



REPUBLIC OF KENYA



**KENYA LAW**  
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**Komen v Republic (Criminal Appeal 258 of 2018)  
[2025] KECA 1380 (KLR) (25 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1380 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CRIMINAL APPEAL 258 OF 2018  
JM MATIVO, PM GACHOKA & WK KORIR, JJA  
JULY 25, 2025**

**BETWEEN**

**STEPHEN CHEBON KOMEN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Eldoret  
(G.K. Kimondo, J.) dated 25<sup>th</sup> February 2016 HCCRC No. 4 of 2008)*

**JUDGMENT**

1. Stephen Chebon Komen, the appellant herein, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on 4<sup>th</sup> November 2007 at Marigat Kilimani village Baringo District Rift Valley Province, the appellant murdered Emmanuel Tarus.
2. When the appellant was arraigned before the trial court, he pleaded not guilty to the offence. After a full trial, the appellant was convicted of the offence and sentenced to death.
3. The appellant is aggrieved by those findings. He filed his notice of appeal dated 29<sup>th</sup> February 2016. He also filed his memorandum of appeal, lodged on 10<sup>th</sup> March 2016, and a supplementary memorandum of appeal dated 31<sup>st</sup> October 2023, raising a combined total of 20 grounds to dispute the findings of the learned judge. We have taken the liberty to summarize those grounds as follows: that the learned judge failed to consider that the single identifying witness was intoxicated and could not therefore establish the identity of the perpetrator; as a consequence, he was improperly condemned to the death sentence; malice aforethought was not proved to the required standard; that PW1's evidence was not corroborated and thus incredible; that the knife that was used to stab the deceased was not preserved for DNA sampling thereby failing to prove that the offence had been committed by the appellant; that the investigations done were shoddy; that the evidence of the prosecution was marred with inconsistencies



- and insufficiencies; that the purported confession failed to meet the threshold set out in law; that the learned judge shifted the burden of proof to the appellant; that the prosecution failed to discharge its burden of proof to the required standard; and that the sentence meted out failed to consider the appellant's mitigation.
4. In view of the foregoing, the appellant urged this Court to allow his appeal, quash his conviction and set aside his sentence so that he is set at liberty.
  5. The appeal was heard on 5<sup>th</sup> May 2025 on the basis of the parties' rival written submissions that were orally highlighted. The appellant was present and represented by learned counsel Mr. Oyaró. Appearing for the state was Principal Prosecution Counsel Mr. Ondimu.
  6. The appellant's written submissions are dated 31<sup>st</sup> October 2023. The appellant submitted that the offence took place at night, and several persons were at the scene. He argued that no one else saw the appellant stabbing the deceased and therefore, PW1's evidence was shaky and unreliable. In any event, PW1 was inebriated, questioning the credibility of his testimony of the unfolding events that night. As such, there were gaps in the prosecution's case that were too apparent and justified the acquittal of the appellant.
  7. The appellant further argued that in fact, he saw PW1 inadvertently stab the deceased. He suspected that he was aiming at the appellant but instead accidentally stabbed the deceased. In other words, the knife was intended to stab the appellant but instead stabbed the deceased. The reason he wanted to stab him, he opined, was that he was sleeping with PW1's wife.
  8. The appellant continued that though the murder weapon was eventually traced, it was not taken for DNA analysis and accordingly, the prosecution failed to prove that he was the perpetrator of the offence. Turning to motive, the appellant submitted that during the deceased's lifetime, they never had grudges against each other. It was therefore not established beyond any shadow of a doubt that he had malice aforethought.
  9. Lastly, the appellant submitted that should we find his conviction safe, then the Court should take into account the decision of the Supreme Court in Francis Karioko Muruatetu & Another vs. Republic & 5 others Petition 15 & 16 of 2015 (Consolidated) and interfere with the sentence. He added that he had been incarcerated for seven years and had since undergone rehabilitation.
  10. The respondent filed written submissions and a case digest both dated 3<sup>rd</sup> November 2023. It submitted that the death of the deceased was committed by the appellant's unlawful act. It relied on PW1's evidence in asserting so. However, on the ingredient of malice afterthought, the respondent conceded that the trial judge failed to consider that the appellant was drunk and did not resultantly possess malice aforethought. It thus proposed that his conviction be substituted with that of manslaughter.
  11. Turning to the sentence meted out, the respondent urged this Court to interfere with the learned judge's findings and substitute the death sentence with a finding that the appellant had served his sentence. It thus made concessions on the appeal to that extent.
  12. We have considered the memorandum of appeal and the parties' written submissions, examined the record of appeal and analyzed the law. As a first appellate court, we are duty bound by law to determine if the decision of the trial court is justified by re-considering, re-examining and re-analyzing the evidence on record while bearing in mind that we did not have the advantage of seeing or hearing the witnesses when they were called to testify. [See *Okeno vs. Republic* (1972) EA 32.]
  13. The prosecution marshaled seven witnesses whose evidence is captured as follows: PW1 Kennedy Temunge, the deceased's friend and neighbor to the appellant recalled that on 4<sup>th</sup> November 2007 at



- 7:00 p.m., he was indulging in busaa at Chepkonde's bar. He was in the company of other unknown persons who were also dancing to the tunes. The deceased was also present at the establishment.
14. Later, the appellant joined them. Suddenly, the appellant stabbed PW1 twice on his left hip and the deceased on the stomach. He then ran away from the scene. PW1 and the deceased were rushed to Kabarnet Hospital. The following day, the deceased was escorted to Nakuru General Hospital. He later succumbed to the injuries that he had sustained.
  15. PW1 claimed that the appellant had slept with his wife, who fell pregnant as a result of the extramarital affair. He alleged that it was the reason that the appellant had attacked him due to the dispute that arose out of that extramarital affair. It was the evidence of PW1 that when he was attacked, the deceased tried to intervene, and the appellant stabbed him in the stomach. He was emphatic that it was the appellant who stabbed the deceased.
  16. In cross examination, PW1 stated that though he was stabbed, he couldn't tell who the assailant was. He, however, stated that it was the appellant who stabbed the deceased. He denied stabbing the appellant and further denied accidentally stabbing the deceased.
  17. Upon being stabbed, PW1 testified that he lost consciousness but recalled that he heard the deceased say that he was being killed. Furthermore, he denied that his wife's name had been mentioned at the drinking spot.
  18. PW2 Isaiah Cheboi Kibowen testified that he found the deceased injured and lying down at Chepkonde's den on 4<sup>th</sup> November 2007 at 10:00 p.m. He was in excruciating pain. PW2 rushed the deceased to Kabarnet Hospital. He later learned that the deceased succumbed to the injuries he had sustained. He also learnt that another person had been injured during that night.
  19. PW3 Wilfred Christopher Tarus testified that he identified the body of the deceased during the post mortem exercise that occurred on 14<sup>th</sup> November 2007 at Nakuru General Hospital. The deceased was his brother. He saw that the deceased had a stab wound on his stomach.
  20. PW4 Dinah Kendagor, a nurse working at Marigat Hospital, testified that on 4<sup>th</sup> November 2007, the deceased was rushed to Marigat Hospital. It was 9:00 a.m. She observed that the deceased had been stabbed in the stomach area with a sharp object. As a result of the cut, the deceased's stomach insides had bulged out. She administered first aid to restore his insides. Owing to the gravity of the injuries sustained, PW4 referred the deceased to Kabarnet Hospital. She testified that the deceased informed her that he was stabbed by his friend while they were drinking.
  21. PW5 PC Elphas Marete testified that on 5<sup>th</sup> November 2017, the appellant approached him while in Marigat police station and confessed that he had stabbed someone. Upon receipt of the report, PW5 locked him up. He intended to prefer assault charges against the appellant. Later, it was reported by the deceased's father that the deceased had passed on.
  22. PW6 CPL Kennedy Kinyua testified that on 10<sup>th</sup> November 2007, he was in the company of the Deputy OCS Inspector Mugo. The appellant informed them that he had hidden the murder weapon. The appellant led them to the hideout where they recovered the knife that was suspected of having been used to murder the deceased. It was described as a kitchen knife that had blood stains. It was surrendered to PC Kamau, the investigating officer. He admitted that the kitchen knife was not submitted for analysis of the blood stains.
  23. PW7 Dr. Daniel Wainaina testified that he conducted the autopsy on the deceased's body. He observed that the deceased had a surgical wound on the abdomen. He suffered a stab wound in the right upper side of his abdomen measuring 6cm.



24. Internally, the deceased suffered a penetrating abdominal injury through the intestine and gall bladder with abdominal contents leaking into the cavity. Though he was sutured, the same was not successful, as he suffered an infection.
25. PW7 concluded that the deceased died as a result of a serious infection of the abdominal cavity following a penetrating injury.  
He filled the autopsy report dated 14<sup>th</sup> November 2007 which was adduced in evidence.
26. At the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case against the appellant. He was placed on his defence. His sworn testimony was that on 4<sup>th</sup> November 2007, he was imbibing with his friend for the better part of the afternoon until 6:00 p.m. On his way back, the appellant passed by Chepkonde's at around 7:00 p.m. where he purchased busaa.
27. At the establishment, the appellant saw PW1 and the deceased. He admitted that he was having an affair with PW1's wife. He had no disagreements with the deceased. Twenty minutes later, as the appellant was speaking with Robert, PW1 approached and threatened him saying: "Hatutakula Christmas na wewe... Leo ni leo." He also hurled accusations that he was aware that the appellant was sleeping with his wife.
28. PW1 removed a knife. Noticing that his life was in danger, the appellant sought cover hiding behind the deceased. As a result, PW1 inadvertently stabbed the deceased. The deceased screamed: "You have stabbed me." The appellant was emphatic that he did not have the knife in his hands.
29. After the ordeal, the appellant took off. He reported the matter at the police station. He denied leading the police to the murder weapon. He was arrested the following day and remanded for three months before he was arraigned before the trial court. He maintained that he had been framed for sleeping with PW1's wife. He accused PW1 of lying.
30. In order to sustain a conviction for a murder charge, the prosecution must establish the following crucial conjunctive ingredients: the death of the deceased; the death was caused by an unlawful act or omission; the death was occasioned by the perpetrator; and malice aforethought.
31. On the deceased's death, PW7 formed the opinion that the deceased died as a result of a serious infection of the abdominal cavity following a penetrating injury. That is not disputed. It is also not denied that the deceased died as a result of the infliction of a stab wound from a sharp object. That was a commission of an unlawful act.
32. Was the appellant the perpetrator? We have reevaluated the evidence carefully. We note that PW1 was clear and straightforward in his testimony. An excerpt of his testimony is captured as follows:

"We were taking refreshments in Chekonde's house...the deceased was also there...the accused came and joined us...he stabbed me and then stabbed the deceased... He stabbed me on the left hip twice...he then stabbed the deceased on the stomach...he then ran away..."
33. We note that in his cross examination, PW1 admitted that the appellant had impregnated his wife. He was however categorical that it is the appellant who approached him at the drinking den where he was found drinking together with the deceased. He was emphatic that: "...I saw the accused stab the deceased as he tried to separate us..." On this issue, the learned Judge held as follows:

"20. I have considered that it was dark and patrons at Chepkonde's house were taking alcohol. The conditions of identification were poor. Under cross examination, PW1 admitted that in his statement to the police he indicated



that he did not see the accused enter or stab him; and that he lost consciousness. He however heard the deceased scream saying that he was being killed. But the gaps in PW1's evidence on identification were filled by no less than the accused. In his sworn evidence, the accused admitted he was at the scene. He said as follows:

“On my way back, I went to Chepkonde's place. I heard people there [sic]. There was alcohol. I reached there at 7:00 p.m. I ordered alcohol (busaa) of Kshs

21. I had taken changaa earlier. I started drinking. I was outside the house. There were other people. I saw the deceased. I found him there. He was with PW1. PW1's wife was my lover. I had no relationship with (sic) deceased. We had no disagreements.”
22. The evidence by the accused placed him squarely at the locus in quo. He confirmed that he saw the deceased and PW1 there. He knew PW1. The accused admitted he was having an illicit liaison with PW1's wife. The evidence of PW1 on identification was thus corroborated by the accused. See *Opo v Republic* [1976-80] 1 KLR 1669. I find that PW1 positively identified the accused on the material night.
23. The next key question is whether the accused stabbed PW1 and the deceased. The accused claimed that it is PW1 who stabbed the deceased. The accused testified that PW1 wanted to stab him because he had an affair with his wife but ended up stabbing the deceased. The accused in defence said:

“He [PW1] said I had a love affair with his wife. He said 'hatutakula Christmas nawe'. Deceased was there. I knew I was in danger when he said 'leo ni leo'. PW1 removed a knife, I went behind the deceased. PW1 stabbed the deceased. I heard the deceased say 'you have stabbed me.' I did not have a knife.”

24. I do not believe the accused. PW1 was emphatic that it is the accused who stabbed him on the hip; and, who also stabbed the deceased on the stomach. When the accused went to the police station his narrative to PW5 was different. By the time the deceased got into Marigat Hospital he was still talking. He told the nurse (PW4) that he was stabbed by his friend. On cross examination, she said as follows:

“I took the history of the patient from him. He was talking. He told me that it was his friend who injured him. He said he and his friend were drinking together. The person who fought with the patient was not brought, only the patient.”

25. It is not lost on me that PW1 was taken to the same hospital. Why would PW1 stab himself? PW1 had no motive to stab the deceased. They were friends. If anything, he would have been more interested in stabbing the accused for having an affair with his wife. Furthermore, there is evidence of CPL Kinyua (PW6). On 10<sup>th</sup> November 2007 he was in the company of the Deputy OCS Inspector Mugo. They escorted the accused to Milimani Estate in Marigat.



The accused showed them some items hidden among some cactus plants. One of the items was a bloodstained kitchen knife. True, no chemical analysis was done. But it leaves me in no doubt that the accused is the person who stabbed the deceased with a knife in the stomach.

26. The legal burden of proof lay throughout with the prosecution. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).

From the evidence of PW1, PW4, PW5 and PW7 I find that the prosecution proved beyond reasonable doubt that the accused stabbed the deceased on 4<sup>th</sup> November 2007; and, that the deceased succumbed to those injuries on 6<sup>th</sup> November 2007.

27. The defence set up by the accused is unbelievable and a red herring. His identity was not in doubt; and, there was also no evidence that he acted in self defence. The accused may have been drunk on chang'aa and busaa; but it was self-induced intoxication. It would not afford a defence. See *Kupele ole Kitaga v Republic*, Court of Appeal, Nakuru, Criminal Appeal 26 of 2007 [2009] eKLR. Medical examination confirmed the accused had a sound mind. In a synopsis, there was no justification for the attack upon the deceased.”

34. Just like the learned Judge, we are satisfied that the evidence of PW1 establishes that it is the appellant who stabbed him and the deceased. We also ask the same question: If it is PW1 who attempted to stab the appellant and then accidentally stabbed the deceased, why would he stab himself twice on the thigh? Although it was at night, the appellant admits that he went to the drinking den and that PW1 was there. There is no question of identification as PW1 knew the appellant very well.

35. PW1 admitted as much and placed himself at the scene of the crime. It is trite law that the burden of proof in criminal matters rests with the prosecution always and just like the trial Judge, we do not believe the defence that was set up by the appellant, as it did not in any way weaken the prosecution case. The appellant stated that the murder weapon was not taken for DNA analysis. This may be so but it is not denied even by the appellant that the stabbing took place.

36. The only issue in contention is who stabbed who? From the evidence of PW1, PW4, PW5 and PW7, we agree with the learned Judge that it was proved beyond reasonable doubt that the appellant stabbed the deceased. This Court in *Kiilu & Another vs. Republic* [2005] 1 KLR 174 held:

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”

37. We have warned ourselves of the danger of relying on the evidence of PW1 who is the only witness at the scene who testified. As already stated, identification was not an issue as the appellant admitted that



they knew each other very well and admitted that he had an affair with PW1's wife. The evidence of PW1 established the stabbing; a fact was corroborated by the evidence of PW4, PW5 and PW7.

38. The last ingredient that the prosecution had to establish is malice aforethought. Section 206 of the [Penal Code](#) establishes malice aforethought in 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;
  - d. 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.”
39. In this case, the deceased was stabbed on the stomach with a knife. The effect of the stab wound was to cause death. The act of stabbing the deceased on the stomach surely was an intention to cause death or grievous bodily harm which the appellant was certainly aware of. The knife, a dangerous weapon in this instance, was used to stab the deceased. The fact that the appellant used that weapon was clear as day that he intended to murder the deceased. In so holding, we are guided by the decision of the former Court of Appeal for Eastern Africa in *Rex vs. Tubere S/O Ochen* (1945) 12 EACA 63 that stated thus on this issue:
40. When the appeal was argued before this Court, the respondent urged this Court to consider that since the appellant was drinking for the better part of the day, the aspect of intoxication ought to have been taken into consideration by the trial judge. Section 13 of the [Penal Code](#) provides:
- “(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
  - (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-
    - a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
    - b. the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
  - (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provision of this Code and of the [Criminal Procedure Code](#) relating to insanity shall apply.
  - (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.



(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”

41. Based on the above provision, coupled with our analysis of the evidence adduced, we reject that argument. Firstly, this was not raised as a defence at trial by the appellant. The appellant furthermore did not qualify himself within the parameters of section 13 (2) of the *Penal Code*. Secondly, the appellant did not demonstrate that he was drunk. The fact that the appellant was drinking that day was not synonymous with a drunken state. We therefore come to the inescapable conclusion that the appeal against the conviction lacks merit and it is hereby dismissed.
42. Turning to the sentence, we note that the trial court sentenced the appellant to death. In his mitigation, it emerged that the appellant was a first offender. He was remorseful, was the sole breadwinner of his two children and was widowed. Taking into account the mitigation and the circumstances leading up to the deceased’s death, we see reason to interfere with the appellant’s sentence. We hereby substitute the sentence of death with a determinate sentence of thirty years imprisonment. The sentence shall be computed from the date he was arrested.

**DATED AND DELIVERED AT NAKURU THIS 25<sup>TH</sup> DAY OF JULY 2025.**

**J. MATIVO**

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**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCI Arb.**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

