



REPUBLIC OF KENYA



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**Republic v Mwololo (Criminal Case 53 of 2015)  
[2025] KEHC 4238 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4238 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL CASE 53 OF 2015**

**MW MUIGAI, J  
MARCH 28, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MARCUS MWENDWA MWOLOLO ..... ACCUSED**

**JUDGMENT**

1. The accused was arraigned before this court on account of Murder charge. The particulars of information leading to his arraignment are stated as follows:-

Murder contrary to section 204 of the *Penal Code*.

Marcus Mwenwa Mwololo: On 22<sup>nd</sup> day of September 2013 at Sikia sub county in Athi River district within Machakos County murdered Felistar Wanzila.

2. The Mental Assessment Report dated 01/07/2015 and filed in Court on 06/07/2015 found the accused person Fit to Plead. The Accused person herein took plea on 08/07/2015 whereof after the charges were read out to him in a language that he understood he pleaded Not Guilty. A plea of Not Guilty was entered on his behalf.

The Accused person was granted bond/bail terms and the ODPP was to provide Witness Statements and Documents to the Defense /Counsel and/or Accused person before commencement of the hearing.

The Accused person was represented by Mr. Kyalo Advocate while the state was represented by Mr. Machoga and later Mr. Mwongera.

The hearing took off and the Prosecution called a total of seven (7) witnesses.



## Evidence

### The evidence was taken by Hon.D.K.Kemei J

3. PW1 Peter Maliti testified that he was a resident of Lukenya location within Athi River and was a mason. On 22-9-2013 at 7.30 pm he was heading home from church when a neighbour called him and informed him to stop as he was seeing him. He joined him and was in company of his wife. That guy is called Ndunda and wife is Virginia. They claimed that their children had heard screams from someone inside a thicket. His mother was called Felister Wanzila. He tried to call her but her phone was not picked. He then called his brother Amos and sister Lilian Nthenya and enquired whether their mother had arrived home. It was then dark and on the way they heard their mother's phone ringing inside the thicket.
4. They checked and saw their mother had been severely cut on the head, hands and back. Ndunda had a torch and used it to observe the scene. He then alerted his brother to rush there so that they could take mother to hospital. His brother arrived after 30 minutes. He then briefed him and then his injured mother was rushed to hospital. They later spotted the deceased's scarf, hat and one shoe. Police and members of public came to the scene, he showed them the items which were almost 50 meters from where his mother lay. He identified the brownish scarf which belonged to Marcus who used to work for a certain person in the area. He used to see him in the area. Marcus' girlfriend one Regina Wayua used also to wear the same scarf. MFI 1- one brownish scarf.
5. He also identified the yellow cap recovered from near the scene. The said Marcus Mwendwa Mwololo used to wear it. MFI 2- one yellow cap.
6. He testified that he led police officers to the house of Regina Wayua so as to confirm about the recovered items. She was a girlfriend to the said Marcus Mwololo who is the accused herein. The police woke up the said Regina Wayua and who confirmed that the recovered items belonged to her boyfriend Marcus Mwololo. He proceeded to Machakos Level Five Hospital to check on his mother and was referred to Kenyatta National Hospital. The following day he went home to see his siblings. He also passed by the accused's house but there was nobody at the time. He saw one bag his mother had used while at the market.
7. There was blood near accused's door. He also found a bloodstained panga outside the house, and identified it MFI4- one bloodstained panga. He reached home and met his two sisters and young brother. He briefed them about the incident. He went back to where he used to reside and on the way learnt that his mother had passed on.
8. Later a member of the community policing alerted him that the accused had been apprehended. He rushed there and confirmed. He also led the police to accused's house where the items were recovered. The police conducted a search at accused's house and other items were recovered. MFI 5- one stripped and bloodstained jersey/ MFI 6- one bag was recovered. A handbag near the gate of Cynthia and that was the one as it was being used by mother. He had not disagreed with the accused before. He did not know if she had any difference with his mother
9. On cross-examination he stated that he did not reside at the house of his mother since he had moved out in 2011 and had his own family. He used to work at the Centre and commute to and from my home on foot which took about one hour. He was not present when deceased was attacked and Ndunda also did not witness as he was only informed by children that they had heard screams. Ndunda's wife did not witness the incident. He did not know if those children saw accused or deceased. Isaac and Amos claimed to spotted the items near the scene and they led him there and he saw the yellow cap and



brown scarf. The two items are ordinary items worn by several persons as they did not have specific marks. He was not present when accused purchased the scarf and cap. The scarf and cap can be worn by anybody. Police from Makutano junction picked up the two items at the scene. The scarf and cap were not collected from accused's compound and did not see any dogs. They had dogs at their home. Accused's house was about 1 ½ km away from their home. Accused's employer was one Mutinda. Yes he entered accused's home without permission. The jersey (MFI 5) was inside the house and that there were bloodstains near the door. The basket and panga were outside and at different places outside accused's house. The members of public searched for the accused that night.

10. The Police collected the items around 11.00 am. the small bag was recovered and it contained milk and sugar. He did not know if photographs were taken or an inventory being made. He did not touch the recovered items until police arrived. He recorded his statement with the police and which contains the issues. He had not met his mother earlier that day.
11. PW2 Amos Mwaniki he was a resident of Sikia village in Lukenya location within Athi River Sub County. He recalled on 22-9-2013 at about 8 pm he was at centre Sikia when his wife Cecilia Mumbua and sister Florence Mbula came and alerted him that his mother had been killed. He then contacted his brother. The scene was about 1 km away from the centre. They then rushed towards the scene. On the way he saw a scarf and a yellow cap. He was using the mobile phone light. It was his first time to see them and he moved to where his mother was lying. She was bleeding profusely. She was in critical condition. She had severe cut wounds on the head, face and hands. The owner of the farm one Ndunda and his wife Virginia were also there with his brother Peter Maliti. They used an unused door to act as a stretcher to ferry their mother to the road where Cosmas Ndeti assisted to rush the victim to hospital at Shalom and then to Machakos Level Five Hospital from where the patient was referred to Kenyatta National Hospital where his mother died on arrival. Later a postmortem was conducted in his presence. He used to see the accused in the area. He had no problem with him. He did not know if he had any problem with his mother.
12. On cross – examination he stated that he used to live at his mother's compound. He used to see the accused in the area and used to live around 600 metres from their home. He was at the trading centre when he received the sad news. Deceased used to run a business at a centre called Kikuyu and was walking home when she was attacked. He was in company of my friends such as Masai, Mwanzia Musyoki, Mutua. It took about 40 minutes to reach the scene. He was not present when police visited scene since I had accompanied my mother to hospital.
13. PW3 Virginia Mutindi Ndunda testified that she was a resident of Matatani area of Mavoko and a farmer. The deceased was her neighbour. The accused herein used to work in the area. On 22-9-2013 at around 7 pm she was from visiting her mother Annah Katuku and heading home. She found her children and husband Philip Ndunda. Her children are Esther Ndunda, Nzibo Ndunda and they informed her that they had heard screams from a nearby thicket which is about 50 meters away from my house. She then alerted her husband who in turn called Peter Maliti (PW1) who arrived shortly and joined them and then they walked together towards Peter's home and they stumbled upon the deceased herein lying inside a thicket. She was in critical condition. She saw cuts on the head and hands.
14. On cross examination she stated that she knew the accused who used to live within her village as he had been employed. She had only seen the accused for one month prior to the incident. She did not see accused at the scene. She did not meet the accused on my way to the scene. Police came after She had left. She had dogs at her home and used to visit the deceased's home and would take about 30 minutes while walking on foot. The accused's house is nearer that that of deceased.



15. PW4 Regina Wayua testified that she was a resident of Mua Hills and ran a kiosk at Matatani centre. She knew the accused herein who used to be her boyfriend. She recalled that on 22-9-2013 at night she heard a knock on my door around 11 pm. She came out and saw police officers in company of Peter Maliti (PW1). They had a scarf and a yellow cap and they enquired if she knew the owner. They informed her that they had recovered them near the deceased. She informed them that items belonged to the accused herein. He used to wear them for about one year when they were lovers. She did not visit the scene. She later recorded her statement
16. On cross –examination she stated that the accused had been her lover. They had already parted ways with the accused one year prior to the incident. They disagreed over the business they used to run. They used to cohabit together. Amos Mwaniki and Peter Maliti are fellow church members. She had never worn such a scarf. There are several such scarfs and caps in the market. She was familiar with the items since one part of the scarf was torn. The accused was not at her house at the time of the incident.
17. PW.5 Isaac Mwanzia Musyoki testified that he was a resident of Sikia village in Lukenya and was a mason by profession. He recalled that on 22-9-2013 at about 9 pm he was at Sikia Shopping Centre enjoying a drink when a young child aged about 4 years came and informed those he was with namely Amos Mwaniki, Peter that their mother had been seriously cut and injured. Mwaniki and Peter then rushed to the scene. It was Mutua Kamuti who later relayed the news to most people in the market. He volunteered to use his motorbike to rush to the scene within Mua area. On arrival he met children who informed to go near a farm where he met a large crowd. He found the deceased who was well known to him as Wanzila. They had torches. He joined Mwaniki and Peter. The deceased appeared to have been viciously cut on the head and hand. She could not talk. The scene was along a certain footpath.
18. Cosmas Ndeti helped to rush the deceased to hospital while they remained at the scene. They managed to recover some items near the scene a scarf (MFI 1) belonged to one Wayua. The yellow cap (MFI 2) used to be worn by the accused herein. Later police visited the scene and they proceeded to the home of Wayua who confirmed ownership of the scarf (MFI 1) and she claimed that she knew the person who used to wear them and accused's name was mentioned.
19. The accused then used to be an employee of a certain man in the area. They rushed there and approached accused's house. They saw bloodstains leading to his house which was locked. They entered the house and found bloodstained clothes. A T-shirt (MFI 3) a long sleeved jersey No. 8 (MFI 8). The basket had bloodstains. one brown rubber open shoe (MFI 9). They made enquiries on the whereabouts of the accused and one Albanus Wambua who was his friend informed them that he had not seen him. The following day they proceeded to accused's house. They also passed by a neighbor's house and they stumbled upon a lady's handbag (MFI 6) which had bloodstains. Later a bloodstained panga was recovered by Peter. They then embarked on searching the nearby bushes for the accused. They managed to catch up with him. The AP officers arrested him. He later recorded my statement. I had never disagreed with accused before. He used to work for my neighbour. He was not aware if he had problems with the deceased.
20. On cross examination, he stated that the incident took place on 22-9-2013. He used to meet the accused within the market and had seen him about three days prior to the incident. He reached the scene around 9 pm. He found one James who was a Maasai and who had arrived at the scene first. It is AP Mireri who picked up the items recovered. Deceased's son Peter accompanied her to hospital while his other brother Mwaniki remained at the scene. Peter claimed that he had earlier in the morning spotted accused wearing the scarf and yellow cap. They found the items placed in a wheelbarrow at accused's house. The deceased used to carry a basket to the market to carry goods. The yellow cap used to be worn by accused. yellow Tusker caps are quite common. The items recovered from accused's house



were collected by Peter who was a son to the deceased. The accused at the time had been laid off by his employer but was still residing at the employer's compound. The home of the deceased was about five hundred meters from accused's house. the scene was not that far from the deceased's home. He was not aware of any differences between the accused and deceased's family. He had known the accused who had no bad antecedences in the area.

21. PW.6 Charles Ndonge Ndambuki stated that he was aged 50 years old and resided at Kilifi. In 2013 September he was at Mathatani area of Mua Hills in Athi River Machakos County as he was an employee of one Catherine Mbithe Kilango. He used to live in her house. He did not know the deceased. On 22-9-2013 at 7.30 pm, he went to the village shopping centre a five minute walk. It was during the time of the Westgate bomb blast. Later someone informed him that there were screams emanating from his place. It was Kioko Mueni who alerted him of the same. He went outside and learnt that his employer might have been harmed. He then rushed back and found his employer safe and sound. She informed him that she had not heard of any screams.
22. He went to bed, the following day at 6.00 am, he saw a certain handbag placed next to their main gate. He alerted his employer about it. She went to the gate, she denied being the owner. She raised alarm upon seeing some bloodstains on the said bag. The bag contained milk in clear polythene bag, vegetables (kales). Her employer made phone calls and they saw many people searching the nearby bushes. They informed them that a certain lady had disappeared from the area previous night. One of them looked like a son to the missing woman.
23. Police officers later arrived and took photographs of the recovered bag. They went to the house of the accused herein. Later around 10.00 am reports came that the accused who was alleged to be the suspect had been apprehended. He rushed there but did not find the suspect. There were many people. He had no relationship with the accused herein. The accused is in court and he had known him well.
24. On Cross – examination he stated that he was alerted of the incident and on coming out of the hotel he heard screams once. It took about eight minutes to reach my place. He found his employer at home who informed him that she had not heard screams. He did not hear any more screams while at his place. The accused's place was about four minutes' walk. He did not visit the scene and had never passed by such a route through the forest. He saw the bag at our gate and it had some bloodstains. The bag is available in many places. His employer did not take the bag as police came for it afterwards. He did not meet with the accused around that time and did not get any information from anyone who claimed to have met him. He did not know the deceased and did not witness the incident.
25. PW.7 NO. 235130 IP Mireri Mokaya Wilson testified that he was based at Kikuyu police station. In 2013 he was based at Kitanga Mathatani within Machakos County. On 23-9-2013 He was at the AP camp when he received a call from a member of public Peter Wanzila. It was around 10 pm. He informed him that his mother had been cut with a panga and was in critical condition. He then suggested to him to try and rush her to hospital as he decided to rush to the scene. His superior IP Gathua Mutum alerted the OCS who sent CPC Philip Kurgat, PC Nyamai and PC Mwendwa to pick him up. They rushed to the scene. They found a large group of people there. The place was called Kikuyu within Mathatani. They found a yellow cap and brown scarf. The deceased had already been rushed to hospital but they were informed that she had passed on. Members of public identified the cap and scarf as belonging to one Marcus Mwendwa Mwololo (accused). They were led to his place by members of public. They carried the two items to his place. On arrival they met one Regina Wayua who was claimed to have been an ex-girlfriend and who identified the items as belonging to her said ex-lover who is the accused herein.



26. They did not find him, it was getting dark and they called off the operation. The following day they received a report from members of public who had apprehended the accused at a place called Malalani as he was headed towards Machakos. They rushed there in order to save his life from the angry members of public. They rearrested him and escorted him to the camp. The OCS Kyumbi police station was alerted and he dispatched S. Sgt Kemboi and CPL Priscah and other to pick him up. CPL Kurgat took possession of the recovered items. He had not known accused before. He did not visit the hospital. The accused was before court.
27. On cross examination he stated that they were alerted on 23-9-2013 at 10 pm and they reached the scene around 11 pm. They were four police officers and had torches. They did not find the deceased at the scene. They saw a pool of blood on the ground and a few blood spots indicating that it came from the deceased as she was being assisted to a vehicle. The two items recovered were not at one place but at a distance of five meters apart. He could not recall if the two items had been placed there by somebody.
28. They proceeded to the home of Regina Wayua as it was claimed that she was former lover of the suspect. They did a search and learnt the accused had stopped visiting his lover for a long while now. He was not the Investigating officer. They did not visit the house occupied by the accused. None of the members of public came forward to claim having met the accused in the area. He learnt accused had been apprehended the following day by members of public. The accused was apprehended within Kaani village around 9.00 am. They found accused had been surrounded by members of public.
29. PW8 NO. 522246 CPL Philip Kurgat testified that he was based at Kapsokwony police station. On 23-9-2013 he was based at Kyumbi police station and at around 11.30 pm with John Nyamu and Mwendwa, they received a call from one Peter Wanzila who claimed that there had been a raid in their Mathatani area by people unknown and who had injured his mother. He rushed to the scene in company of two officers. They met members of public at Sikilia village and who gave them a brief of what had happened. There was a police officer already at the scene. The deceased had already been rushed to hospital. They had torches. They recovered a cap (yellow) and scarf (brown) these are the one (MFI 1 & 2). It was claimed that the two items belonged to the accused herein. They searched the area but did not recover any more items. They later briefed the OCS. The following day the accused was apprehended by members of public and was later handed over to their station. He had not seen him before. He could not recall the names of the deceased.
30. On cross examination, he stated that they received the distress call around 11 pm and took half an hour to reach the scene. They were four officers at the scene. They found two members of public standing at the scene. He did not see any bloodstains at the scene. The two items were about five meters apart. The members of public claimed that the owner of the two items recovered was one Marcus Mwololo. They searched the bushes in vain and did not manage to locate the suspect. They visited the accused's girlfriend's house.
31. PW9 NO. 233968 CPL Joseph Ngaira testified that he was currently based in Garsen police station. Previously, in 2013 he was at Athi River police station where he was in charge of crime branch office. On 24-9-2013 at 2 pm his supervisor informed him that there was an incident of a certain lady who had been violently attacked and robbed and that she had finally died. He proceeded to Mathatani area and met PC Wilson Mireu who led them to the scene of crime. They saw bloodstains along a footpath. They learnt that some exhibits had been taken to Kyumbi police station which comprised a yellow cap and a brown scarf. There were also more items collected. He then proceeded to accused's house and along the way they could see blood spots which led them all the way to accused's employer's compound. A neighbor showed them the accused's house which was then locked. He entered inside and saw a polythene bag containing clothes belonging to the deceased. There was sugar, vegetables (kale), milk.



- He then took photographs. The bag was a manila one which had bloodstains. There was a t-shirt, One brown open shoe (MFI 9) A son of the deceased was present and he positively identified some of the items as belonging to his mother. He took custody of the items and kept them as exhibits at Athi River police station. He also received from Kyumbi police station bloodstained panga that had been recovered from the accused (MFI 4). He produced the items as exhibits. MIF 1,2,4,5,6,8,9- now produced as exhibits 1,2,4,5,6,8 and 9 respectively.
32. From the scene he went to Kyumbi police station and picked up the accused who had injuries inflicted by members of public. He took him to Athi River police station. Later he accompanied an officer to the hospital who confirmed that the deceased had passed on. He issued a postmortem form which was later filed after autopsy. The accused is before court. He had not known him before. He also had not known the deceased before.
33. On cross examination, he stated that he was the Investigating officer herein. He did visit the scene on 24-9-2013 in company of the driver PC Meta. He did not pick any exhibits at the scene but only took photographs. They proceeded to the house of the accused through a footpath and there were blood spots which led all the way to the house belonging to the accused. He was in company of a son to the deceased. EXH 5 was inside the manila bag and likewise EXH 8, EXH 6 and EXH 9. Yes the panga (EXH 4) was given to him by Kyumbi police station as it had been recovered from the accused by members of public. exhibit 1 and 2 were recovered from the accused on 24-9-2013. exhibits 1,2,4,5,6, 8 and 9 had bloodstains. He took photographs. DNA analysis was done on the bloodstains and no finger prints dusting was done on the recovered items. The accused had been beaten seriously by members of public. An exhibit memo was made and used before Mavoko Law Courts. He had not seen the inventory.
34. On 1/12/2021, this Court took over the matter, Section 200 CPC was read to the Accused person in Kiswahili by the Court Assistant to which he opted the matter proceeds from where the previous Trial Court stopped. Typed proceedings were availed to both Defense and ODPP/Prosecution.
35. PW.10 DR. Mativo Mwikali testified that she had worked at Machakos Level 5 Hospital for 6 years and was familiar/stepping in her colleague Dr. Okiri who undertook the post mortem on 27/02/2014. He was indisposed and he relocated from Nairobi. Post Mortem Report Form was filled and Post mortem performed on the body of Felistar Wanzila Mutua under escort of PC James Wafula. The body was found at Sikia sub location on 22/09/2013 at 8.00 p.m. At the time of death indicated is 22/09/2013 at 23 hours – 11 p.m. The circumstances as indicated are alleged to have been inflicted; Cuts on the head and hand with a blunt object. She was rushed to Machakos Hospital and later referred to KNH and then pronounced dead on arrival. Motive of the incident is unknown. Post mortem report of 22/09/2020 – reflex of the body. External observation of the body – female African Adult 43 years old. Post mortem changes – Body well preserved external appearance was noted – pale – 3+ signs of surgical intervention. Cut wounds on the scalp – with stiches on the scalp – stitching done at the hospital, bandage on the hands, bilateral cut wounds on the right arm left hand with damaged tendons – deeper structures of the body after murder and bond – 10x6 cm. Internal appearance – Respiratory system – normal Cardiovascular – normal Digestive system – normal. Head – multiple cut wounds 7x2 cm On the scalp on the parietal – (side of the head) Occipital (behind the head) temporal – (right above the ear) 7 stab wounds Nervous system – skull fracture – open around 7 x 3 cm with subdural haemorrhage bleeding within the brain. Multiple brain cuts Spinal cord – normal.
36. The cause of death – Head injury caused by sharp cutting object specimen taken blood for DNA matching on the assaulting object. Signed by Dr. Okiri – 27/02/2014 at Machakos Level 5 Hospital – stamped – Post mortem on 27/10/2013. She pointed to Dr. Okiri's signature and handwriting - MFI-1 P Exhibit 7.



37. On cross examination she stated that the deceased on presentation to hospital was alive and taken to Machakos level 5 and then transferred to KNH on arrival she died. That was the post mortem report when the deceased was examined. Physically there were surgical wounds and was under medication. Blood collected on DNA to be compared to the assaulting item/gadget. Some blood was found on the object and was sent for analysis
38. The Prosecution closed its case and the Court directed the parties to file and serve their written submissions. Each party was granted 21 days to do so.
- The Court delivered Ruling on a case to answer under Section 306 CPC.

### **The Defence Case.**

39. The accused was placed on his defence on 17/10/2024. He gave sworn evidence and testified that on 22/9/2013 he was at home with his wife and that he was tending to his shamba. That the next day he went to sell tomatoes at Athi River and that he was accosted by the some on his way back home, the people asked if he knew Mutinda. That Mutinda was his former employer and the accused took them to his house . He was taken to the police station where he was eventually charged with the offence.
40. He stated that Pw1 was his customer at the shop and that Pw4 worked for him. Pw1 also knew his home.
41. He stated during cross examination that he did not live in Athi river and that he took his produce to Njoroge, he was charged with robbery with violence which was withdrawn after the deceased died. That Pw4, Pw1 and pw2 were customers and they knew where he lived.
42. That he was taken to the police station and he was supposed to bring Mutinda who was the owner of the shamba to explain what happened. The accused left 2 years before arrest. He lived with Faith at the shamba but she left him while he was on custody and she also refused to testify in the case.
43. The accused closed the defense case.

### **Closing Submissions.**

44. Written submissions were filed as follows:-.

### **The Prosecution's Submissions.**

45. The prosecution frames issues as whether the accused was involved in the murder of the deceased. That Pw4 identified the yellow cap and brownish scarf and these exhibits were from the scene while Pw1, pw5 and pw9 said that the accused had the blood stained panga and the deceased handbag which had blood stains.

It is submitted that circumstantial evidence placed the accused at the scene of crime.

That malice aforethought was proved by how the accused inflicted the head injury using a panga , the prosecution refers to Section 206 of the *Penal Code*

46. The cause of death was proved by Dr Mativo who testified on behalf of Dr Okinyi. That there were signs of surgical intervention on the cuts and wounds with bandages and sutures on the scalp .The cause of death was sharp cutting edge .The accused referred to the case of Ronald Nyaga Kiura Vs Republic (2018) eklr.
47. Contradiction is disputed, the prosecution submits that Pw1 was present when the panga was recovered at the accused house .That Pw9 stated that he recovered it from Kyumbi police station while



the accused did not deny that the panga , the basket and soiled clothes were found nor did he offer any explanation .

48. That there was no motive for Pw1 and Pw5 to frame him and the witnesses confirmed that there was no grudge between them and the accused. The items were recovered from scene belonged to him while those identified from his house belonged to the deceased. That the accused failed to offer explanation .Reliance is placed on Section 111 of the *Evidence Act* and the case *Chai v Republic (2022) eklr Republic - Vs- Ahmad Abolfathi Mohammed* Petition 30 of 2018.
49. Lastly that the prosecution evidence was consistent and the accused did not displace the prosecution's case.

### **The Accused's Submissions**

50. The accused submits that the exhibits recovered were believed to belong to him. However, the exhibits 1 and 2 cannot be used to link him to the offence. That no one saw him wear the scarf and the hat on that day or on previous part days. He also denied owning the items and also said that he sold second hand clothes .That the items were not recovered from his house and that the panga was hidden in a bush outside the house.
51. That the evidence had contradictions. That the investigation officer claimed that the panga was recovered at his house when he was being arrested while Pw1 said it was found in a bush. He also stated that the panga was recovered by members of the public during arrest and that the cap and scarf were found in his house. That the investigating officer did not have an exhibit memo and an inventory, the way the exhibits were recovered and stored also raises doubt on whether the accused was in possession and whether they are linked to the crime.
52. That DNA test was not done despite blood stains being found on the scene, the Government Chemist report was also not produced. Finger prints were not dusted from the items recovered. That the police did not record the statement of Esther who heard the screams and also the owner of the home where the accused worked.
53. He submits that the investigations were poorly done and that the investigating officer was not sure about the exhibits. That photographs were not produced .That the police intended to charge him with robbery with violence before they brought the current charge. That the police preferred two charges in the same year.
54. That poor investigations and the suspicious circumstances informed the arrest and charges and these anomalies render the case doubtful on his guilt. This should be resolved in his favour He relies on the case of *Republic v Morris Karani Alando Kakamega* criminal case 32 of 2012 where the High court noted poor investigations or lethargy on the prosecution to call necessary witnesses
55. Further that circumstantial evidence does not prove his guilt since other circumstances weakened the chain. That the court should not be misled suspicion and that suspicion cannot form a basis to infer guilt beyond reasonable doubt.
56. That malice aforethought was not proved and all witnesses testified that he was of good character.

### **Analysis And Determination.**

57. The Court considered the evidence on the Trial Court record, the evidence adduced before this Court, Accused person's Defence and submissions by parties through respective Advocates on record.



Section 203 of the *Penal Code* provides that :-

“ Any person who of malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder.”

58. I have considered the prosecution’s evidence and the accused defence statement together with the closing submissions on record. The issues that commend themselves for determination are framed as follows :-

1. Whether the accused is responsible for the death.
2. Whether contradiction’s and omissions on investigations affect the prosecution’s case.
3. Whether the accused had motive.

59. The elements of the offence of murder include: That the deceased died from an unlawful action or omission, that the accused was responsible for the death, that the accused had malice aforethought.

60. This was elaborated in the case of Republic – Vs- Andrew Omwenga (2009) eKLR the court explained this scope as follows: -

“ it is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act omission there are therefore three ingredients of murder which is the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-

- a. Death of the deceased and the cause of death.
- b. That deceased died from committed the unlawful act which caused the death of the accused.
- c. The accused had the malice aforethought.”

### **The death of the deceased and cause of death**

61. The postmortem was produced as Exhibit, by Pw10 Dr Mativo Mwikali on behalf of Dr Okiri who performed Post Mortem on the deceased but later left Public Service. Dr Mativi produced the Post Mortem report under Section 77 CPC and she explained that the deceased suffered multiple bran cuts which informed the death. That on examination of the deceased body, cuts and wounds on the scalp were noted to have been stitched and bandaged on the hand and bilateral cut wounds on the right arm and left hand with damaged tendons. That cause of death was the head injuries that were caused by a sharp cutting object.

62. The Postmortem findings confirmed Deceased’s death. Pw1 and Pw2 who went to the scene and found the deceased lying in a thicket. The witnesses testified that she had body injuries, the witnesses also stated that there was blood on the scene. Pw 7 stated that they rushed to the scene where they saw a pool of blood and few blood spots indicating that it came from the deceased who had been rushed to hospital at the time.

63. The conclusion is that the deceased succumbed to the injuries caused by the attack that night. The accused did not dispute the cause of death.



### **Whether the accused is responsible for the death.**

64. The commission of the offence was not witnessed and direct evidence was not adduced to link the accused directly as one who murdered the deceased.
65. The witnesses arrived after the assault. Pw2 and Pw3 stated that the children claimed that they heard screams from a nearby thicket which was about 50 meters from their house. They went with Pw1 to the place where they stumbled on the deceased who had sustained the injuries stated above.
66. However, the Court found evidence on record in form of circumstantial evidence.
67. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal held that:

“However, it is a truism 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 a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

Further That:

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.

The burden of proof still vests on the prosecution and the offence must be proved beyond reasonable doubt.

68. In the case of *Abanga alias Onyango v Republic* Cr. Appeal No. 32 of 1990 the Court of Appeal set out the threshold of circumstantial evidence holding that .

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests.

- I. The circumstances from which an inference of guilt is sought to be drawn, must cogently and firmly established.
- II. Those circumstances should be of a definite tendency unerringly pointing towards guilty of the accused.
- III. The circumstances cumulatively, should form a chain so complete that there is no escape from the conclusion that within or human probability a crime was committed by the accused and none else.”

69. The evidence on record by several witness is that the Accused person was known as resident and worker in the area the deceased lived and neighbor to the deceased.
70. PW1 saw the deceased his mother and called his brother PW2 who came and spotted the deceased’s scarf, yellow hat and I shoe. The brownish scarf and yellow cap was discovered a few meters from the



- place where the deceased was found lying in pain. Pw1 identified the yellow cap as one of the accused clothing and also knew him as Marcus and as a person who used to work for a certain person in the area.
71. Pw1 took the police to Pw4's house, the witness conformed that the accused was her boyfriend and that the accused used to wear the scarf and the yellow cap. She also specified that the scarf was torn which made it different from others which may have been commonly used or available.
  72. Pw1 also testified that he went to the accused house while on his way to his siblings, that he saw his mother's bag, Exhibit 3, which she used at the market. The bag had blood stains. He also stated that a bag was found next to Cynthia's door, the bag was identified as MFI 6 and produced as exhibit 6.
  73. PW1 went to Accused's house and found blood at the Accused person's house door. He found a blood stained panga PW Exh 14 outside the house of the deceased.
  74. PW4 confirmed the Accused and her were in a relationship and the scarf and cap belonged to the accused person. These items found near the deceased's mutilated body were identified as used by the Accused person before and blood stains found at his house.
  75. PW5 who volunteered his motorbike to take deceased to hospital remained at the scene as Cosmas Ndeti took her to hospital. He was one of those who remained at the scene with PW1. The police came to the scene took the yellow cap and scarf. When they went to Accused person's house, the Police found blood stains leading to Accused person's door. The police entered and recovered bloodstained clothes, Tshirt PWExh 3 Long sleeved jersey PWExh 8 the basket and 1 brown rubber open shoe. They passed by a neighbour's house and stumbled upon a lady's bag which had bloodstains.
  76. PW6 witnessed the bag that had blood stains and contained milk and vegetables in a clear polythene bag. The Police recovered the same bag and took photographs.
  77. PW7 PW8 & PW9 Police Officers on receiving distress call went to the scene recovered scarf and yellow cap, they checked with PW4 the Accused girlfriend and she confirmed they belonged to the Accused person.
  78. PW9, the investigating officer stated that a neighbour showed them the accused house which was locked. They entered and saw a polythene bag containing clothes belonging to the deceased. They saw sugar, vegetables, milk and a manila bag which had blood stains. These were identified by Pw1, the deceased son. He also received exhibits at Kyumbi Police station which he took over, the scarf and yellow cap. In Accused's House recovered Tshirt and shoe and bloodstained panga to Mavoko Police Station.
  79. He also collected the Accused person from Kyumbi Police station as he was arrested by members of the public.
  80. PW6 stated that he heard screams and went back to check on his employer, she was called Catherine. He testified that the next day they found a brown bag near the main gate. That the bag had milk and kales and blood stains were also noted. The bag was identified as MFI 6. That they raised alarm and members of the public came. He also stated that the accused house which was also the accused employer's house was about 4 minutes' walk away.
  81. The prosecution evidence was corroborated and proved that the deceased clothing was also found in the accused house while the accused clothing was found near the scene. The deceased clothes had bloodstains, witness testimony and post mortem also proved that she was attacked she that she succumbed to serious injuries inflicted on the night of the offence.



82. The weapon was described as a sharp cutting object Pw10 also testified that the specimen was taken for DNA and that it matched with the blood on the assaulting object. The panga was found within the accused place of abode.
83. The Prosecution witnesses whose evidence is on record confirmed the Accused who was known in the area and was arrested by members of the public, he had as neighbour resident and businessman in the area the deceased resided had the opportunity and/or knowledge of deceased whereabouts activities and circumstances that made him accost attack and visit violence on the deceased on her way home.
84. The Accused person was not found at the scene, at his alleged business or at home, the house was locked. The Police on opening the house found assorted items blood stained clothing, shoe, hand bag with edibles and bloodstained panga. The evidence on record confirms Police took photographs of the items but these were not produced in Court.
85. The totality of the evidence on record places accused at the scene or within distance of injury on the deceased on the fateful day, the unexplained disappearance from home and whereabouts unknown until he was arrested by members of the public is a pointer of having something to hide, the recovery of bloodstained weapon/sharp object bloodstained pang and bloodstained clothes lead to the logical and reasonable conclusion, the Accused caused death of deceased.

#### **Whether contradiction's and omissions affect the prosecution's case and the accused defence**

86. The accused has pointed out contradictions in his submissions which relate to how and where the panga was recovered. Also, that the evidence was not sufficient to link him to the murder.
87. First, the fact that the panga produced as Pexhibit 4 had the blood was not disputed. Secondly, Pw1 testified that the basket and panga were outside the accused house and at different places, see page 18 of the proceedings. Pw5 corroborated Pw1's evidence stating that bloods stains were on the path leading to the accused house and that they stumbled on the bag and later a blood stained panga was recovered by Pw1. See page 24.
88. The Investigating officer PW9 received the panga from Kyumbi police station. Suffice, the panga had been recovered by PW1 in the company of PW5 and it was collected by the police who came to the scene as per evidence of PW1 at page 17 and 18 of proceedings
89. Further contradictions are also evident on the case, Pw1 stated that the hand bag, Exhibit 6, was near Cynthia's gate, Pw5 stated that they entered the house and that Pw1 claimed that he had seen the accused wear the scarf and yellow cap. That the items were collected by Peter who testified PW1. He also stated during cross examination that they found the items placed in a wheel barrow at the accused house. See page 25 of Proceedings
90. PW1 testified that he did not touch the items, he also did not tell court how he saw the accused wearing the cap and scarf earlier that day.
91. PW 6 stated the bag, exhibit 6 was found near Catherine Mbithe, his employer's door .
92. Pw9, the investigating officer stated that he proceeded to the accused house , they entered and saw a polythene bag / manila bag which had milk sugar kales . He also recovered the brown hand bag which was produced as Exhibit 6.
93. That exhibit 1 and 2, the yellow cap and brownish scarf was recovered from the accused on 24/9/2013 contrary to PW1 and police evidence that these were found within the locus of the scene where the deceased was murdered. See page 34-26 of the proceedings.



94. The accused also takes issue with the fact that an inventory was not prepared and it was also not produced. In the case of *Stephen Kimani Robe and Others v Republic* [2013] eKLR the court explained that:

“The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence.”

95. The Investigating Officer testified that an exhibit memo was made and used at Mavoko Law courts. The Exhibit Memo is filled to include specimen and/or samples to Government Chemist for analysis. In the instant case although blood samples of deceased were taken as shown in Post Mortem Report, the Government Analyst did not testify nor were the photographs taken by Scene Visiting Officer. The Court record shows physical exhibits were produced in Court during Trial and not challenged in cross-examination.

96. I find that the chronology of recoveries made from the scene of crime and the accused place of abode and neighborhood was corroborated. The contradictions did not affect the key ingredients of the offence .

In the case of *Njuki & 4 Others v Republic* [2002] 1 KLR 771 the court went further to state that:

“Where discrepancies in the evidence do not affect an otherwise proved case against an accused a court is entitled to ignore those discrepancies.”

97. The blood stained panga was also found within the accused place of residence. Photographs were alleged to have been taken but none were produced. Again, the exhibits were seen by witnesses and the individual police officers testified on how they recovered and handled by the exhibits from the scene and the accused house.

98. On the veracity of the defence case, the law is that the evidentiary burden shifts to the accused and that he is required to cast doubt on the prosecution’s evidence. Sections 111(1) of the [Evidence Act](#) provides as follows:

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”



99. Section 109 of the *Evidence Act* also provides:

The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

100. Further, the accused was found in recent possession of the deceased clothing and he also admitted that the police intended to charge him with robbery with violence. A second burden of proof shifted to him requiring explanation of his possession / recent possession.
101. Thirdly, the circumstantial evidence linking him to the crime called for further effort to displace and / or create doubt on the chain of events linking him to the offence.
102. Notably, the accused case did not displace the witness testimony adduced, the direction taken from the first witnesses was that the cap and the brownish scarf belonged to him .Pw4s evidence was also credible and unshaken and further identified the clothing which linked him to the offence. Witnesses also testified that they had seen the accused with the clothing earlier although it was not at the time of the offence.
103. The accused did not sell or dispose them off and nothing was brought to prove that he was not the owner or that he had not worn the clothes at the time of the offence.
104. The accused admitted that he knew PW4 and that she worked for her. He also knew Pw1 who was also a key witness. There was no bad blood and therefore the witnesses had no reason to deceive the court or frame him for the charges.
105. The offence occurred at night, the events given in the defence case were done during the day and the next day when he went to sell tomatoes and he was accosted by members of the public and questioned on the incident.
106. Evidence was adduced proving that the members of the public looked for him in the bush and that he was arrested as he attempted to escape to Machakos.
107. PW7 stated that they rushed to save his life from angry members of the public, pw9 also picked him up from Kyumbi police station and he noted that the accused had injuries inflicted by members of the public.
108. These events lead to what he explained as two charges being brought in the same year and that the police did not investigate the case.
109. The accused defence was that he was previously charged at the Magistrate's Court court the offence of robbery with violence.I find that circumstantial evidence proved that the deceased was attacked on her way home and that she sustained serious injuries. The accused defence and the investigating officer's evidence had one common ground , that charges had been preferred against the accused at Mavoko Law Court. The accused defense pointed that these charges were related to robbery with violence .It is also apparent that the same exhibits and exhibit memo was intended to be used at the lower court. The case was withdrawn paving way for this case.
110. Section 203 of the *Penal Code* allows the prosecution to bring murder charges where a person dies as a result of unlawful actions or omission, this includes assault and grievous harm.



111. Article 26 of *the Constitution* of Kenya, 2010 particularly provides for the right to life and the greater need for the accused arraignment. That

- “(1) Every person has the right to life.
- a. The life of a person begins at conception.
  - b. A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.”

112. The deceased succumbed to the injuries inflicted on the night she was attacked and charges had to be drafted afresh. The lower court did not have jurisdiction to determine the case and the same charge sheet could not be used to introduce the murder charges.

113. The accused defense that he was selling tomatoes and also second hand clothes and was at home on the fateful night with wife and children was evasive and did not cast doubt on Prosecution case the circumstantial evidence disclosed by the Court record pointed to the accused person, was known as resident neighbour and worked in the area, after the unfortunate incident culminating with untimely death of deceased , the accused person was nowhere to be found until irate mob arrested him and handed him over to Police and of concern unexplained the assorted items recovered among them a weapon and clothe items with blood stains and was therefore dismissed.

114. The Defense raised a number of issues

#### **Whether the accused had motive.**

115. Lastly, the motive and intention to kill must be proved by the prosecution. This was explained in the case of *Joseph Kimani Njau v R (2014) eKLR*, where the Court of Appeal held that murder must be aimed at someone and committed with intention , the court referred to subjective test under Section 206 of the *Penal Code*:

116. That “Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

117. It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

118. In *John Mutuma Gatobu v Republic [2015] eKLR* further stated that there is nothing in the definition of malice aforethought:

“...that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, it is to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought.”



119. The Ugandan case of *Chesakit v Uganda Cr. Appeal No. 95 of 2004* cited by our court of appeal in *Milton Kabulit & 4 Others v Republic [2015] eKR* also clarifies how malice aforethought can be implied from the facts of the case. The Court of Appeal of Uganda held that :

“In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.” See *Ruth Wanjiku Kamande v Republic [2020] eKlr*

120. In the offence of murder, the motive has to be the motive with malice aforethought nothing more or less. In *Nzuki v Republic [1993]*, the Court in substituting Nzuki’s charge of murder with manslaughter observed:

“There was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”

121. The Court is not satisfied that malice aforethought has been established in terms of Section 206 of the *Penal Code*. A life has been lost but based on the evidence in totality, I am unable to find that the ingredients of murder have been proved in the absence of motive malice aforethought

122. Section 179 of the *Criminal Procedure Code* provides-

When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

123. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

124. In the upshot, I find that the prosecution proved the case beyond reasonable doubt that the Accused caused death of the deceased. In the premises, I reduce the charge of murder to manslaughter. The accused is acquitted of the charge of murder but convicted of the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*.

Judgment accordingly.

**JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT AT MACHAKOS HIGH COURT ON 28/3/2025 VIRTUALLY/PHYSICALLY.**

**M.W.MUIGAI**



**JUDGE**

Deputy Registrar Criminal Division Milimani-Nairobi to refer matter to Probation Officer to prepare Pre-Sentence Report.

Further Mention on 8/4/2024 for Pre-sentence Report to be availed by Probation Officer and Pre-Sentence Proceedings.

**M.W.MUIGAI**

**JUDGE**

