



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Wako (Criminal Case 92 of 2018)  
[2025] KEHC 801 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 801 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 92 OF 2018  
EM MURIITHI, J  
JANUARY 30, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ISA MOHAMED WAKO ALIAS GUYO MOHAMED WAKO ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused Isa Mohamed Wako alias Guyo Mohamed Wako is charged with murder contrary to section 203 as read with 204 of the Penal Code, the particulars of the offence being that he “on the 29<sup>th</sup> day of September 2018 at Manyatta Shambole, MertiNorth in Merti sub-county of Isiolo County within eastern Region armed with dangerous weapon namely knife stabbed and murdered Guyo Karayu Guyo.”
2. The prosecution called 10 witnesses to prove the charge.
3. PW1 Hawo Abduba, resident of Merti testified that on 29<sup>th</sup> September, 2018 she was at her son Hassan Abduba Guyo’s house, with her son’s daughter, Abdia Abduba, and her daughter Sadia Abduba, , when she saw the deceased being killed. The deceased was going to the mosque, which neighbours her son’s house. She had heard somebody scream for help and she ran away for her life and went to her son’s house. She said before she entered her son’s house, she had seen the accused person killing Guyo Karayu using a knife. She said the distance from where she was to where the accused was stabbing the deceased is about 50 metres (giving the size of a plot 50\*100 as an example). She said she knew the accused for about 3 years before as he was her neighbor. She said it was at 8.00p.m and the accused had come and told her that he had killed someone. The witness also claimed to have seen the accused through a window and that there was electricity. She said that when she ran and entered the house, she had looked through the window and saw the accused kill the deceased. She said other people came when they heard the screams. After killing the deceased, the accused ran to the same house she was in



but they did not open the house for him so he was outside the house. The witness remained inside and the accused was outside when they refused to open the door. The accused was arrested later by the people together with the police officers who responded. She said the accused was carrying a torch, a knife and a rungu (club) and was dressed in a stripped white shirt and grey trouser. Shirt white stripped (PMFI 1) and Trouser brown (MFI 2); the knife (MFI3). She said she saw the accused in his clothes and carrying a knife since there was light outside and she was still looking through the window. She saw the accused come by the window after refusing to open for him. She said the deceased was Guyo Karayu. Before the accused was arrested Sadia also came running to the house and she thought it was one Gubalow, but before she opened for Sadia the accused person chased Sadia away. The accused person also hit Sadia and a baby she was carrying. The witness saw accused hit Sadia by the shoulder and the baby on the side of the face. After the accused was arrested, she opened the house and went towards the scene where she saw the deceased lying down in a pool of blood. She said that she saw blood oozing from several wounds on his body – abdomen, thighs and both sides of kidney areas and the deceased was already dead at the time she went to the scene.. She said the deceased was wearing a blue checked kikoi and a reddish shirt and she identified the clothes - 1 printed shirt MFI 4 with blood stains; 1 checked kikoi (MFI 5) with dried blood stains. The officers took the body and took him to the hospital, and the witness and the people took the injured child and mother Sadia to the hospital at Merti dispensary, and then started preparing for burial.

4. On Cross – examination, the witness said that on hearing the screams she had called the children and we went into the house and they locked the door. It was 8.00p.m, and she had seen Sadia calling Gubalow and when she looked out she saw a person carrying a knife. She said her statement was true even though it did not record that she saw the deceased being killed. She said that the accused asked her to open the door as he had killed someone. She said she did not see the deceased being stabbed but she saw the accused carrying the knife saying he had killed somebody, and when she went to the scene she saw the deceased had been killed. She said that there are 2 houses in the plot - accused person’s house and that of her son, but her own house was not in the plot but a distance away. She said that the mosque which is neighbouring her son’s house has electricity, as did her son’s house.
5. PW2 Abdi Guyo Karayu, Chief of Makagela Location and son of the deceased testified that on 29<sup>th</sup> September, 2018 he was working as Assistant chief Makagela sub-location. At 8.00p.m, he was at Isiolo for workshop and received a telephone call from his father’s brother Hussein Karayu informing him that his father Guyo Karayu had been killed by one Isa Mohammed. He said he was with the Chief Merti Location and they immediately organized to go from Isiolo to Merti arriving next day at 5.00a.m. in the morning of 30<sup>th</sup> September, 2018. They went to Merti Health Centre and found the body of his father which had been stabbed on the chest and on the stomach at about 7 places and the body was covered with blood. He confirmed that it was his father and they took his body to Isiolo Hospital for post-mortem. After post-mortem, they took the body back for burial at Merti. He said that he learnt that there was grudge between the accused and himself because 3-6 months before the date he had done robbery with violence and taken livestock belonging to others they had visited and forwarded their names to security agents. The accused had been charged with Robbery with Violence and the case was still going on at the time of his testimony before this court and he had been a witness at Isiolo about 5 days before the date of his testimony before this court.
6. The Accused’s Counsel did not put any question to the witness in Cross – examination.
7. PW3 Huka Dida testified that on 29<sup>th</sup> September, 2018 at 8.00p.m, he had heard screams while at the mosque and he had run out to see what was happening. He found that the person screaming was Guyo Karayu and the accused Guyo Mohammed was using a knife attacking Guyo Karayu. At this time, Guyo Karayu was lying on the ground and he saw Guyo Mohammed (the accused), who the witness



knew since birth as his mother was his tribe, stabbing the deceased. He was only a short distance of around 10 meters from the scene. He said it was at night but he was able to see because there was electricity light and moonlight. When he saw Karayu lying on the ground, the accused ran towards him and he also wanted to attack him so he ran away. The accused had a torch, a knife and a stick, and he identified the knife (MFI 3) saying it is the knife he saw the accused with. PW3 ran to the deceased's house since they were neighbours and he informed his wife and son what happened. He went back to the scene as there were many people who came and he saw at the scene that the deceased had died and the accused was arrested by one of persons present, one Kunu. The accused was wearing a shirt with black and white stripes and a brown trouser - the shirt worn by the accused (MFI1) and brown trouser that was worn by the accused (MFI 2). The deceased was wearing a shirt and Kikoi, (Kikoi (MFI 5) and the coloured printed shirt (MFI4). He said he had not disagreed or borne any grudge against the accused before the incident.

8. On Cross – examination, he said the deceased was Guyo Karayu his colleague herdsman, and when it was put to the witness that his statement did not mention that he saw accused stabbing the deceased and only that he found him lying down, he said he had told the Police that somebody had killed someone and that he was the first person who responded to the screams to see the accused stab the deceased. He said that his house was close to the deceased's house - with only two houses between them – and that he was the first person to get to the scene after he heard the screams. He said the incident happened at 8.00p.m. when he was on his way to the mosque for prayer. On Re – examination he said his statement was written for him by police as he could not write. The police recorded and read it back to him and that he told the Police what he had seen, which was that he saw the accused killing the deceased and he was the first person at the scene.
9. PW4 Sadia Abduba testified that on 29<sup>th</sup> September, 2018 at 8.00p.m. she was at home which neighbours a mosque and they were going to the mosque for prayers when the accused killed her neighbour Guyo Karayu. She said she got to know that accused had killed the deceased as the deceased screamed and when they responded to the screams, they saw the deceased lying in the ground and the accused carrying a knife. He was also carrying a torch and a stick. She said she knew the accused as a village mate for a long time. She said she saw the accused carrying a knife which was bloody but she did not see the accused stab the deceased, only saw the bloodied knife which accused was holding. When the accused approached her, she had run to her brother's house which is in the same village. The accused person had reached before her at her brother's house. The accused shone his torch at the witness calling her by the name Gubalo - the name of the wife of the Accused's brother as the accused thought she was Gubalo. When the witness told the accused not to spot light on her and that she was not Gubalo, the accused then hit her with a stick on the shoulder (right) and also hit the 2-year-old baby she was carrying, Amina Said, on the left eye. PW4 ran away towards a neighbour's house. She said the accused person was in a black and white striped shirt and brown trousers; the deceased's shirt MFI 1 white-striped shirt; brown trouser MFI 2. She identified accused's knife MFI 3. She said it was at night but she could see the accused using light of electricity and moonlight.
10. On Cross – examination, she her she accepted that Statement indicating that witness could not recognize the person who had the torch contradicted her testimony in court. She said she ran to her brother's house to seek safety; she found the house locked and was informed that there was someone killing people. As she ran away, she met someone who lit a torch on her but she would not realize who he was. She said it was true that she did not recognize him and had heard people say that it was Guyo Mohammed who had hit her. In Re – examination, she said she recognized the person who hit her as the accused Guyo and that she had told the police when she recorded the statement, which was recorded by the police officers.



11. PW5 Abdullahi Komba testified that on 29<sup>th</sup> September, 2018 at 8.00p.m. in the night while at the mosque after prayers, somebody screamed and they rushed to scene of screams, and found the deceased Guyo Karayu lying on the ground and the accused, Guyo Mohammed Wako, was standing by the deceased holding a blood-stained knife and saying he had killed. The body was oozing blood from the stomach and kidney area. He said that he had heard the screams while at the mosque and ran to the scene immediately, taking only around 1 minute as it was close by, and he did not see anyone else at the scene, save the accused and the deceased. He said the incident happened at night and he had seen that it was the accused holding a knife as there were two electricity security lights on the wall, and he gave the distance from where he stood to where accused was holding a knife at about 5 meters (giving example of distance from the witness box to the judge's bench). He said the accused and deceased were near each other as the accused was standing over the body pointing the knife towards the body. The accused had started charging towards the people who had come in response to the screams and chasing them and he ran away towards a neighbor Mohammed Bijum's, a retired chief and informed him that Mohammed Wako had killed Guyo Karayu. And the retired chief in turn called Chief Abakul Godona to convey the same. As the Chief was then at Isiolo and he, therefore, asked the retired chief to call the police. The police arrived and arrested the accused and took the body. He said he knew the accused as they reside at the same place and he had known him since he was born, for more than thirty (30) years and he never had any disagreement with the accused before this death.
12. On Cross – examination, when asked whether his son Gimale and accused wanted to marry the same girl and disagreement arose, he said it was not true. He said his son Gimale had no disagreement over a lady by the name Shakala. He said it was true his son Gimale married Shakala and later divorced and that was the end of the matter. He said he was at mosque praying at 8.00p.m. and he had left the mosque with many people. He said the accused fled the scene. He was referred to his statement indicating that the accused was 50 meters away from the body and said he was not sure of the measurement. As to the circumstances under which the deceased died, he said he first saw the body lying on the ground.
13. In Re – examination, he said the statement was written for him by the Police and he told the police the information and he did not know how far 50 meters were [50 meters in the statement was the distance between accused and witness], and he had not been asked by the police about the distance in meters.
14. PW6 Kunu Jillo, a member of the Peace Committee in charge of security at the village, testified that on 29<sup>th</sup> September, 2018 at 8.00p.m. – 8.30p.m, he went with the Police offices in the police vehicle and when they arrived at the scene they saw body near the mosque. There was a youth named Mohammed Wako, the accused, who was holding a knife and piece of mabati. He was using the knife and the mabati piece to ward off the members of public who were approaching. They disarmed him and took the knife. The police were preventing the public from beating the accused. The members of public also hit him (PW6) on the head. The Police took the accused to the station and went back to take the body. At the scene the witness and the police established that the deceased was called Guyo Karayu. The body was fully bloodied and his clothes had blood all over.
15. There was no Cross – examination for the witness.
16. Pw7 Dr. Mohammed Abdikadir, Medical Officer at Isiolo Hospital testified on post mortem report of Guyo Karayu Guyo on an examination on 30<sup>th</sup> September, 2018 at 11.00a.m. He said the body had cap, kikoi and shirt. Male of African origin. Age 60 years. Medically good and physically well built. Height 170cm. post mortem indicated body was well preserved. External appearances – multiple stab wounds on the head - deep stab wound on left temporal measuring 2\*1cm. Fracture of skull bone. Blood on nose, mouth and ears. Cervical bone fracture and upper limb stab on bicep muscle. Blood vessels around the area severed on the lower limb left interior thigh and days stab wound affecting



major blood vessels. The chest wall had mid left chest stab wound near nipple extending tears to left lungs. The left knee had stab wound around the patella bone. The doctor did not dissect the body as the family asked that they do not dissect. The family was represented by Abdi Guyo son and Abdula Roba uncle of the deceased. PW7 said the cause of death was Cardiopulmonary arrest due to severe blood loss and hemopneumothorax – blood and air in the lungs as a result of the stab wound. Report signed and stamped on 30<sup>th</sup> September, 2018 [PExhibit no.1.] On Cross – examination he said they did not dissect the body and had just observed the body, the wounds and put the fingers into the wounds. There was excessive blood loss and the heart would stop. PW7 did not agree that the conclusion would have been different if he had dissected. He said there was blood loss and blood in the lung as a result of the stab wound.

17. PW8 No. 110729 PC Victor Owino Otieno of Forensic Crime Scene Investigation in Meru County testified that on 29<sup>th</sup> September, 2018 around 2120hours upon having been informed by then Deputy DCIO Abdikadir Kohai of Merti sub-county Isiolo that there was scene murder incident at Merti, he joined the team at around 22.00 hours at Merti Sub-location County hospital whereby they found an aged male adult of Borana community identified as Abdi Karayu. They collected some blood-stained clothes, kikoi and Islamic cap which they kept as exhibits. On 10th November, 2018 they took the exhibits which they collected from the accused and the deceased to Government Chemist for further analysis, the items recovered being-

1. Blood stained Kikoi MFI 5
2. Shirt MFI 4
3. Blood stained knife MFI 3
4. Brown trouser MFI 2
5. White striped shirt MFI 1
6. Islamic Cap MFI 6
7. Belt – red, black and green stripped MFI 7
8. Belt for knife – black and green holster MFI 8.

He said the exhibits were escorted to the Government Chemist - the shirt (MFI 4) and MFI 1 (white shirt) Kikoi (MFI 5) and belt (MFI 7) together with blood samples collection from the deceased and suspect.

18. On Cross – examination, he said he was assisting the investigating officer and he had arrived at Merti sub-county hospital to find the deceased and he collected exhibits from the deceased at hospital while other exhibits were recovered by others in the Multi-agency Authorities who were there.

19. PW9 No. 239615 Chief Inspector Theophilus Kahari currently at Nyandarua County under Murangine DCI as Deputy DCIO testified that on 29<sup>th</sup> September, 2018 at 21.00hours he had been called by OCS Merti Police Station Isiolo with information that there was a scene of murder at Manyatta Shambole within Merti North Location. Accompanied by Deputy OCS Bernard Chanyora, PC Awunga, PC Nyakundi and PC Rulio they went to the scene. On arrival at the scene they found the deceased who was on the ground and a person who was around with sharp knife chasing people who were around who were trying to arrest him. With the help of the members of the public they managed to disarm him, arrested him and took him to Merti Police Station and the deceased to Merti sub-County hospital where he was received by clinical officer on duty Ann Matoe who confirmed that he was already dead. The clinical officer preserved the body over –night at the hospital and in the morning of 30<sup>th</sup>



September, 2018 the police requested him to extract blood samples of the deceased who was already confirmed by family members and villagers as Guyo Karayu Guyo. After he had extracted samples they took the body to Isiolo Sub-County hospital for purposes of postmortem. PW9 was with other officers PC Victor Otieno and PC Titus Ongundi and in the company of two sons of deceased Abdi Karayu Guyo and Abkur Godana. On arrival at Isiolo, after the two sons identified the body, Dr. Mohammed Guyo performed the post mortem and made the conclusion on cause of death. The body was escorted back again to Merti and handed over the body to the relatives for burial ceremony. On that evening of 30<sup>th</sup> September, 2018, the police escorted the suspect to Merti Sub-County hospital for treatment and removal of blood samples for comparisons with other exhibits. The exhibits which they had collected, the blood of the deceased and the blood sample of the suspect were as follows:

On the side of the deceased

1. Shirt of the deceased
2. Kikoi
3. Belt

From the accused

1. Blood sample
2. Shirt
3. Trouser

20. On 1<sup>st</sup> October, 2018 he prepared an affidavit for request for suspect to be detained to allow investigation, they were granted 10 days and a committal warrant. On 2<sup>nd</sup> October, 2018 he was together with PC Victor Otieno and Titus Ongunda, granted suspect who they confirmed from his identity card as Issa Mohammed Wako. Before they got the identity card they had gotten his name from the villagers as Guyo Mohammed Wako. After getting the Identity Card they confirmed the real name as Issa Mohammed Wako and they escorted him to Meru Referral hospital for mental assessment and he was examined by Doctor Adrine Mwikimba who gave the opinion as represented. All the exhibits were submitted to the Government Chemist whereby Susan an officer by Government Chemist examined the exhibits and filed a report. PW9 said he was present during the arrest and confirmed that the accused was the person they arrested together with other police officers and members of the public who disarmed the accused and arrested him. The accused was chasing people. He chasing people with the knife and a piece of iron sheet he was using it to ward any person getting near him. PW9 said that from the investigations, there was another man who had married a woman who, after the man died, the suspect had tried to remarry. The old man (father of the dead son) refused the offer of the suspect to remarry the widow of his son. The suspect informed him that it was mis-identity thinking that it was the old man who had refused him to marry the woman. The suspect appeared drunk but PW9 could not confirm whether it was drugs or beer. PW9 said he was present when the samples of blood were being taken from the deceased and the accused and that he was the one who escorted the exhibit to Government Chemist for analysis, and he identified the accused as the person he had arrested. He produced the exhibits:

1. Post Mortem dated 30<sup>th</sup> September, 2018 P. Exhibit 1
2. White striped shirt (MFI 1) Exhibit No. 2
3. Knife (MFI 3) P. Exhibit 3.



4. Brown trouser (MFI 2). P. Exhibit No. 4
  5. Standard Floral Shirt (MFI 4) P. Exhibit 5.
  6. Checked Kikoi (MFI 5) P. Exhibit 6
  7. Islamic cap (MFI 6) P. Exhibit 7.
  8. Red green and black belt (MFI 7) P. exhibit 8 and
  9. Black and Green Belt whistler (MFI 8) P. Exhibit 9.
21. On Cross – examination he said he had received report at 2100 hours and they arrived after five (5) minutes at the scene and found the deceased lying down unconscious. On defence suggestion that it is the deceased who attacked suspect, he said it was not true because he had done his investigation. He said that the knife that was blood stained was taken to Government Chemist and it confirmed that it was the knife that killed him and that there were other witnesses in the case who said he was the one who attacked the deceased. He said he had recorded some of the statements while others were recorded by the PC Otieno. Of the statements, he had had recorded Molu, Abela, Kune Jillo, habi Guyo Karayu but they were not at the scene as they came later. He said Kuno Jillo had assisted him to disarm the suspect off the knife he was holding. PW9 said that members of the public had confirmed that that the accused is the one who attacked the deceased. He said there was no eye-witness. He said the witnesses heard commotion, it was at nighttime and they heard commotion, and he could not tell whether it was deceased who attacked the suspect. He confirmed that there was blood taken from deceased and accused and he had an exhibit memo. setting out Inventory of exhibits to present to the Government chemist. The investigating officer produced the exhibit-memo dated 29<sup>th</sup> September, 2018 as P.exhibit no. 11, indicating the exhibits were submitted on 15<sup>th</sup> October, 2018 with exhibits marked A-H:
- a. Blood sample of the deceased removed by Dr. Ali Matoe at Merti – Sub-county hospital.
  - b. Blood samples of suspect removed by clinical officer Ali Matoe at Merti Hospital.
  - c. Knife with bloodstains recovered from the suspect at the time of the arrest. It was removed from the hand of the suspect at the time of arrested.
  - d. Shirt of the deceased with blood stains which he was wearing when he was attacked.
  - e. Kikoi of the deceased with blood stains which the deceased was wearing.
  - f. A belt of the deceased with blood stains which he was wearing when we found him at the scene.
  - g. Shirt of the suspect which was with blood stains which he was wearing at the time of arrest.
  - h. A trouser of suspect which was with blood stains which he was wearing at the time of arrest.
- He said he escorted the exhibits on 15<sup>th</sup> October, 2018 after taking samples from Merti Hospital where it was kept for preservation and escorted it to Government Chemist for analysis.
22. PW10 Susan Wanjiru Ngugi of Government Chemist Department in Forensic Biology studies dealing with DNA Analysis produced the report of her analysis of exhibits submitted on 15<sup>th</sup> October, 2019. The following exhibits were received at the Chemist and brought by file no. 236195 inspector Theophilus Kahari from DCI Merti with a request to examine the items and ascertain presence and origin of any biological evidential material:
1. “Blood samples marked A for Guyo Kareya Guyo the deceased.



2. Blood samples marked B belonging to Issa Mohammed Wako who is the accused.
  3. Knife marked C a khaki envelop. It had multi-color handle with decorations.
  4. Shirt in a khaki envelop marked D – multi- flowered of green blue, white and brown
  5. Item E kikoi – particular with black and green colour.
  6. Item F- belt belonging to the deceased. carrying the exhibit memo for, Exhibit D, E A F belonged to the deceased.
  7. Item G was a shirt white in colour with white stripes packed in khaki envelop.
  8. Beige – long trouser parked in khaki envelop marked H  
Both exhibits G and H belonged to the suspect.”
23. The Analysis was done on 23<sup>rd</sup> October, 2019 and it was found that all the exhibit C, D, E F, G and H were all stained with blood of human origin; all Exhibits generated DNA Profile; and the DNA report was as follows:
1. “DNA on shirt item D Kikoi E and Belt F matched with DNA profile for the deceased. All the clothing for deceased and the DNA matched.
  2. DNA profile for blood stained on the suspects items Shirt G and trouser H also matched DNA for the suspect blood.
  3. Blood stains on the knife C generated a mixed DNA profile upon tabulating the mixture and found that the mixture belonged to the accused and the deceased.”
24. She prepared the report on 1<sup>st</sup> December, 2020, signed and dated the report which she produced as exhibit (P.Exhibit. No. 10)
25. On Cross – examination she said the mixed DNA profile on knife means that both deceased and accused were injured, because the knife had both DNA profile of the two.

### **Defence**

26. When put on his defence, the accused gave an unsworn statement denying the charge and saying that on 29<sup>th</sup> September, 2018 he was at Merti Location Manyatta Katue, and he dismissed the testimony of the prosecution witnesses as maliciously given against him. He said:
- “PW1 Hawo is a witness in another case at CM’s Isiolo for assault and grievous harm. Her evidence is malicious because of the other matter in Isiolo. PW2 Abdi Guyo. I do not know much about Abdi Guyo. I know him as chief. He is son of the deceased. I did not see him on that date. PW3 Huka Dida - I do not know him. I never saw Huko Dida on that date. PW4 Sadia Abduba - I saw her when she was accusing me in the Isiolo case. It is not true that she was my neighbor. PW5 Abdullahi Komba - I do not know him. His evidence is malicious. Pw6 Kunu Jillo. I know Kunu Jillo. His evidence is also malicious. It is trumped up.”
27. Asked why the witnesses maliciously accused him, the Accused said they had differences over a water tank from 11<sup>th</sup> June, 2017 and that the differences were with all of them because they are from the same village, and they accused him of taking their wives. He said he had differences with Abdi Guyo, Abdullahi, Huka, Dida and Kuno over the water tank and they had ganged up against him over the water tank. He finally alleged that the blood samples were not taken from him.



## Submissions

28. Counsel for the DPP, Mr. Masila filed submissions dated 1/9/2024 urging that the Prosecution had established the case for murder against the accused on circumstantial and DNA evidence as follows:

- “ 18. The burden lies with the prosecution to prove the three ingredients/elements in a charge of murder, which are as follows: -
- a) Proof of the fact and the cause of the death of the deceased;
  - b) That the cause of the deceased's death was as a result of the direct consequence of the accused's unlawful act or omission;
  - c) Proof that the unlawful act or omission was committed with malice aforethought as defined by section 206 of the Penal Code.
19. The prosecution has satisfied all the three ingredients/elements as against the accused as hereinbelow: -
20. The first element of death in respect to the deceased is not in dispute. This was confirmed by PW1, PW2, PW3 and corroborated by PW7 who examined the deceased body and testified as to the nature and cause of death.
21. The second element, PW1, PW2, PW3, PW4 and PW5 all saw the accused holding a bloody knife. PW6 also saw the accused brandishing a knife and the body of the deceased lying on the ground. PW8 and PW9 were the first police officers responders who rushed to the scene and saw the accused holding a knife and managed to disarm him with help from members of the public. The accused was arrested at the scene of the crime. PW10 testimony on the examination of the knife (item c, PExh 3) which was recovered at the scene, matched the DNA profile generated from the blood sample of the deceased and the blood sample of the accused.

The prosecution case is hinged on circumstantial and DNA evidence.

In the case of *Ahamad Abolfathi Mohammed and Another v Republic* (2018) eKLR, this Court had this to say on circumstantial evidence:

However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in *R v. Taylor, Weaver & Donovan* [1928] CR. App. R. 21:

“It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that is circumstantial.”



Additionally, in *Sawe Vs. Republic* (2003) KLR the Court of Appeal amplified on the above:-

In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused'.

From the evidence tendered in court, PW1, PW2, PW3, PW4, PWS, and PW6 saw the accused holding a bloodied knife. Upon arriving at the scene, police officers (PW8 and PW9) also witnessed the accused holding the knife to which they managed to disarm him leading to his arrest. PW7 evidence on the examination of the deceased body was that he had multiple stab wounds on the head; upper limb; lower limb; and chest wall. PW10 testimony on the examination of the knife (item c, PExh 3) which was recovered at the scene, matched the DNA profile generated from the blood sample of the deceased and the blood sample of the accused.

The above evidence there were no gaps or a break in the chain of events which irresistibly leads to the guilt of the accused.

As such, the prosecution did prove beyond reasonable doubt that it was the accused and nobody else who committed the unlawful act that led to the death of the deceased.

22. The doctor's finding at the post mortem corroborates the evidence OfPW1, PW2, PW3, PWS and PW6. The question is whether the accused had malice aforethought.

The Court of Appeal decision of *Daniel Muthee v Republic CA No. 218 of 2005* (UR) considered what constitutes malice aforethought and observed as follows: -

'When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code'.

Therefore, the accused must have known when he stabbed the deceased multiple times on the head, upper limb, lower limb, and chest wall that the injury could cause death. The accused had all the intention to cause death to the deceased. Consequently, the prosecution has proved that the accused had formed the necessary malice aforethought to cause the deceased death.



23. The effect of an unsworn testimony rendered by the accused was explained in the case of *Josephat Muli Musyimi v Republic* (2016) eKLR where the court, guided by the principle held in *May v Republic*, C.A. Criminal Appeal No. 24 of 1979 (1981) affirmed that:

An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case'.

Thus, flowing from the above principle, the unsworn evidence of the accused has little or no probative value and as such it is merely persuasive.

24. Having considered the entire evidence adduced in this case, the prosecution has proved a case against the accused beyond any reasonable doubt. I urge this honourable court to find the accused guilty of murder contrary to section 203 of the Penal Code and convict him accordingly."

29. Counsel for the accused Mr. Kaimenyi sought to rely on evidence on record, without filing submissions and Judgement was reserved.

#### **Issue for determination**

30. On the ingredients of the offence of murder, (see *Republic vs. Nyambura & 4 Others* [2001] KLR 355), the issues that arose on the evidence was (a) whether the death of the deceased was proved; (b) whether it was established that the accused's unlawful act caused the death; and (c) whether the accused caused the death with malice aforethought.

#### **Death of the deceased proved**

31. On the facts death was proved by multiple accounts of Prosecution witnesses PW1 the neighbour who watched the incident from a window in her son's house near the scene outside, Merti mosque; PW2, Chief Makagela location and son of the deceased; PW6 member of the Security Peace Committee who accompanied the police to the scene; medical evidence of postmortem examination doctor PW7; and PW8 police officer who assisted in collection of the body and assisted in the investigations by the Investigating Officer PW9.

#### **Death caused by Accused's unlawful act**

32. The accused defence was given in an unsworn testimony without cross-examination. As submitted by the Prosecution on the authority of *May v. R* (1981) KLR, an unsworn statement of an accused of the least value because it has not been tested by cross-examination. The statement must, however, be considered by the court in determining whether a reasonable doubt is raised to the prosecution evidence.
33. Consequently, in evaluating the evidence as a whole as required of this court by *Okethi Olale v. R* (1965) EA, the court must bear the statement of the defence in mind using it to spotlight on the evidence of Prosecution witnesses and illuminate any facts, inconsistencies and gaps that destroy the Prosecution's case.



34. The evidence of Prosecution witnesses in this case, although at times strenuously presented as eye-witness accounts was but circumstantial evidence as no witness testified that he/she saw the accused stabbing the deceased. All testified to the state of things after the stabbing of the deceased when their attention was attracted to the scene by the deceased's screams for help.
35. In cases resting on circumstantial evidence, as in this case, the Supreme Court in *R. v. Ahmad Abolfathi Mohammed & Another*, Pet. 39 of 2018 (2019) eKLR (on appeal from the decision cited by the DPP) has authoritatively set out the application of circumstantial evidence as follows:
- “(59) To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, “the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established....” As was stated in the case of *Kipkering Arap Koskei & Another v. R* (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the “... the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, ...””
36. The Court noted the significant implication of circumstantial evidence of presence of an accused's DNA genetic material recovered from scene of crime, as follows:
- “(56) On its application, circumstantial evidence is like any other evidence. Though, it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case,<sup>8</sup> and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact<sup>9</sup>, circumstantial evidence should never be given a derogatory tag. *Jowitt's Dictionary of English Law*, 4<sup>th</sup> Edition, states thus of circumstantial evidence: “... with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the accused's fingerprints, ... [or where there is] a ... DNA match between the accused's control sample and genetic material recovered from the scene of the crime ....””
37. In considering evidence of accused's role as perpetrator of the acts of stabbing that led to the death of the deceased, the court notes the following:
- a. PW1 saw the accused at the scene and later out through a window at the son's house, saying that he had killed someone. The Court has in the background of its mind considered the accused's defence in the unsworn statement which is merely that the charge was trumped up in view of his grudge with all the witnesses over a watering point and his alleged relationship with their wives.
- b. PW3 who was the first responder after screams were heard saw the deceased lying on the ground and the accused, who the witness knew since birth, stabbing the deceased, from only a short distance of around 10 meters from the scene. Although it was established that he had not



recorded in his statement the fact that he had seen accused stab the deceased, his evidence places the accused and the deceased together at the scene immediately after the screams were heard.

- c. PW4 saw the accused carrying a knife which was bloody although she did not see the accused stab the deceased.
- d. PW5 saw the Accused standing over the body of the deceased, pointing the knife towards the body and the accused had started charging towards the people who had come in response to the screams and chasing them.
- e. PW6 Kuno Jillo whose evidence was not challenged by cross-examination testified that they arrived with the police to find the accused using the knife and piece of mabati (iron sheet) to ward off members of the public who sought to lynch the accused.
- f. PW8 the Government Analyst reported that the bloodied knife presented for DNA testing revealed presence of genetic material for both the deceased and the accused and when asked whether it meant that both had been injured she responded in the affirmative that both deceased and accused were injured, because the knife had both DNA profile of the two. It would appear that the deceased and accused had been injured by the same knife, supporting the notion of a fight.
- g. There was no claim to self-defence or provocation however, and there being no evidence of any injury on the accused, there is no basis for inferring an act of self-defence, which would excuse the killing, or provocation as would commute the charge of murder to one of manslaughter in terms of section 207 of the Penal Code.
- h. PW1, PW4, PW5 who saw the accused at the scene did not see anybody else at the scene and it is reasonable to infer on this circumstantial evidence that the accused had caused the stabbing injuries on the deceased's body reported in the postmortem examination report.
- i. There was no evidence from the prosecution witnesses or the defence as to any injuries on the accused. The accused's questioning in cross-examination had taken a turn for self defence in retaliation suggesting that the deceased attacked the accused first. In his formal statement in defence which was unsworn, however, the accused did not allege that they had been in any fight with the deceased.
- j. It is significant that the Accused was arrested by the police and the members of the Public, as testified by PW5 Kuno and PW8 the assisting Investigating officer, while he was trying to ward off the public by threatening them with the knife and a piece of Iron Sheet. There is no break in the chain of events from when he was sighted by PW1, PW3, PW4 and PW5 with a knife shortly after hearing screams for the deceased, when he tried to escape to the Gubalow's house and meeting the PW4 Abduba and hitting her together with her baby to when he is cornered by members of the public who try to lynch him after they respond to the screams of the deceased, until the accused who is trying to ward off members of the public using a knife and a piece of mabati iron sheet is rescued and disarmed and arrested by members of the public and the police as testified PW6, PW8, PW9 and rescued from the public. The chain of commission of the offence of murder by the accused is complete.
- k. In view of the complete chain of events from the attack to the arrest of the accused, there is no issue of identification of the accused as the person who attacked the deceased with a knife, despite the night circumstances and lighting from electricity security lighting from nearby houses and mosque and moonlight as testified by the Prosecution witnesses.



38. The Court, consequently, finds it established on the evidence that it was the accused who by his acts of stabbing the deceased severally on his body caused the death of the deceased as confirmed in the cause of death established by PW7 as “Cardiopulmonary arrest due to severe blood loss and hemopneumothorax – blood and air in the lungs as a result of the stab wound.”

### **Malice aforethought**

39. The question then arises under the elements of murder test whether the accused acted with malice aforethought. The evidence of the postmortem doctor PW7 indicated multiple injuries on the body of the deceased - multiple stab wounds on the head - deep stab wound on left temporal measuring 2\*1cm. Fracture of skull bone. Blood on nose, mouth and ears. Cervical bone fracture and upper limb stab on bicep muscle. Blood vessels around the area severed on the lower limb left interior thigh and the stab wound affecting major blood vessels. The chest wall had mid left chest stab wound near nipple extending tears to left lungs. The left knee had stab wound around the patella bone.

40. The decision cited by the DPP in its Submissions of 1/10/2024, Daniel Muthee v Republic [CA No. 218 of 2005](#) [2007] eKLR, Court of Appeal (Bosire, Okubasu & Onyango Otieno JJA.) is authority for the proposition that malice aforethought under section 206 (b) of the penal Code may be inferred from the nature of the injuries inflicted upon the deceased, as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code’.”

41. In this case, the multiple stabbing of the deceased at the head and chest as revealed in the Postmortem examination report of PW7 betrays the accused malice aforethought as he must be taken to have known that the knife stabs to the head and chest would likely cause death or grievous harm.

42. From the evidence of the Investigation Officer PW9, it appeared that the accused was motivated by the rejection by the father of deceased husband of a lady that he wished to marry, leading to the confrontation which resulted in the fatal stabbing of the deceased father. In cross-examination of the Investigating Officer, the defence counsel suggested that the accused’s case was that the deceased had attacked first, which might, with relevant evidence, support a case of self-defence and or provocation. However, no evidence of a fight, no quarreling, no strike, beating or wounding of the accused by the deceased, and no weapon recovered from the deceased or at the scene, was forthcoming. The Court must find that the accused stabbed the deceased in cold-blood.

### **Orders:**

43. Accordingly, for the reasons set out above, this Court finds that the Prosecution has established the case for murder against the accused, and the Court convicts him for murder contrary to section 203 as read with 204 of the Penal Code.

44. The Accused’s mitigation and sentencing proceedings will be taken on a date to be fixed in consultation with Counsel for the Accused and the DPP

Orders accordingly.

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**EDWARD M. MURIITHI**



## **JUDGE**

Appearances:

Mr. Masila for the DPP.

Mr. Kaimenyi for the Accused.

