



REPUBLIC OF KENYA



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**Republic v Ithoka (Criminal Case 7 of 2019)  
[2025] KEHC 11658 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11658 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL CASE 7 OF 2019**

**EN MAINA, J  
JULY 31, 2025**

**BETWEEN**

**REPUBLIC/STATE ..... PROSECUTION**

**AND**

**EVANS NZAU ITHOKA ..... ACCUSED**

**JUDGMENT**

**BACKGROUND**

1. The Accused person herein Evans Nzau Ithoka is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that the Accused on the night of 18<sup>th</sup> and 19<sup>th</sup> February at Mwanja Mbiti Village in Ngoleni location, Kathiani Sub-County, within Machakos County jointly with others not before court murdered Martin Kithuka Ngewa.
2. The Mental Assessment Report dated 09/04/2019 and filed in Court on 10/04/2019 found the accused person Fit to Plead. The Accused person herein took plea whereof after the charges were read out to in a language that he understood she pleaded Not Guilty. A plea of Not Guilty was entered on his behalf.
3. The hearing took off and the Prosecution called a total of twelve [12] witnesses.

**EVIDENCE**

4. Pw.1 Grace Mueni Kithuka a resident of Ngoleni testified that the deceased herein was her husband. The accused herein was her nephew. On 18-2-2019 around 5 pm her husband was away as he had gone to do some casual work. He arrived at 5pm and left for the market to buy food but never came back. The following day while escorting her daughter to Machakos, someone inquired whether her husband had gone home the previous night, he directed her to a certain place and when she went she found her husband lying next to a land belonging to a former counsellor already dead. There were injuries on the



head, eyes and mouth. The villagers joined her and the deceased's sister went to view the body. They then proceeded to Ngoleni Police post and the police officers agreed to visit the scene. The CID arrived and took photographs and carried the body to Kathiani. On 21-2-2019, she accompanied the family chairman, her son Nicholas Ngewa to the hospital for postmortem. She had known of any grudge between the accused and the deceased as they used to do casual jobs such as charcoal burning

5. On cross-examination she stated that the deceased was her husband and the accused was well known to her for over ten years. She did not hear any noise on the night of 18-6-2019. She visited Ngoleni police post but did not state that she heard the accused's voice on the night of 18-2-2019. The only evidence she had is that she went to the scene and saw the body of the deceased. she came to learn of the death of the deceased at 6.00 am on 19-2-2019 while escorting her daughter when a young man alerted her about it. The young man is not a witness in the case, the owner of the homestead near the scene is also not a witness. The deceased did not sleep at home on the night of 10<sup>th</sup> and 19<sup>th</sup> February 2019. She assumed that her husband had spent the night at a bar as he used to arrive home late at night. She did not find anyone near the body when she arrived. She did not know her husband's killers.
6. Pw2 Tabitha Wanza Kisevu a resident of Ngoleni testified that the deceased herein was his lastborn brother. The deceased lived around the same compound. The accused was a nephew. On 19-2-2019 around 6.30 am the deceased's son Kioko came to his house and informed him that his father had fallen down. I accompanied him to the scene where he found the wife in company of other members of the public. He saw the body of the deceased had severe injuries on the head and forehead. He was lying on a road between two homes belonging to Kitomeo and Karanja. He used a bed sheet to cover his body.
7. He then joined the deceased wife to Ngoleni police post to report. The police accompanied them back to the scene. They took photographs and the body was put in their landrover. The police made inquiries and later picked up some persons the accused included. The body was taken to Kathiani hospital Mortuary and later organized it transferred to Machakos. He learnt that the accused and the deceased used to work together in casual jobs and had not heard of any grudge between them.
8. On cross – examination pw2 stated that Kioko Kithuka came at around 6am to alert him over the incident. He did not witness the incident. Kioko is not a witness. Those living near the scene did not record statements. He found a large crowd at the scene. The deceased had already died and he picked a sheet from the deceased's wife and covered the body. He could not tell the identity of the killers. His home was 2km away from the scene.
9. Pw3 Nicholas Ngewa testified that the deceased was his father. On 21-2-1019 at Machakos funeral home he was in the company of his mother and brother. A post mortem was conducted on the body which they positively identified. He had the chance to the check the body which had injuries on the face, head and eyes.
10. On cross examination he stated that he recorded statement after the post mortem examination.
11. Pw4 Augustus Kakai Munzu testified that on 18-2-2019 he had placed an order for charcoal which was to be prepared by the deceased. they had agreed on the fees of kshs 1000. He later paid him a deposit of kshs 600 and he was to complete the job. The deceased was in good health and he later received the report that the deceased had been killed. He did not witness the incident
12. On cross –examination he said that he was a pastor as well as a mason. He had hired the services of the deceased to prepare charcoal for him at a fee of kshs 1000. He paid kshs 600 as deposit. He was not present when the incident took place, he later learnt from his wife that the deceased had worked jointly with the accused. The deceased had informed him that he would work jointly with the accused. He recorded a statement with the police which he advised his wife to look for another person to burn



- the charcoal as the deceased had been killed. He denied being involved in the death of the deceased. The accused and the deceased had been in good terms and he had no problem with the accused and deceased working together in the task. He did not witness the incident.
13. Pw.5 Sabina Nthenya Nzioka testified that on 19-2-2019 she was at home when she saw people running and upon inquiring, they did not tell her the reason behind their running. She joined them and found the body of an unknown person lying on the ground. She alerted the village elder and assistant chief and then went back to her house.
  14. On cross examination she stated that she lived with her children as her husband was away at Mua Hills then. Her home was about 200 metres from the scene. She found many people at the scene including the wife and the sister to the deceased. She later came to know the identity of the deceased as Kithuka who turned out to be a neighbor. She did not hear of any screams or alarms. The deceased was lying on the ground and she could not tell the cause of death.
  15. Pw.6 Daniel Muia Wambua testified that on 18-2-2019 the deceased went to the bar in the company of two people who included the accused and one Kitel. He served them with drinks. They shared Dalas Vodka. They had arrived at 7pm and the two later left leaving the deceased behind. The deceased then order for half a bottle of dalas vodka which he drank alone. He looked drunk. The accused came later at 10 and left in the company of the deceased. He could not tell the directions they took as he continued with his work. The following day he saw people rush to the scene where the body of the deceased was found. He also went there and found the body of the deceased covered with a sheet. The deceased and the accused were great friends. The accused was the last person in the company of the deceased as they left the bar.
  16. On Cross – examination he stated that he has run that bar for the last six years since 2014. On 18-2-2019 he opened the bar at around 5pm the deceased in the company of another arrived at 7pm. The accused returned to the bar and left with the deceased at around 10pm. His neighbor Bob alerted him of the incident the following day. Deceased lay about 400 metres from his place of business. He did not hear of any screams. The accused home was quite far from where the body of the deceased was found. He did not manage to view the body of the deceased to see if he had any injuries. The deceased was not that totally drunk. The accused and the deceased exited the bar through the rear door. The two have been good friends.
  17. Pw.7 Paul Ngila Mwanja testified that on 19/02/2019 he was at home when he received a report about the incident. He went there and found the deceased lying on the ground having been killed. The deceased forehead had a deep cut. There were no other noticeable injuries. He helped the police load the body on the vehicle. He had known the accused since he was his first cousin. The accused and the deceased had been great friends.
  18. On cross examination he stated that the deceased and the deceased were his cousins. He arrived at the scene around 9 am and found the body had been covered with a sheet leaving only the head. The body lay near the compound of Kalanza and a member of the County Assembly. He did not see the accused at the scene and he could not implicate anybody since he did not witness the incident.
  19. PW8 Dr Kamotho Watenga testified that he is a Pathologist – Medicine & Surgery degree from Moi University after studying for 6 years from 2005. He did his Masters in Human Pathology at the UON from 2014 – 2017. Since then he has been practicing as a Government Pathologist in Muranga County. He testified that he did the post mortem of the deceased upon the request of Kathiani police station. The body was identified to him by the deceased’s mother Grace Mwanthi Kithuka and son Nicholas Ngewa. He conducted the post-mortem on 21/02/2019 at Machakos Funeral Home. Findings externally – Face swollen and covered with blood and soil and both hands were covered with



- soil. Injuries – He had very deep cuts on the mid forehead which exposed the underlying skull bone. Bruises on right forehead and a cut on the top of the left eye, nose was fractured bruised and fractured with a cut on the right side. On right cheek, bruise and bruise on the left cheek and cut on the lower lip on the right side and lower front teeth were loose.
20. Internally when he opened up the deceased chest, Abdomen and lower limbs no injuries on the head found and upper part both sides had bruises on the scalp and had haemorrhage on the back aspect of the head. A fracture on the mid frontal aspect of the skull bone and the fracture was depressed and into many pieces. Due that fracture there was exposed brain matter. This fracture extended to the orbit – the bone below the both eyes. There was a maxillary bone fracture - bone of the cheek and the bone had detached from the rest of the skull.
  21. They opened up the brain – bleeding on the surface of the brain which affected the whole brain and more pronounced in the frontal aspect.
  22. In view of the findings he found the opinion the cause of death was severe head injury secondary multiple impacts of blunt post trauma. He took samples of DNA blood fingernails and hair with its roots. He issued death certificate Number 1004405 and consequently appended my signature on the said form. He produced the post mortem Report as exhibit. Post mortem report MFI-2 produced as Exhibit 2.
  23. On cross examination, he stated that the date of death is on night of 18/19 February 2019. The 1<sup>st</sup> part of the Post Mortem was filed by the police and he could not attest to what is filled herein. The bar attendant testified that the deceased was drinking at there. The injuries were multiple and localized – targeted injury in form of an assault. A fall cannot break the skull and detach the skull.
  24. PW9 Patrick Sila Mitisya testified that on 10/02/2019 he was at home got a call from Sabina Nzioka that they found somebody found dead. He went to the place and saw it was martin Kithuka Ngewa who was on the scene. He called the Assistant Chief and informed him of the deceased’s body. There were many people police officers and village elders and they started to found out what happened. They went to Kathiani, found blood on the road and it led them to the deceased’s home where there was a hole/pit and soil had been removed. They came back to where the deceased lay. Chief and police officers found them at the scene. They went towards the scene where there were blood stains and they began to investigate the cause of the deceased’s death. He went back to where the deceased’s body was and waited there.
  25. In cross examination he stated that he was a “mzee wa mtaa” [village elder]. He was dealing with this matter as a village elder. He ran to the scene when he was called. He knew the deceased as a relative from the same clan. He looked at the place where the deceased was, he had blood and there was no blood around the place. He followed the blood stains and followed to where they led to. He was not an expert to investigate the scene but he used his eyes and saw the blood drops on the road upto where it took him. The weather was dry and there was no rain.
  26. PW 10 Elizabeth Oyiego, testified that she was a Government Analyst. She has Bachelor of Science U.o.N and Masters in Science in Applied Analytical Chemist from Kenyatta University. In the matter in court, on 9/4/2018 at Government Chemist Laboratory/Nairobi the items listed were received from PC. Njuguna Lawrence from DCI Machakos and accompanied by Memo Exhibit Form. Blood samples in a bottle marked ‘A’ Martin Kithuka Ngewa, nail, hair in a khaki envelope, Martin Kithuka Ngewa marked ‘B’, Blood sample marked ‘C’ & “D”, Evans Nzau Ithoka. A blue red white shirt – marked ‘E’, A navy blue pair of trousers marked ‘F’, Swab stick & marked ‘G’ ‘H’ ‘I’ ‘J’ ‘K’. They were to examine the items and determine whether there was DNA matching any of the blood stains on the shirt item ‘E’ lightly stained with blood; pair of trousers moderately stained with blood. She stated that



- the swab item G, H, I, J & stains of blood did not generate DNA profile. DNA profile on items A, B, C, D, E & F were tabulated in the annexed table. The accused's DNA profile locus frequently of occurrence in the evidenced items =  $2.6 \times 10^{20}$ .
27. The conclusion was that the DNA profile for blood on the shirt and trousers matched the generated samples of the accused person. She filled the form and signed it on the 3/06/2020.
  28. In cross examination, she testified that she received the samples on 9/04/2019. She was not aware where the alleged offence took place. The Exhibit memo showed 18<sup>th</sup> – 19<sup>th</sup> February, 2019. She recovered the samples on 9/04/2019 it was 2 months after the alleged incident. Referrals from the prosecution and the same can be examined but depolarising of various factors, there were those that will not generate DNA profile. As long as they are well preserved the specimen were well preserved when she received them. There was a shirt and trousers. She received the whole shirt and part that was contaminated only slightly stained not the whole shirt was soaked in blood, she said slightly stained.
  29. Pw11, Inspector Maurice, testified that at the time material to this case, he was in charge of the crime office in Machakos County. He is a graduate of Makerere University and a trained police officer- normal instructions at Kiganjo and trained locally and internationally. He does crime scene management – crime scene documentation and processing and collection of evidence - Crime scene reconstruction. He is the link between scientific and general investigation. On 19/02/2019, around 14.13 hours he accompanied Mutisya Simon and other officers to Ngoleni market – Mwanja Mbiti village. He was requested to document a scene of murder. He took twelve coloured photographs; Photo 1 – 5 – general and closer view of the deceased lying across the path a few metres behind the market. Photo 6 – 11 – General and close-up views of the deceased's head and forehead. Photo 12 – close-up view of deceased's shoe. He helped the investigating officer to collect blood samples on the ground and on the two alleged suspected. He marked the swabs and the exhibit memo was prepared by the investigating officer and they were taken.
  30. On 13/03/2019 he took the film for processing. He prepared the certificate and appended his signature and date and the office stamp. He produced the photographs and certificate.
  31. In cross examination he stated that he arrived at the scene at 14.13 hours. He was at the scene for about one and a half hours. They followed the traces of blood to where they met and went to both accused's home and around the suspects home. The body was at primary scene and this is because that is the place that was disturbed and where the shoe was. It was not a secondary scene. He used the forensic gadget they normally use. The officers arrested several suspects and they left the scene at 3 – 4 p.m. His vehicle usually does not carry the body. It is the officer in charge who carries the body. After he checked the body and scene OCS took over. He left the scene at 3 p.m.
  32. Pw12, 232872 Inspector Simon Mutisya, testified that he was from DCIO – Kathiani. On 19/02/2019 he was in the office with Chief Inspector Maina while there they received a call that there was a dead body found at Ngoleni location. He proceeded to the scene with Chief Inspector Maina and Pc. Lawrence Njuguna. They were accompanied by Scenes of Crime – officer Inspector Ndunda. They got information that on night of 18/09/2019 during the day he was in the company of the accused person and were burning charcoal business. That night the deceased and accused person went on a drinking spree and later left together.
  33. At the scene they found the deceased was injured on the head and had blood drifting and these droplets leading to accused persons home. On 19/02/2019 they arrested the accused person and he had blood stained clothes. The scene was processed by C.I. Ndunda scene of crime. They conducted investigations and found out that on the fateful night he was with 7 others suspects digging sand at a road reserve at a place known as 'Kailoti'. However, the Accused person left alone with the deceased.



- On 19/02/2019 he filed CM Misc. Application No.14 of 2019. He was granted orders to have the accused person and other 7 suspects for 10 days. They preferred charges against the 7 for mining sand and were fined 2 million in default 2 years imprisonment. He charged the accused person with the charge of murder.
34. On 19/02/2019 he visited the accused person's home and underneath the mattress recovered blood stained shirt and 1 pair of trousers. They interrogated the accused person's Auntie and she said she took food to the suspect person and she did not find the accused in the house. She is now deceased. Swabs were taken by C.I Ndunda of Scenes of Crime and the accused had blood stained nails. He prepared the exhibit Memo form with the blood-stained shirt and trousers and swabs and later on he obtained the Government Chemist Report and charged the accused with the offence. He produced exhibits; Shirt – MFI-5 [exhibit 5], Trouser – MFI-6 [exhibit 6].
  35. Accused person DNA – blood sample from Machakos Level 5 and gone to Government Chemist. He also obtained sample of deceased's blood during post mortem. He did not see him before
  36. On cross examination he stated that he was the investigating officer. He joined DCI – 1997 and worked with police force for the last 33 years. He has handled such cases in Kathiani for the last 3 years. He served the witness statements in court in 2023 and the accused signed. He was accompanied by CI Maina, Inspector Ndunda, Pc Maina and driver of the motor vehicle. He recorded his statement and Lawrence Njuguna and Inspector Ndunda of scenes of crime. At Ngoleni they had Administration officers. The whole area is manned by Kathiani police station and Ngoleni police post.
  37. It was 10 a.m. when they got to the scene and was informed by OCS at 8a.m. they waited for a vehicle that had brought suspects to court. They had to call the vehicle back. It took 2 hours – waiting for a vehicle. He had to go to the scene with a motor vehicle as we would transport the body. He found the body covered with a lesso.
  38. There were signs of struggle and he deemed it as the primary scene from where the body was to the home of the accused person there were bloodstains/blood dropouts. He was familiar with inventory – he had the expert C.I. Ndunda from scenes to crime who proceeded to the scene. He did not conduct photographs taking: it was done by the scene of crime personnel. The lesso was used to cover the body by members of the public. Tabitha Wanza Kisevu's [PW.2] statement was recorded by PC Njuguna.
  39. The accused and deceased were working together and lived near each other. The accused person lived in Ngoleni with his auntie. The Previous day they were harvesting sand/burning charcoal. They were called by Patrick Kakei to burn charcoal.
  40. When he went to the scene, he found many members of the public were at the scene. Others had left the scene. He cannot tell if the accused person was at the scene. They followed the blood droplets from the scene that led us to his house.
  41. Daniel Muia Wambua [Mrefu] PW.6 stated that the 2 accused person and deceased were friends and they left together after drinking. He was not in court thus does not know what Pw.6 told the court. He did not investigate how many people operated the bar. He did not find out the number of people who drink in that bar that night. The blood- stained trousers were found under the accused person's bed/mattress. The blue trousers had blood stains and the shirt also and the Government Chemist found the blood. The deceased was cut on the head, he did not recover any weapon. The distance from the bar where they were drinking to the primary scene where the body was found is about 100 metres within the Township. He did not know the distance from the scene of crime and accused person home. The body was lying opposite the gate. No one in the area is a witness in this case.
  42. The Prosecution closed its case and the Court made a finding that the accused had a case to answer.



43. The accused gave sworn evidence and testified that he knew he was in court in relation to the killing of Martin Kithuka Ngewa. He stated that on 18/02/2019 he woke up as usual at 7 a.m. and left to get cigarettes at a nearby shop. He met Martin Kithuka Ngewa who informed him that he had been given work to bake charcoal. He invited him to go with him. They went and did the work until 5.30 p.m. He had been given the job by Kakai. Kakai came and paid them 600/-
44. It was his testimony that after being paid they went to Martin's house where he changed and then went to Mrefu's bar. They got there at 7 p.m. At about 8.15 p.m. one Kitele came for him and told him to go load sand into a lorry. They left Martin in the bar.
45. At about 9 p.m. the vehicle came and they started loading. He was hit by Lazarus on the nose and started bleeding. The reason he hit him was because of a spade they were disputing about.
46. According to the accused, all his clothes got stained with blood. He went somewhere to wash his face and after went to the lorry but found they had finished loading the sand. He went home, removed his blood stained clothes and put them on the bed.
47. He stated that he heard the testimonies of all the prosecution witnesses. PW1 said they were relatives and that he had no grudge with Martin. The person whom she alleges informed her of her husband's death did not come to testify. The child she alleges she was taking to school did not come to testify.
48. He testified that he went to the scene on the morning of 19<sup>th</sup> after his mother told him that Martin had been found dead. He found many people at the scene. The body was covered with a Maasai shuka. He uncovered him and saw he had been hit on the head. He was wearing slippers. There was blood on the ground flowing from where the body lay. The body was in a spot between two homesteads. Nobody came from those homesteads to the scene. The body was about less than 100 metres from where they had been drinking. The deceased was not only his uncle but also a friend. They used to do jobs together. Nothing transpired as they were baking the charcoal save that he cut himself on the forehead and he gave him first aid. The clothes that the investigating officer took from his home were not taken to the Government analyst. What was produced in court was not taken from his house. What was taken from his house was a blue shirt and blue trouser. He did not know where the clothes taken to the Government chemist were gotten from.
49. It was his testimony that he observed the scene but he was shaken he was not able to tell if he was killed there or elsewhere and the body dumped there. He was not involved in the killing of Martin, nothing connected with the killing was recovered from my house. The clothes found in his house had his own blood.
50. The Prosecution submitted that it availed twelve witnesses in support of its case and framed the following issues for determination-
  - a. Was the accused involved in the murder of the deceased?
  - b. Did the accused have malice?
  - c. Was the accused identified appropriately?
  - d. Was the cause of death as a result of the injuries inflicted?
51. On the issue of whether the accused was involved in the murder of the deceased Counsel submitted that the testimony of Pw6 places the accused as the last person to be seen with the deceased and that was solely responsible to what transpired to the deceased. Reliance was placed on the case of *Moses Jua v The State* [2007] regarding the doctrine of last seen.



52. On the issue of whether the accused had malice aforethought, counsel submitted that Section 206 of the Penal Code states that malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
- [a] an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
  - [b] knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
  - [c] an intent to commit a felony;
  - [d] an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”
53. Counsel stated that in this case it is evident that the deceased met his demise as a result of the injury he sustained on the head.
54. On the issue of whether the accused was properly identified, the state relied on circumstantial evidence to place the accused at the scene of the crime.
55. On the issue of the cause of death, counsel submitted that PW8 Dr Kamotho who conducted the post mortem formed an opinion that the cause of death was exsanguination due to severe head injury secondary to multiple impacts of blunt force trauma.
56. The Prosecution finally submitted that it has through the testimonies of twelve witnesses and documentary evidence proved its case beyond reasonable doubt.
57. For the accused it was submitted that the applicable law is Section 215 of the CPC, Article 10 and 27 of *the Constitution*. Counsel relied on the cases of Woolmington v DPP [1935], Hc Criminal case No 17 of 2018, Regan Mokaya v Republic {2006} eKLR. Counsel argued that for any criminal charge to stand, the evidence tendered by the prosecution should be free from any inconsistencies, contradictions and innuendos; that the evidence tendered is insufficient and incapable of supporting the charge and the prosecution’s case was built on suspicion and should fail.
58. He submitted that the testimony of the accused was a true story and should be believed. That the state had failed to prove the elements of murder in this case and thus the accused should be set free.

### **Analysis and Determination.**

59. The elements of the offence of murder are as stated in the case of Republic v Mohammed Dadi Kokane & 7 others [2014] KEHC 1088 [KLR]-
- “ 1] The fact of the death of the deceased.
  - 2] The cause of such death.
  - 3] Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, and lastly
  - 4] Proof that said unlawful act or omission was committed with malice aforethought.”



60. Consequently, those are the elements I will consider to determine whether the prosecution has proved the charge against the accused person beyond reasonable doubt.
61. The fact of death is not in doubt. There was overwhelming evidence from the witnesses that the person named in the information is deceased. That evidence was corroborated by medical evidence in the form of the post-mortem. The first element was therefore proved beyond reasonable doubt.
62. The cause of death was determined by PW8 Dr Kamotho, a pathologist, to be severe head injury secondary multiple impacts of blunt trauma. This is consistent with the evidence that the deceased was severely assaulted. There is therefore evidence beyond reasonable doubt that the death was as a result of an unlawful act.
63. As to whether that unlawful act was committed by the accused it is my finding that whereas there is no direct evidence that the accused killed the deceased there is strong circumstantial evidence to connect him to the offence. To begin with there was evidence from Pw6 Daniel Muia, that on the material night the accused left the bar with the deceased and after that he was not seen alive. Pw6 had earlier on served the two and another person with beer. The accused left with that other person but returned to the bar later and left with the deceased at 10pm. He was therefore the last person to be seen with the deceased. Pw6 had operated the bar for six years and knew the accused and the deceased well and hence was in a position to positively identify the accused. His was evidence of recognition which is even more reliable. Further, there was evidence from Pw12 Inspector Simon Mutisya, that there was a trail of blood from where they found the body of the deceased to the house of the accused. The accused was also wearing bloodstained clothes when he was arrested. Pw12 also testified that they found bloodstained clothes underneath a mattress in the house of the accused. In his defence, the accused admitted that blood stained clothes were found in his house but contended that it was his blood; that he bled after being hit on the nose by someone with whom he was disputing over a spade at the place he went to load sand in a truck after leaving the deceased in his bar. What he did not explain however was why the blood on those clothes matched that of the deceased or even why he had concealed those clothes under the mattress. Contrary to his evidence, Pw12 who had no reason at all to lie against the accused, was emphatic that the clothes which were found in the accused's house were submitted to the government chemist for analysis.
64. It is my finding that the evidence that the accused was the last to be seen with the deceased coupled with the evidence that there was a trail of blood from where the body was found to his house, the recovery of clothes stained with the blood of the deceased in his house are inculpatory facts which cannot be explained on any other hypothesis other than that of his guilt.
65. In the case of *Neema Mwandoro Ndurya v Republic* [2008] KECA 324 the court observed that -
- “It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in *R. V. Taylor Weaver And Donovan* [1928] 21 Cr App. R. 20. But circumstantial evidence should be very closely examined before basing a conviction on it. In *Teper V. R.* [1952] AC at p. 489 Lord Normand said:
- “Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence”



66. The threshold to be established if a conviction is to be *Sawe v Republic* [Criminal Appeal 2 of 2002] [2003] KECA 182 [KLR] based on circumstantial evidence was also discussed In, where the court of appeal held-

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

Circumstantial evidence could be a basis of a conviction only if there was no other existing circumstances weakening the chain of circumstances relied on.”

67. In *R v. ECK* [2018] KEHC 4600[KLR], Lessit, J. in analysis of the doctrine of the last seen with deceased alive stated: -

“Regarding the doctrine of the last seen with the deceased. I will quote from the Nigeria: Court case of *Moses Jua v The state* [2007] [PELR – CA/11 42/2006. The court while considering the last seen doctrine held: -

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory 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.”

68. On whether there was malice aforethought, Section 206 of the Penal Code sets out the circumstances from which malice aforethought may be deduced and it states as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- [a] An intention to caused death or to do grievous harm to any person whether such person is the person actually killed or not.
- [b] Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.
- [c] An intention to commit a felony.
- [d] An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.”

69. The Court of Appeal in *Nzuki v Republic* [1993] KECA 83 [KLR] held 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 accused;

- i] The intention to cause death;



ii] The intention to cause grievous bodily harm;

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.

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 The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. [See *Hyman v Director of Public Prosecutions* [1975] AC 55". [emphasis added]

70. From the analysis of the injuries found on the body of the deceased, it is clear that the accused intended to inflict grievous harm upon the deceased. It is also my finding that the accused person knew or ought to have known that his action would result in death, and it can be safely inferred from the nature of injury inflicted on the deceased that the accused person's action was premeditated.
71. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the Information of murder against the accused beyond reasonable doubt. I find him guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**E N MAINA**

**JUDGE**

In The Presence Of:

Miss Nyauncho for the State

Mr. Nagwere Advocate for the Accused.

Miriam Court Assistant/Interpreter.

