



**Republic v Kivaru (Criminal Case 31 of 2018)
[2025] KEHC 9364 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 31 OF 2018**

**RK LIMO, J
JUNE 30, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

MWENDWA KIVARU ACCUSED

JUDGMENT

1. Mwendwa Kivaru, the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars as per the information filed are that on the 5th day of September 2018 at Kathaalani Village, Kamusilui Location, Kyuso Sub County within Kitui County he murdered Syengo Nyamu.
2. The accused denied committing the offence and the prosecution called 8 witnesses to prove their case. The prosecution's case is hinged on direct evidence. The accused on the other hand defended himself that he was framed and was used as a scapegoat to cover up for the killer. Below is the summary of the evidence tendered during trial.
3. Katwii Mwanzia (PW1) testified that on 5/9/2018 (herein after to be referred to as the material night for ease of reference) while she was sleeping at her house, she heard someone outside asking why he had been cut by a panga. She stated that the other person responded that he had cut him on revenge for being bitten and beaten by the deceased.
4. The witness stated that she recognized the voices of the two people adding that the person who was complaining of being cut was Syengo Nyamu (deceased) while the accused was the one stating that he was revenging. She further told this court that she knew the 2 people well adding that the deceased lived in her plot after he asked her for a parcel of land to till and also live. She stated that the accused was a neighbour well known to her and that he did casual jobs and that she used to interact with him quite often.



5. She stated that after she heard the voices outside their house, she called her husband namely Mwanzia Syanda. That he went out to check and went back quickly asking her to go out and see. She stated that she rushed out with a torch and saw the accused holding a panga over the deceased who was lying down. She stated that the deceased was still breathing with his head cut. She stated that the accused was still holding the panga which she recalled was long and sharp.
6. She testified that she asked her husband that they carry the deceased to his house. She stated that the deceased was lying down facing upward bleeding from the injury on the head. She stated that as they tried lifting the deceased he died and they left him there.
7. She stated that her husband then called the neighbours and informed them of the incident. She further said that she went and called one Kyalo (PW3) who came quickly and that the accused told him what had transpired upon which Mwendwa called the police. She said that the police from Kyuso arrived the following morning and collected the body.
8. She stated under cross-examination that she used a torch to see both the deceased and the accused outside and that when she went to call Kyalo the accused went with her and did not run away. She denied suggestions from the defence that the deceased may have been found in her house. She stated that the deceased was an old man and was certain that the accused killed him because he found him holding a panga with blood stains on it with the deceased lying down next to the accused.
9. Mwanzia Syanda (PW2) the husband to PW1 testified and largely corroborated with what PW1 stated. He stated he had given a piece of land to the deceased and that on the material night he was woken up by his wife (PW1) and told to go and check some people outside their house. He stated that he went out and found the accused holding a panga over the deceased who was lying down. He stated he was a bit tipsy and decided to go wake up his son known as Simba and together they tried to carry the deceased to his house but the deceased died. He stated that he called the police who later came and collected the body.
10. Stephen Kyalo (PW3) recalled that on 5/9/2018 at around 5.45pm he found PW2 who was his neighbour at a Club known as "KUNDA KINDU" and that PW2 asked him to drop him home which he did. He stated that his house was around 300 metres from that of PW2 and that at around 11.30pm, Mama Simba (PW1) called him twice as he slept. He stated that he peeped outside and saw PW1 and the accused. He further stated that the accused told him that Syengo (deceased) had died.
11. He stated that the accused told him that the deceased had cut himself and showed him a panga and he took the panga and kept it before accompanying the 2 to the scene where he found the deceased lying down facing up. He stated that the deceased had been cut at the back of the head and the bridge of the nose. He stated that the deceased was bleeding and that it was obvious he had been cut. He stated that he then asked the accused why he had lied to him that the deceased had cut himself. He stated that the accused started getting anxious and wanted to flee from the scene but he caught him and before long people arrived and they assisted him in apprehending the accused by tying him with ropes.
12. Kathare Muthui (PW4) a brother to the deceased testified that on 6/9/2018 at around 4am he was asleep in his house when someone woke him up and informed him that his brother (deceased) was very sick. He stated that the reportee one Kyalo Mwasya went to him on a motorbike and carried him with the same motorcycle to Kathaalini area where the deceased resided. He stated that when they reached the place, he found his brother (deceased) dead and next to the body was a person who had been tied with ropes. He stated that he found the deceased lying down dead facing up. He stated that his deceased brother was cut on the head and that the police arrived at around 10am and took the body.



13. Winfred Muthuli Muthusi (PW5) as Assistant Chief Kathaalini Location testified that she knew the deceased well as a resident of her Sub-location. She stated that deceased did not have a permanent residence and that the accused person did casual jobs in the area though he was not a local. According to her the accused comes from Mataka Sub location, Mivukoni Location.
14. She recalled that on the material night she was called on her mobile phone by a village elder known as Katuni Mwendwa who informed her that the deceased had been killed. She stated that since it was late in the night she did not go to the scene and that at 3am PW1 and PW2 went to her house and woke her up. She stated that she accompanied the two to the scene where she found Syengo (deceased) lying down dead outside a house he was living in. She stated that she found the accused tied up by the villagers. She stated that she was shown the panga which was stained with blood. She said that she saw the deceased with a deep cut on the back of the head and the face. She stated that she informed the Area Chief who notified the Deputy County Commissioner and the police. She stated that the police later arrived and collected both the body and the accused.
15. Dr. Daniel Asiago Misiani (PW6) a medical doctor testified that on 13/9/2018 he performed a post mortem on the body of Syengo Nyamu (deceased) and made the following observations;
 - i. That the deceased was aged around 55 years and internally he had a deep cut on the head measuring 12cm by 1cm in width and 3cm deep. He stated the cut was through the scalp of the head of the skull into the brain tissue which were visible. He stated that the damage of the brain tissue was on the left side. He opined that the cause of death was traumatic brain injury caused by penetrative injury which caused shock and severe hemorrhage.

He tendered the post mortem report as PExhibit 3.
16. Joseph Kilonzi Nyamu (PW7) an elder brother to the deceased testified that on 13/9/2018 he went to Kyuso Hospital Mortuary to identify the body of his deceased brother before post mortem was done. He stated that the deceased had cuts on the face as well as the back of his head.
17. Police Constable Harry Kimeli (PW8), the investigating officer in the case testified that on 6/9/2018 he was notified by the D.C.I.O Kyuso about a murder incident that required investigations. He stated that he proceeded to Kathaalini area with one P.C Masha and the Area Assistant Chief who led them to the scene of crime. He stated that they were led to the homestead of PW2 and found a suspect, the accused herein. He stated that he interrogated both PW1 and PW2 and recovered a panga which was handed over to him by PW1. He tendered the panga as PExhibit 1. He stated that the body of the deceased was lying at the scene which was between 20-30 metres from the house of PW2. He stated that they then took the body to Kyuso Hospital Mortuary before escorting the accused to Kyuso police station where he was placed in custody. He stated that on 13/9/2018 he attended a post mortem examination on the body of the deceased where the cause of death was established by the doctor as head injury caused by a sharp object.
18. He conceded under cross-examination by defence counsel that he found the body of the deceased moved from the home of the accused due to fear of being victimized but according to him PW1 and PW2 did not kill the deceased and ruled out any such possibility. He stated that both the accused and the deceased were housed in the compound of PW1 and PW2. He further stated that both the accused and deceased had no wives. He ruled out a love triangle between the deceased, accused and any other person stating that no such evidence was presented to him.
19. When placed on his defence, the accused gave a sworn statement denying the offence. He stated that on the material night he was sleeping in his house when he was woken up at around 4am by PW2 telling him that the deceased was very sick. He clarified that Syanda's (PW2) sons Simba Mbuvi and Mutie



woke him up. He stated that they told him to accompany him to their home where he found PW1 crying adding that PW2 was seated. He stated that the deceased was by then lying down and he asked for a torch to look for him. He stated that he took a torch and saw the deceased was lying dead. He stated that he asked PW2 why he had killed the deceased and PW1 screamed that he the accused is the one who had reported that the deceased was having an affair with her. He stated that the sons of PW2 Simba and Mutie then tied him up and discussed among themselves that they had better move the body of the deceased since they would be in trouble if the police found the deceased body in their house. He stated that the body of the deceased was moved outside the compound near a house where he was also taken to. He stated that they then took sand and poured around where the body was initially to conceal blood. He stated that a panga was taken to where he was before the Area Chief was called.

20. He further testified that when the Area Chief arrived he explained to her that he had been tied because of revealing an extra marital affair between PW1 and the deceased.
21. He stated that the police later arrived and he told them what happened but that he was arrested and beaten when they reached police station. He denied killing the deceased. He conceded that the police arrived and found him tied and placed next to the body of the deceased with a panga placed next to him.
22. He stated that he had no grudge against anyone and thought that he might have been implicated by people who wanted to save themselves. He stated that the deceased used to have an affair with PW1 and that he used to sleep in their house. He denied having revealed the affair and insisted that he was just called to take the deceased to hospital but found him dead.
23. This court has laid out both the prosecution's case and the defence case. As observed above the accused is charged with the offence of murder contrary to section 203 of the *Penal Code* and in a case of murder the prosecution is required to establish and prove beyond reasonable doubt the following elements;
 - i. Actus reus or that the unlawful act of causing death was caused or linked to the accused.
 - ii. Malice aforethought or that the act causing death was actuated by malice or ill motivated.
 - iii. Fact of death and its cause.

(i) Fact of death and its cause.

24. The fact of death and its cause is less contested in this case. All the prosecution's witnesses and the accused person are all in concurrence that the deceased died on the night of 5/9/2018 as a result of an attack that saw him being cut on the back of the head and the face.
25. Dr. Daniel Asiago Musiani testified and gave an account about observations he made during post mortem examination. He stated that the deceased suffered a deep cut on the back of his head that exposed the brain tissue. He concluded that the cause of death was traumatic brain injury and severe hemorrhage caused by a penetrating sharp object. He tendered the post mortem report as PExhibit 3. This court finds that the element of death and its cause were well established and proved. The deceased was murdered no doubt and the only question is who murdered him.

(ii) Actus reus or did the accused unlawfully cause the death of the deceased?

26. This is a highly contested issue in this case. The prosecution witnesses all pointed a finger at the accused while the accused on the other hand pointed a finger at PW2.
27. PW1 was categorical that she heard the accused and deceased talking outside their house. She says she recognized the voices well because she knew them. In particular she heard the deceased asking the accused why he was cutting him and that the accused responded that he was cutting him on revenge.



28. What I find a bit strange from the account of events is that PW1 says she heard 2 people having a conversation as though it was nothing serious but then the aftermath of what transpired was something totally different. The doctor (PW6) testified that he observed a deep cut measuring 12cm by 1cm in width and 3cm deep. He stated that the cut went through the scalp through the skull exposing the brain tissue. Such a horrendous and vicious attack will make even the bravest of men scream and certainly a person viciously attacked would not be having a conversation of the type that was narrated by PW1. That is the first issue that created some doubts about the veracity of the testimony narrated by PW1.
29. The other issue that left some doubts lingering in the mind of this court is the evidence of PW1 and PW3. PW1 stated that she left the deceased lying down and went to call PW3 accompanied by the accused who was still holding the panga he had allegedly used to assault the deceased. This is how she narrated the incident

“I went to call Kyalo (PW3) who was a neighbour. Mwendwa (accused) followed me to Kyalo’s house. He still carried his panga. Mwendwa (accused) did not run away”.

The question posed is why did the accused not run away or even hide the panga or even wipe away the blood stains on it if he had actually killed the deceased?

30. Stephen Kyalo (PW3) who was the immediate neighbour stated that indeed PW1 and the accused went to him on the material night and that the accused told him that the deceased had cut himself and was dead. He says the accused even handed him the panga which he identified here in court during trial. Kyalo (PW3) says he went with both the accused and PW1 back to their compound and found the deceased lying in a pool of blood.
31. There were gaps or grey areas left out by the prosecution’s witness (PW3). He did not explain whether he went with the panga that was handed over to him or even whether the same was given to him voluntarily. The narrative given by PW1 and PW3 with respect to the accused paints a picture of someone who was confident and not worried or violent. The question posed is why was the accused tied and placed where the body of the deceased had been moved to with a panga strategically placed next to him?
32. The investigating officer (PW8) conceded that when he visited the scene the following day at around 10am, he found that the body of the deceased had been moved from the scene of the attack. He appeared to brush off the rather suspicious act. This is what he said;

“The family (read John Mwanzia (PW2) and Katwii (PW2) moved the body to the house of the deceased because of fear of being victimized.....?”

But was that the only reason? There appears to have been more particularly in view of the strong defence mounted by the accused because even if they feared victimization, which I do not buy, why tie the accused and place him next to the body of the deceased with a panga that he had allegedly given to PW3 also placed next to him?

Why not tie him where the deceased was found lying if he was caught in the act?

33. The accused in his defence stated that he heard the family of PW2 discussing among themselves and this is how he expressed it;

“They discussed among themselves that if the police find the deceased died in their house, they would be in trouble. They took the deceased body to another house outside the



compound. I was taken to that house as well..... they took sand to conceal blood at Mwanzia's (PW2) house..."

34. That act of concealment by PW2 and his family suggests that they had something to hide which was the real killer or killers of the deceased. In their testimony in court there was no mention about moving the body by PW1, PW2 and PW3. In fact PW1 and PW2 stated that they attempted to lift the body but when the deceased died they left it there. That narrative was quite inconsistent with the observations made by the investigating officer (PW8) and the narrative given by the accused. This court observed the demeanour of the accused when he was testifying and he was quite steadfast in what he was saying.
35. The Area Assistant Chief Winfred Muthuli Muthusi (PW5) mentioned something that was significant in this case. She stated that the accused was not a local and did casual jobs. It is quite apparent especially going by the defence mounted that he was implicated for the purpose of concealing the real killer(s).
36. This court finds that the prosecution's case with respect to the element of actus reus is lacking and is riddled with inconsistencies and doubts which I have highlighted. In situations where doubts, however slight, arise in a case, an accused person is usually given the benefit because of the principle of law that it is better to let free 99 criminals than to convict one innocent person.

(iii) Mens rea

37. The prosecution witnesses did not tender any evidence showing that the accused harboured ill motives against the deceased. It is true that under the provisions of Section 206 of the *Penal Code*, malice can be inferred from the serious nature of injuries suffered or weapons used but in the absence of the element of actus reus, the provisions of Section 206 of the *Penal Code* cannot come into play.

The long and short of this, is that this court finds that the prosecution has not discharged their burden of proof to the required standard given the doubts I have highlighted. The police needed and still need to do more to establish who the killer(s) was or were. This court finds that the accused person is not guilty and is acquitted accordingly. He shall be set free forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF JUNE, 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered virtually

In the presence of;

Njehia for the State

Mwatha for the Accused

