



Republic v Kemei (Criminal Case 30 of 2019) [2025] KEHC 8981 (KLR) (24 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 30 OF 2019
PN GICHOHI, J
JUNE 24, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

ERNEST KIBET KEMEI ACCUSED

RULING

1. Ernest Kibet Kemei (hereafter referred to as Accused) is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on 27th and 28th day of June, 2019, unknown time at Kamungei area in Rongai Sub-County within Nakuru County, murdered Lucy Njeri Sang.
2. He denied the charge and the matter proceeded for hearing with the Prosecution calling six (6) witnesses in support of its case.
3. Allan Cheruiyot Koli (PW1), a tractor driver and a resident of Ngata area testified that at approximately 1:30 pm on 29th June, 2019, he was at home for lunch when his five-year-old named Collins Kipkoech, returned from herding cattle and informed his mother, who was weeding, that he wanted to retrieve a jembe from his grandmother, Lucy Kole's (the deceased) house.
4. Shortly after, Collins ran back, distressed and reporting that his grandmother was unresponsive. Allan and his wife went to check on Lucy, confirming she was indeed unresponsive. They then sought help from a neighbour, Abraham Kiplagat.
5. He testified that they found the deceased lying between a seat and a table, fully covered with only her legs visible. Abraham uncovered her head, revealing a vegetable cutting knife in her neck, and a blood-stained panga on a chair. The house was dark. Abraham believed she was dead and went to inform other neighbours.



6. It was his evidence that Lucy lived alone, consumed alcohol and had many visitors. Allan did not hear any disturbance when the incident occurred. He later recalled seeing a short rope hanging from the roof but did not mention it to the police.
7. During cross-examination by defence counsel, Allan clarified that the deceased was Lucy Chepkoech Koli, not Chepkemoi. He reiterated that the deceased was his aunt by virtue of the fact that her husband was his father's brother. He did not know who killed her. He stressed that many people visited her.
8. Upon re-examination, Allan clarified that the deceased was known to him as Lucy Njeri and that the name Njeri, was from her home. They also knew her as Lucy Koli. He did not know her name as per the National Identity Card.
9. Daniel Kipkoko Cherop (PW2), a boda boda operator residing in Ngata, testified that on 27th June, 2019, around 8:00 PM, while returning home from work, he saw a woman lying across the road. He observed her attempting to wake up and he recognised her as Lucy Njeri. She was intoxicated. He offered her a ride home on his motorbike, and dropped her at her gate. He did not see anyone else when he dropped her off.
10. During cross-examination, he confirmed knowing the deceased for a long time and that she was a heavy drinker. He reiterated that he found no one at her gate. He knew her as Lucy Njeri, not Lucy Chepkoech. He only knew her husband as Job but not his full name .
11. Job Kipkoech Kole (PW3) testified that on 4th July, 2019, at approximately 1:30 PM, a young man working on a neighbour's house came to him wailing saying that his wife had been killed. Job went to the deceased house. He did not enter the house. He only saw her at the mortuary. He stated the deceased's full name was Lucy Njeri Sang Kole, with "Sang" being her father's name and "Kole" his own.
12. On Cross-examination, Job stated that it was one Maina who called him to the scene. He told the Court that he married the deceased in 1987. She was a heavy drinker. She had left for ten years, and by the time she return, he had married another wife. He took her back before her father passed away. He confirmed that he first saw her body at the mortuary.
13. John Mburu Kamau (PW4), tractor driver and cattle milker in Ngata, testified that on 27th June, 2019, he was looking for air time credit when he met Lucy Njeri (the deceased) and a woman named Bibi ya Kongo. It was around 8:00 a.m. The two told him that they were seeking casual work but they failed to get it, they entered Eva's house.
14. At 8:30 AM, he again passed Eva's house and found them still there. He went home. At 11:00 a.m, the deceased called him twice, asking him to buy her "best alcohol," referring to an illegal spirit sold by Eva.
15. He instructed Eva to give her alcohol. He later saw the deceased holding Eva's child and in company of a young man named Denis. The deceased asked Denis to send her a song via phone. They then continued their work, went to the shop, returned, and slept.
16. The next day, they woke up , worked, went to the shopping centre, returned, and slept. The day after, around 3:00 pm, they heard screams from a neighbour and learned Lucy had been found dead. Police later contacted him, and he recorded a statement. He never witnessed the incident, did not know Lucy's husband, and did not see Lucy's body.
17. During cross-examination, he stated that he had known Lucy Njeri since 2015, did not know her husband or her house, and described her as social and a friend. He confirmed she drank heavily and had called him to buy her alcohol. He heard screams from a neighbour but did not see who killed Lucy or if she had a boyfriend.



18. Abraham Kiplagat Cheron (PW5), a teacher at Arus Primary School in Solai, testified that on 29th September, 2019, Allan, his wife Sharon, and their child Kipkoech alerted him that the deceased (Lucy) who was their aunt, was unresponsive. Upon entering her house, he found her lying under a sofa, covered with a lessa, with a knife in her neck and blood beneath the sofa. He also saw a blood-stained panga near her body. He testified that the sub chief declared her dead.
19. No. 38374 PC Paul Tarus (PW6) of DCI Rongai told the Court that on 29th June, 2019, he responded to a murder report in Kamungei village. Upon arrival, he found a deceased identified as Njeri. She had a cut on the neck. A kitchen knife was beside her and a blood-stained panga nearby.
20. Neighbours informed him that the accused and another man had been seen drinking with the deceased the night before. The accused later confessed to him and this informed his decision to charge him with the offence of Murder.
21. After the close of the prosecution case, both parties opted to file submissions on whether the accused person has a case to answer.

Prosecution's Submissions

22. Mr. Kihara for the State submitted that from the evidence of the five witnesses, its case heavily relies on circumstantial evidence and the "last seen" doctrine to prove the three elements of an offence of murder being, Fact and cause of death, Act of commission or omission linked to the accused person (*actus reus*) and the act of commission or omission actuated by malice aforethought (*mens rea/intention*).
23. It was submitted that the death of the deceased has been confirmed, and the accused's identity is deduced from the information given to the Investigating Officer, as he was the last person seen with the deceased before his disappearance and subsequent arrest.
24. While defining malice aforethought as captured in Section 206 of the *Penal Code*, he submitted that malice aforethought can be inferred from; the nature of the weapon used (lethal), the targeted body part (vulnerable), the manner of weapon use and the accused's conduct before, during, and after the attack as was held in the case of Republic Vs Tubere s/o Ochen [1945] 12 EACA 63.
25. He argued that in this case, malice aforethought can be inferred from the circumstances such as; the stab wound on the neck, blood-stained machete, and the presence of a rope suggesting an intent to stage a suicide.
26. He contended that these ingredients squarely place the accused as the perpetrator, especially given his conduct after the act. He submitted that the murder weapons and the rope were produced as exhibits.
27. It was further submitted that in regard to circumstantial evidence and last seen doctrine, the person last seen with the deceased bears full responsibility for their death if circumstantial evidence is overwhelming and no other conclusion is possible. Accordingly, he submitted, an accused person is obligated to provide a satisfactory explanation for the deceased's death in such circumstances; otherwise, an inference of guilt can be drawn. For that argument, reliance was placed in the Supreme Court of Nigeria Case of Haruna vs AG of Federation (2012)LPELR-SC.72 /2010. which held that;-

“Where the only evidence against a criminal defendant is circumstantial, that is, the evidence which depends for its probative value on its consistency with the hypothesis in issue, and in the case of murder, that the accused committed the murder and with the incompatibility with any other hypothesis, then for the evidence to be sufficient to sustain a conviction, it



must be of such a nature that not only is it consistent with the guilt of the accused but it is also inconsistent with any other reasonable conclusion.”

28. Further reliance was placed on the case of *Kimani vs Republic* [2023] eKLR the Court held:-

“In a case resting purely on circumstantial evidence like this one, it is necessary to point out that before drawing the inference of the accused's guilt from the circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

29. Further still, reliance was placed on the case of *Dida Ali Mohammed vs R* [2000] eKLR that:-

“...the fact that the deceased was last seen alive in the company of the appellant, that the appellant did not report his death to anybody, that the appellant was a close friend of the deceased, that the deceased's personal property were found in the custody of the appellant, and the recovery of the deceased's body consequent upon information the appellant gave are all circumstances which, when taken cumulatively, lead to an irresistible conclusion that the appellant and no other person killed the deceased, and which exclude any other reasonable hypothesis than that the appellant killed the deceased.”

30. Lastly, he relied on the case of *Moingo & Another v. Republic* [2022] KECA 6 (KLR) that held:-

“The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times. The Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.”

31. In light of the foregoing, he asserted that cogent evidence has been availed to place the accused on his defence

Respondent's Submissions

32. Ms Wambui for the accused person contended that the prosecution has failed to prove each element of the charge beyond a reasonable doubt, as mandated by Article 50(2)(a) of *the Constitution* of Kenya, 2010, which guarantees the presumption of innocence, and Section 107(1) of the *Evidence Act*, Cap 80, which states that the person who alleges must prove.

33. She argued that the prosecution's case suffers from several fatal defects, including; the absence of a conclusive medical cause of death, lack of direct or credible circumstantial evidence linking the accused to the offence, serious investigative lapses, breach of the accused's constitutional rights, and erroneous invocation of the "last seen" doctrine.

34. Regarding the cause of death, Counsel highlighted that while the Post-Mortem Report (Exhibit-1) was produced by consent under Section 77 of the *Evidence Act*, its maker was not called to testify, the report does not specify a clear cause of death, and there is no expert explanation to rule out alternative causes like accidental injury, alcohol-related complications, or suicide. She cited judicial warnings against relying on incomplete or inconclusive post-mortem evidence to sustain a conviction for murder.



35. Counsel further asserted that the prosecution relied entirely on hearsay, unsupported inferences, and an alleged confession that was never produced in court. That in any event, the Investigating Officer (PW6), admitted that no one saw the accused commit the offence, that the purported confession was not recorded by him, and that no confession statement was ever formally tendered in Court.
36. It was therefore argued that the alleged confession is inadmissible without proof of voluntary making, proper recording, and due process.
37. Regarding Allan Cheruiyot's (PW1) testimony, it was submitted that the evidence was limited to the discovery of the body and did not link the accused to the scene and further, this witness misidentified the deceased, raising identification doubts.
38. As for Daniel Cherop (PW2), it was submitted that his testimony supported a hypothesis of accidental death or exposure, as he observed the deceased drunk and unaccompanied shortly before her death and did not see the accused with her.
39. As regards Abraham Kiplagat (PW5), it was submitted that the witness observed a rope hanging in the room, suggesting a possibility of suicide, a critical piece of evidence that was never recovered or analysed.
40. It was therefore submitted that Paul Tarus (PW6) conducted a superficial investigation with no fingerprint or DNA analysis on weapons, no blood-stained clothing linked to the accused, and no attempts to trace the deceased's final movements via phone records or CCTV footage.
41. Further, it was also submitted that PW6 contradicted himself regarding a romantic relationship between the accused and the deceased without supporting evidence.
42. On "last seen" doctrine, Counsel made reference the case of *Marita v Republic* [2023] KECA 580 (KLR), which states that the "last seen" doctrine only stands if the prosecution eliminates all others with equal or greater opportunity to commit the offence.
43. In this case, Counsel argued that the prosecution's reliance on the "last seen" doctrine is erroneous as no credible eyewitness placed the accused in exclusive company of the deceased shortly before her death. It was submitted that PW2 and PW4 indicated that the deceased was last seen with other individuals.
44. Furthermore, Counsel claimed violations of the accused's constitutional rights, specifically the right to legal representation at the State's expense during critical early stages of investigation and custodial interrogation, in violation of Article 50(2)(h) of *the Constitution*. She argued that these breaches vitiate the fairness of the trial and justify an acquittal.
45. Lastly, Counsel submitted that the circumstantial evidence presented fails to meet the required standards as established in several cases including the case of *Kipkering Arap Koske v Republic* (1949) EACA 135 and *Republic v Mutethia* [2023] KEHC 519 (KLR) which held that the law requires circumstantial evidence to form a complete and unbroken chain, inescapably point to the accused's guilt to the exclusion of any other person, and be incompatible with any innocent hypothesis.
46. Conversely, she submitted that in this case, the rope suggests possible suicide and that the deceased's heavy drinking could lead to misadventure. In any case, that no forensic evidence links the accused to the crime scene, and further, the other drinking companions were not traced or excluded.
47. In conclusion, counsel maintained that the prosecution utterly failed to establish a medically and legally certain cause of death. Further, there is no direct or admissible circumstantial evidence linking the accused to the crime, and there was no confession properly recorded or tendered.



48. For these reasons, Counsel urged the court to find that the prosecution has not met the required standard of proof for a murder charge and therefore proceed to acquit the accused forthwith under Section 306(1) of the [Criminal Procedure Code](#).

Analysis and determination

49. Upon consideration of the prosecution case and the submissions by both parties, this Court's duty is to ascertain if the prosecution has established a prima facie case to warrant the accused being placed on his defence as stated in the celebrated case of Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335 thus:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the case is merely one which on fully consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence.”

50. Regarding this charge, Section 306 of the [Criminal Procedure Code](#) requires the prosecution to tender prima facie evidence on the following elements:-
- a. The death of the deceased.
 - b. Whether his death was unlawfully caused.
 - c. Whether the death was actuated by malice aforethought.
 - d. Whether the accused person before court were positively identified and placed at the scene of the crime.

51. For emphasis, Section 306 of the [Criminal Procedure Code](#) provides as follows:-

“(1)When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit recording a finding of not guilty. (2)When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether is intended to call any witness as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.”

52. In this case, the death of the deceased herein is factual from the evidence herein.
53. As to whether the death was unlawful, the Post Mortem Report herein was produced by consent of parties and therefore, the defence cannot turn around and attack on the grounds that the maker was



not called to testify. If they needed the maker, then they should have said so and the document would at that stage be marked only of identification. That report is admissible in evidence.

54. The said report shows that the body of the deceased had slash wounds on the right parietal -occipital region, face and left neck, sliced skull bones around the right the parietal -occipital region and that the brain was exposed. There was lacerated brain on the right-side. On the spinal column, there trauma on the left cervical region – C4.
55. The cause of death was ascertained as:-

“Massive blood loss , severed neck vessels by sharp force trauma (machette) in a body with multiple slash wounds on the face /occipital parietal region.”
56. From that report and the testimony by witnesses herein, it is therefore a wild imagination by the defence to allude that the death could have been through suicide considering the presence of a rope hanging there. It cannot be that the deceased went around slicing her body with a machette and placing the knife and panga beside her in the position she was found in by the witnesses who went to the scene.
57. There is no doubt that the death of the deceased was caused by someone and that death was unlawful. The weapons were placed and arranged there by the killer. The kind of weapon used to kill her was intended to cause the death. The act was savage and actuated by malice aforethought.
58. The issue then is whether the accused person was the killer. There is no one who saw the accused kill the deceased. The “last seen” doctrine cannot apply as the last person who saw the deceased alive was the boda boda rider, Daniel Kipkoko Cherop (PW2), who found her lying on the road intoxicated and unable to rise up. He dropped her at the gate and left.
59. Though the Investigating Officer (PW8) alleged to have received information from people that accused, deceased and other young men had been seen drinking alcohol in the bar the night before, those people were not named or called as witnesses to prove that indeed , the accused had contact with the deceased. That line of evidence cannot be used to argue that there was sufficient circumstantial evidence to make inference that the accused person had a hand in this death. Further, the alleged confession made by the Accused as alluded to by the Investigating Officer has no basis in law.
60. To place the accused on his defence based on the evidence on record is tantamount to shifting the burden on him so as to fill gaps in the prosecution case.
61. In the circumstances, this Court finds that no prima facie case was established against the accused person to warrant him being placed on his defence.
62. In conclusion the Accused person has no case to answer. He is therefore acquitted under Section 306 (1) of the Criminal Procedure Code. He is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF JUNE, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Kihara for the State

Ernest Kibet Kemei - Accused

Mr. Opondo for Accused



