.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this 28<sup>th</sup> day of April 2026.

**KANYI KIMONDO**  
**JUDGE**

**Judgement read virtually on *Microsoft Teams* in the presence of-**

Accused.

Ms. Kigira for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. Mundia for the 1<sup>st</sup> accused instructed by Mundia Mwangi & Company Advocates.

Mr. Kinara for the 2<sup>nd</sup> accused instructed by Innocent Kinara Rasugu Advocate.

Mr. E. Ombuna, Court Assistant.