



**Republic v Nzau alias Calipso & 4 others (Criminal Case
E010 of 2021) [2025] KEHC 9087 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9087 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE E010 OF 2021**

EN MAINA, J

JUNE 26, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

JAMES NYAMAI NZAU ALIAS CALIPSO 1ST ACCUSED

CHRISTOPHER NDUNDA SAMMY 2ND ACCUSED

JOSEPH MWANZIA MUSYIMI 3RD ACCUSED

JOHN MULI ANNA 4TH ACCUSED

ERICK MWANGANGI MUNYAO 5TH ACCUSED

RULING

1. The five accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars of the offence are that on the night of 29th May 2021 at Mukalwa shopping Centre in Matungulu Sub-County within Machakos County, the accused persons jointly murdered Mbiti Muia.
3. The accused persons all pleaded not guilty to the charge whereupon the prosecution called eleven (11) witnesses in an effort to prove its case. The prosecution was conducted by Miss Linda Nyauncho (ADPP) while the accused persons were represented by Mr. Mumo Mutua Advocate.
4. The sum total of the evidence of the eleven prosecution witnesses is that on the material day the deceased and his friend Joshua Kioko Musyoki (PW6), left the friend's bar at about 8.30 p.m. and had not gone far, about 50 Metres, when they were accosted by a group of people who were wielding pangas. That group of people ordered them to sit before slashing them with pangas. Luckily, PW6 escaped to a nearby bush with injuries on his face and right and leg but the deceased was not so lucky.



From his hideout, PW6 heard the deceased crying for help but nobody went to his rescue then after a while all went silent. Unbeknown to PW6 one of the traders in that market, Jane Njeri Musyoki (PW7), had reported the attack to the police who soon arrived at the scene. On seeing the police vehicle PW6 came out of his hideout and ran to the vehicle.

5. According to PW6, the 1st and the 2nd accused persons assisted him and the deceased to get inside the police vehicle. He stated that he knew them before as they were from that area and that indeed he had identified them in the group that attacked them.
6. There was also evidence that a search mounted by a large team of officers who had responded to the report by PW7 took the officers to a house where they found the 2nd to 5th accused persons. Upon questioning them, the 2nd to 5th accused persons led the officers to the house of the 1st accused where the officers arrested the 1st accused and recovered a jacket and pair of trousers with blood. In the meantime the deceased succumbed to his injuries while PW6 was treated and discharged.
7. In the course of investigations the blood stained jacket and trouser recovered in the house of the 1st accused were taken to the Government chemist for analysis and it was confirmed that the blood matched that of the deceased.
8. Upon conclusion of investigations, the accused persons were charged with this offence. As part of its evidence the prosecution produced a post mortem report to the effect that the deceased died and that death was as a result of severe head injury secondary to subdural haematoma with multiple cuts on the head. It also produced a P3 form confirming that PW6 was treated at the Kangundo Level 4 Hospital for deep cut wounds on the left cheek and the occipital region; zygomatic bone fractures and the probable type of weapon used was sharp. The P3 describes the injuries sustained by PW6 as grievous harm.
9. The prosecution also produced a Government analyst's report to the effect that the DNA generated from the blood stains on the jacket and trousers found in the 1st accused's house matched the DNA profile generated from the blood sample of the deceased.
10. After the close of the prosecution's case, learned Counsel for the prosecution and the accused persons agreed to reduce their arguments, on whether or not the accused persons have a case to answer, into writing. However, only Counsel for the prosecution filed her submissions. Despite several reminders counsel for the accused persons did not file his submissions.
11. Ms Nyauncho submitted that the prosecution had adduced sufficient evidence to warrant this court to put the accused persons on their defence. She submitted that the 1st and 2nd accused persons were positively identified by PW6 as being among the killers; that the medical report (P3 form) proves that PW6 was at the scene as it details the injuries he said he suffered in the hands of the attackers. She contended that the 3rd, 4th and 5th accused persons were arrested in hiding in the company of the 2nd accused and that they then led the police to the house of the 1st accused. She contended that there was circumstantial evidence that the 3rd, 4th and 5th accused persons participated in the offence as PW6's evidence was that the attack was perpetrated by a group of people. She urged this court to place the accused persons on their defence.
12. At this stage, the point for determination is whether or not the prosecution has established a prima facie case sufficiently for the accused persons to be put on their defence.
13. In the case of *Bhatt v Republic* [1957] EA 332 it was held that a prima facie case "is one on which a reasonable tribunal properly directing its mind to the law and the evidence, could convict if no explanation is offered by the defence."



14. The ingredients of the offence of murder are the death of the deceased, the cause of that death, malice aforethought and the identification of the accused as the perpetrator of the offence. The offence may be proved through direct evidence or circumstantial evidence.
15. In this case, the death of the deceased and the cause of that death are not in doubt as there is evidence by PW6 and other witnesses that the deceased in fact died and that he died as a result of injuries sustained in an attack on the material night. The death and cause of death are corroborated by the post mortem report and as for malice aforethought, it is proved by the circumstances of the attack and the nature and extent of injuries inflicted upon the deceased. The same are indicative of the intention of the perpetrator(s) of the attack to cause the death of/or grievous harm to the victim. What remains for determination is the identity of the perpetrator(s) of the offence.
16. Having carefully considered the evidence adduced by the prosecution, it is my finding that there is no direct evidence to connect the accused persons with this offence. I say so because the attack having occurred at night with the only light being PW6's phone torch the identification may not be safe. The witness (PW6) did not describe the intensity of the light at the place where the attack took place. It is also evident that he could not have had the opportunity to see who the attackers were as the attack occurred suddenly and unexpectedly. The only evidence against the accused persons is therefore circumstantial.
17. Circumstantial evidence can only sustain a conviction where the same irresistibly points to the accused persons and is incompatible with the innocence of the accused and where the inculpatory facts cannot be explained on any other hypothesis other than the guilt of the accused person – see the case of *Karanja v Republic* [1986] KLR 190 where the court stated:
 - “2. In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.
 - (3) An aggregation of separate facts is inconclusive because they are as consistent with innocence as with guilt is not good enough evidence.”
18. It is my finding that the inculpatory facts in this case, which are, that the 2nd, 3rd, 4th & 5th accused persons were found huddled in a small room and that the clothes of the 1st accused were stained with the blood of the deceased, may be explained on other reasonable hypothesis other than the guilt of the accused persons. To begin with, being together in a room, small as it may be, is not proof of the commission of an offence. The accused persons could have been hiding from the attackers just as everybody else or they could have been in that room for any reason other than hiding. True their huddling together in a small room could have roused suspicion that they were hiding for committing the offence but it is trite that suspicion no matter how strong cannot be the basis for a conviction.
19. Leading the police to the house of the 1st accused, is also not in itself an inculpatory fact. There is no evidence that the 2nd to 5th accused persons took the police there because they were his accomplices. No such evidence was adduced. From the evidence, they did so because they knew the 1st accused person and had been asked by the police officers to lead them to his house.
20. As for the blood found on the clothes taken from the house of the 1st accused generating DNA matching the blood sample of the deceased, that too can be explained by the testimony of PW6 that the



1st and 2nd accused persons are the ones who helped him and the deceased to get into the police vehicle. It is highly probable that the blood found its way on his clothes in the course of assisting the deceased into the vehicle but not in the course of killing him. That therefore is an inculpatory fact which can be explained on other reasonable hypothesis other than the guilt of the 1st accused person.

21. The upshot is that the evidence before this court does not irresistibly point to the accused persons. It cannot form the basis upon which this court can convict the accused persons, were they to be put on their defence and they elect to remain silent. It is therefore my finding that the prosecution has not established a prima facie case against the accused persons to warrant this court to put them on their defence.
22. Accordingly, this court enters a finding of not guilty for all the accused persons and acquits them under Section 306(1) of the *Criminal Procedure Code*.
23. They shall be released forthwith unless otherwise lawfully held.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 26TH DAY OF JUNE, 2025.

E. N. MAINA

JUDGE

In the presence of:

Ms Kaburu for the state

Mr. Mutua for the accused persons

All accused persons

Geoffrey - Court Assistant/Interpreter

