



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mmbaya (Criminal Case E006 of 2022)
[2025] KEHC 11452 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11452 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E006 OF 2022**

**AC BETT, J
JULY 29, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

GERALD MMBAYA ACCUSED

JUDGMENT

1. The Accused was charged with the offence of murder contrary to Section 202 as read with Section 204 of the *Penal Code*. The particulars were that on the 11th of February 2022 at Kaluni Village, Kaluni Sub-location, Kakamega South sub-county within Kakamega County, the Accused murdered Kennedy Ambale.
2. The Accused denied the offence and the matter proceeded to hearing. The prosecution called six (6) witnesses.
3. PW1 was Nicholas Akwesa who recalled that on 11.2.2022 at about 7pm, he was at home at Lidolo. He had gone to a chang'aa den with the deceased and another person called Amiani. The Accused approached them while shouting that he had barred the deceased from visiting their home and since the deceased was stubborn, he would teach him a lesson. The Accused then attacked Amiani who was his brother and started to beat him in the house while PW1 and the deceased were seated outside the house. The Accused then went out, removed a panga from his trouser and slapped the witness on the mouth with it causing him to lose a tooth. The witness said that he fled, leaving the deceased being beaten. The deceased also managed to flee and met PW1 at the field and told him he had been beaten too. The deceased had a wound on the forehead. He was bleeding and claimed that he needed to rest as he was tired. He let PW1 go home. After 30 minutes, Rose the mother to the Accused called him and requested him to go and take the deceased to his home.



4. According to PW1, he accompanied Rose to the place he had left the deceased. he tried to talk to the deceased but the deceased did not respond. On touching him, he realized the deceased was dead. He then told Rose that her son had killed the deceased. The deceased's mother and other people were informed about the incident. The deceased's mother went to the field. Police were called but did not collect the body until the next day.
5. It was PW1's evidence that the Accused hated the deceased whom he would say had inherited his mother. PW1 identified the blue overall the Accused was wearing on the material date. PW1 further stated that he went to hospital for treatment. He said that he lost a tooth instantly and another one became loose and came out later. PW1 identified the P3 form that was issued to him.
6. On cross-examination, PW1 said that the incident occurred between 7pm and 8pm and there was moonlight. He said that when they were attacked, nobody else came to the scene. He denied the suggestion that he fought with the deceased. He also said that he went for treatment after 12 days.
7. PW2, John Anyani Lumumba testified that on 11.2.2022, he had gone to repay his in-law, Anne a debt. Anne is the wife of his brother Lidolo. On arrival, he found Kennedy and PW1. Anne was also there. The Accused came and started beating people and PW2 ran into the house. PW2 stated that the Accused is his brother. He recalled that the Accused first attacked him, then PW1 and then the deceased. He said that the Accused beat him with a maasai rungu which he identified in court. He hit him on the left arm while in the house. It was about 8pm and there was moonlight. The Accused was dressed in a blue overall. PW2 said he could hear the commotion outside. He stayed in the house for about 30 minutes and fell asleep only to be woken up by his mother who informed him that Kennedy had died. He woke up and proceeded to a field which was near a tea farm where he found many people. Kennedy's body was there with a cut on the forehead.
8. In brief cross-examination, PW2 said that he had not differed with the Accused on that day and that he had no grudge with the Accused.
9. PW3, was Rusalia Shikhanga, who said she was a mother to the Accused. She testified that on 11.2.2022, she was in her house cooking when the Accused came, greeted her and left to go to Vitalis Musuku's house. After a while, she heard wailing from PW2. She recalled that she got out and found the Accused who had an overall and a maasai rungu, chasing PW1 and the deceased. After a while, Rose Mdeizi came and informed her that a young man was dead in the field. She proceeded there and found that Kennedy was dead. She looked at the body and found that it had cuts all over the face and the forehead. She then went to PW1's home and informed him about the death and led him where the body was lying. They then called the deceased's mother as well as the Assistant Chief and Chief. The three came to the scene but the body was not collected until the next day. PW3 further stated that for reasons unknown to her, the Accused did not want the deceased to walk with PW2. She further said that the deceased used to assist her with chores since January 2020.
10. On cross-examination, PW3 stated that the Accused, who was her first born son, had a good relationship with her before the incident. She reiterated that the Accused, who lives across the river, was at her home on the material day as she knows her child well. She said that when she came out, she saw the deceased and PW1 running towards the same direction while Accused was there quarrelling. She further stated that on the fateful night, she called the Accused to inform him that Kennedy had died but he denied having been to the place.
11. When questioned by court PW3 said that Lidolo, who is her son was not at home that day but his wife was there. She further stated that as PW1 and the deceased were fleeing, the Accused was saying that he



- did not want people to joke in his father's house. He was also claiming that PW3 had been inherited by the deceased a claim which PW3 denied.
12. PW4 was Ann Maximilla. She testified that on 11.2.2022 at 7pm, she was preparing vegetables at her home when the deceased, PW1, and PW2 came to settle a debt. It was the deceased who handed over the money to her. While in the house, she heard noise and soon saw PW2 crawling on the ground towards the sitting room. She heard a voice she did not recognize saying, "don't walk with Amiani". The voice repeated the same order twice and stated that he had refused the deceased not to walk with Amiani. PW4 who said that she had been in their home for only two weeks testified that she later learnt that the attacker was the Accused who is her brother-in-law. she recalled that later, PW1 came and told her that Kennedy had died. She said that did not see the Accused that day. According to her, PW2 had a swollen hand and did not tell her what happened to him.
 13. When cross-examined, PW4 conceded that she sold Chang'aa. She said that after the fracas nobody entered the house. She said that she sold alcohol to the deceased in the company of PW1 and PW2.
 14. Dr. Masika Collins who testified as PW5 produced the post-mortem report. He said that he carried out an autopsy on the body of the deceased on 16.2.22 at Vihiga County Referral Hospital. The body was for a male African aged 36 years and being 5.6 feet and it was about 5 days after the death. According to the report which was produced as PExh. 4, the body was identified by Jacob Masaire and Geoffrey Jabulino. Externally the body had a wound on the frontal side of the skull extending into the cavity. The abdomen was swollen and internally, there was a ruptured spleen. The head was fractured extending into the cranium. PW5 said that he informed the opinion that the death was caused by intercranial hemorrhage secondary to trauma from a sharp object. He then signed the report and rubber stamped it.
 15. In response to cross-examination, PW5 reiterated that he made the conclusion that the weapon was a sharp object not a panga. He also stated that there was a likelihood that blunt trauma to the abdomen led to the ruptured spleen.
 16. PW6 was Force No. 111235, PC Collins Baraza who was attached to the DCI, Kakamega South. He recollected that on 12.2.2022, he received a phone call from Sergeant Ngeiywa who requested that he accompanies him to a scene of crime at Kaluni village. On arrival at the scene, they found a crowd of people and the body of the deceased lying on the ground. Among the crowd was the deceased's mother who identified the body as belonging to Kennedy Ambale. There were eye witnesses at the scene. They narrated to them that on 11.2.2022 at about 8pm while at the homestead of one Lidolo, the Accused attacked them while armed with a panga and a Maasai rungu. Nicholas stated that during the commotion, he fled in a different direction after being assaulted on the mouth and losing his incisor teeth. He said that he was later treated at Kilingili Health Centre. PW6 said that on 13.2.2022, police officers from Eregi police station arrested the Accused in his home and recovered a blue dust coat and a maasai rungu. PW6 produced the said items and the P3 form in respect of Nicholas Akwesa. PW6 further stated that he attended the postmortem exercise that was carried out by PW5 on 16.2.2022 and on 17.2.2022, escorted the Accused to Kakamega General Hospital for mental assessment. PW6 stated that he undertook investigations and recorded statements from the witnesses. He established that the attack was propelled by the Accused's belief that the deceased was engaged in a love affair with his mother.
 17. At the close of the prosecution's case the Accused who was placed on his defence, chose to give a sworn statement and call one witness.
 18. DW1 was the Accused who said that on 11.2.2022, he was at home at night with his wife and children. Nothing happened and on 12.2.2022, he woke up and was left with their child while his wife left for casual work. He stayed in the compound the whole day and later, a boda boda rider called Gibson



- Shisanya informed him that the OCS, Eregi Police station was looking for him although he did not tell him why.
19. The Accused said that although he was arrested on 13.2.2022 for the murder of the deceased he did not know the deceased or Nicholas. He also denied knowing Maximilla, PW4. He said that it is not true that he was at his mother's home in Kaluni sub-location on the night of the murder. He said that he was in his home in Madini location which is about 6 to 7 kilometers away. He said that although the witnesses who included in his biological mother (PW3) claimed that he was the assailant, he was not there as he never went to his mother's house. The Accused said that he did not have a good relationship with his mother because he stopped her from selling their shamba as well as alcohol.
 20. On being cross-examined, the Accused said that his wife did not record a statement with the police to confirm his assertion that he had been at home. He said that John Amiani Lumumba (PW2) is his brother, as is Vitalis. He claimed that PW2 wants to sell the land and he and PW3 implicated him so that they could sell the land. He also said that he was not aware that the deceased had a relationship with his mother and that she is too old to have such a relationship.
 21. PW2 was Sheila Amalia Shimoli who said that she was the Accused's wife. She said that on 11.2.2022 she was at home with the Accused and their children. She made supper then they slept. On 13.2.2022 as they were preparing to go to church, four police officers from Eregi Police station and led by the OCS arrived in the home and took the Accused. DW2 said that the Accused normally does not go out of the house at night.
 22. On being cross-examined, DW2 responded that the Accused would go to the mother's home at least once a week often with her, but sometimes alone. According to her, he would however, come back early between 3 pm and 4 pm. she said that the Accused used to urge Vitalis Musoka, her in-law to stop selling alcohol and had even reported to the chief. She further stated that there was a land dispute between the Accused and the mother because the mother intended to sell the family land which was yet to undergo succession. Cross-examined further, DW2 said that she did not inform the police that the Accused had been in the house on the night it is alleged that he committed murder.
 23. The prosecution submitted that it had proved that the deceased had died and that the death was caused by an unlawful act for it resulted from intracranial hemorrhage secondary to trauma from a sharp object as proved in the postmortem. It relied on *Republic v Fredrick Mmbala Musoti* [2019] eKLR and *Ramadhan Kombe v Republic Mombasa* [*CA No. 168 of 2002*](#).
 24. The prosecution further submitted that the Accused who was well known to PW1, PW2 and PW3 was positively identified by the witnesses as the person who attacked the deceased. In regard to the alibi defence proffered by the Accused and supported by his wife, the prosecution submitted that the same should be treated as an afterthought as it was not raised during cross-examination. The prosecution relied on the case of *Nalkona v Republic* [2024] KEHC 4019 (KLR) to buttress its submissions contesting the alibi defence.
 25. As to whether there was malice aforethought on the actions of the Accused, the prosecution submitted that from the circumstances of the attack, malice aforethought can be referred. Reliance was placed on the case of *Nganga v Republic* [2024] KECA 238(KLR).
 26. The Accused on his part contended that the prosecution had failed to prove its case beyond reasonable doubt. He submitted that no pictures were produced to prove the scene of crime as there was no evidence of blood spilled in the homestead of Vitalis Musoka where the fight was alleged to have occurred despite witnesses testifying that there was a commotion and people were running up and



- down. He submitted that PW1's testimony was that he did not see an injury on the head of the deceased when he met him after the assault and only saw his injury after the death.
27. The Accused also submitted that he is a case of mistaken identity as PW1 who identified him came from a different village. He also submitted that PW1 and PW2 were drunk at the time since they were drinking illicit brew. The Accused contended that PW1 and PW2 claimed that they were assaulted by the Accused yet they never reported the assault at all. It was the Accused's submissions that no one saw him hit the deceased on the head and that there is a possibility that PW1 who was the last person with the deceased caused the injury. As to mens rea the Accused submit that no evidence was led to prove that he had the intention of attacking the deceased.
28. The issue before the court is whether the prosecution has proved the charges of murder against the Accused to the required standard. The charge of murder envisages the following vital ingredients: -
- a. That the person named is dead.
 - b. That the death was unlawfully caused.
 - c. That the Accused has been positively identified as having caused the death.
 - d. That the unlawful act of the accused was accompanied with malice aforethought. See Section 203 of the *Penal Code*.
29. It was conclusively proven that Kennedy Ambale was deceased. His death was confirmed by PW1, PW2, PW3 and PW4. Further a postmortem was conducted by PW5 who produced a post-mortem report. The post-mortem report which was produced as PExh4 indicated that a death certificate No. 1739592 was issued. A post-mortem can only be done on a dead body and a death certificate is issued to confirm that the person named on the death certificate is dead. Consequently, I find that the prosecution discharged its burden as regards the first element of the offence.
30. On whether it was proven that the cause of death was an unlawful act, the landmark case of *Guzambizi Wesonga v Republic* [1948] 15 EACA 63 set out the following test: -
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. for a homicide to be excusable, it must have been under justifiable circumstances for example in self-defence or in defence of property.”
31. In the instant case the evidence points to the deceased having been assaulted. This was confirmed during the autopsy where the Doctor (PW5) established the cause of death to be bleeding into the brain cavity caused by a sharp object. There was unassailable evidence from PW1 and PW2 that there was an incident in which the Accused assaulted them and PW1 fled while PW2 ran into the house leaving the deceased being beaten. PW3 who is the Accused's mother testified that she saw him chasing PW1 and the deceased when she came out of the house. Her evidence bolstered the prosecution's case that the injuries that caused the death of the deceased was caused by the Accused. Assault is an unlawful act as it is a crime under our penal system. The defence did not tender any explanation to justify assault.
32. Although the panga that was used in the assault was not produced, it has been held that failure to produce the weapon that caused the injury is not fatal to the prosecution's case. In the case of *Republic v Fredrick Mmbala Musoti* (supra) the Court of Appeal stated:-
- “Our courts have dealt with this issue in the past. The Court of Appeal in *Karani v. Republic* (2010) 1 KLR 73 stated that:



‘The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.’”

33. In my analysis, I find that having proven that the fatal injury was inflicted by a panga in the course of an assault, and in absence of any justification of the assault, the second element was proved beyond reasonable doubt.
34. The third element is whether the Accused was the one who committed the unlawful act and I find from the evidence that the Accused was identified by way of recognition. The Accused raised an alibi as his defence and called his wife in corroboration. The principles governing the defence of alibi are well settled and were reiterated in the case of *Naikona v Republic* [2024] KGHC 4019 (KLR) when the court stated :-

“R.V – Sukha Singh S/o Wazir Singh and others (1939) 6 E.A C.A 145 the court held that;

“if a person accused of anything and his defense is an alibi, he should bring forward that alibi as soon as he can, because firstly if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly if he brings it forward at the earliest possible moment, it will give the prosecution an opportunity of inquiring into the alibi and if they are satisfied as to its genuine, proceedings must stop.”

This remains the position to this day. The Court of Appeal in the case of *Kiarie Vs Republic* (1984) KLR stated as follows on defence of alibi:-

“An alibi defence raises a specific defence and an accused person who puts an alibi defence does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduced in the mind of a court a doubt that is not unreasonable”

When the defence of alibi is raised at the defence stage, it should not escape the scrutiny of the court. The prosecution no doubt required adequate notice to investigate the allegation of alibi defence. The governing principle on alibi defence is that it must be disclosed early enough in the proceedings to permit it to be investigated by the police. That determines the weight the court will give to it.”

35. The Accused never raised the defence of alibi during his cross-examination of any of the witnesses. He never put it to the witnesses save his mother PW3 that he was not at the scene during the incident. Although his wife supported him in his defence, I am persuaded that the alibi defence was an afterthought. In any event, the incident occurred between 7 and 8 pm, and neither the Accused nor DW2 gave evidence regarding the time when the Accused was at home. Both of them alluded to the Accused being at home “at night.” “Night” spans a whole twelve hours and there was nothing to prevent the Accused from going to his home 6 to 7 kilometers away and going back to his house the same night. I am therefore inclined to reject the alibi and find that it was tendered by the Accused in an effort to displace the prosecution’s case that he was positively identified by introducing the possibility of mistaken identity.
36. It has been held that identification by recognition is the best form of identification. However, this can only be so if the identification is done under favorable circumstances in order to rule out instances of



mistaken identity. In the case of Valentine alias Onsusu Ongeni v Republic [KEHC] 3623 (KLR), the court cited the case of Mwaura v Republic [1987] KLR 645 where it was held that:-

“...in this case guilt turned upon visual identification by one or more witnesses.. a reference to the circumstances usually requires the judge to deal with such important matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of the light.”

37. The Accused was well known to PW1, PW2 and PW3. PW2 was his brother while PW3 was his mother. The Accused was said to have been in an altercation with the deceased on the fateful date as he was castigating the deceased for being in a place that he had forewarned him not to go. It was between 7 to 8 p.m. and there was moonlight. The fight took place in close quarters as the Accused drew his panga and hit PW1 with it. PW3 saw the Accused in her house before he left to Vitalis’ home and shortly thereafter, she heard PW2 wailing and on going out, saw the Accused chasing PW1 and the deceased. From the evidence, the fracas caused by the Accused did not last a short time as he managed to assault both PW1 and PW2. PW2 and the deceased are biological brothers. It would be remiss of me to conclude that PW2 and PW3 could not identify their kith and kin.

38. In the case of Reuben Anjanoni & others v Republic [1976-1980] KLR 1556, it was held that identification by recognition is the more satisfactory, more assuring and more reliable than the identification of a stranger. Taking into account the conditions prevailing at the time of the incident, I find that the prosecution proved that the Accused was properly identified with no possibility of any error whatsoever.

39. Having established the existence of the first three ingredients, I now turn to the final ingredient in the offence of murder. Malice aforethought is defined in Section 206 of the [Penal Code](#) which provides:-

“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.”

40. Malice is therefore proven by way of evidence and can be inferred from the circumstances surrounding the case. In this context, malice aforethought is deemed to be an intention to kill or cause grievous injury to the victim. In Nganga v Republic (KECA) 238 KLR, the Court of Appeal the court held as follows:-

“In assessing the weight to be given to intention as an element of murder, the relevant circumstances must be considered whether the appellant foresaw the risk of the voluntary act he was about to carry out against the deceased. Whether the appellant was able to foresee



the real or substantial risk and the consequences of targeting the part of the body that may result in the deceased suffering grievous harm. A similar statement of Law was made in the persuasive authority of *S. vs. Sigwahla* 1967 4 SA 566 in which the court stated:-

“The expression intention to kill does not in Law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as a *dolus eventualis* as distinct from *dolus directus*.”

41. The evidence shows that the Accused armed himself with a rungu in his hand and a panga, which he concealed in his trouser. He then went on a rampage and while ranting, attacked PW1 and PW2 who were in company of the deceased. By the end of the rampage both witnesses had injuries and the deceased had a cut on the forehead. Whereas the Accused hit PW1 with the flat side of the panga and PW2 with the rungu, he cut the deceased. It was the evidence of PW1 that he fled and shortly thereafter the deceased met him at the field by which time the deceased had a cut wound on the forehead. The act of inflicting a cut on the forehead entailed some force and was intended to cause serious harm.
42. The evidence from PW1 was that the Accused held a grudge against the deceased whom he perceived to have inherited his widowed mother. Further evidence from PW3 was that the Accused did not want his brother PW2 to walk around with the deceased. Although she said that she did not know the reason for the animosity, her evidence corroborated that of PW1 who said that the Accused hated the deceased.
43. In targeting the head, the Accused demonstrated express malice. In *Kaburu v Republic* [2024] KECA 536 KLR the court defined express malice as follows:- “Malice may be express or implied. Express malice is when a deliberate intention is manifested to take away the life of a person unlawfully. Malice is implied when no considerable provocation appears or when the circumstances attending the killing show a reckless and wicked heart.”

Ultimately, I hold that there is overwhelming evidence that the Accused had the intention to kill the deceased, an intention that he realized when he cut him on the forehead with the panga.
44. For the foregoing reasons, I find the Accused guilty of the offence of murder and do convict him of murder under Section 203 as read with Section 204 of the [Penal Code](#).

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF JULY 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Chala for the Prosecution

Ms. Khatshi for the Accused

Court Assistant: Polycap

