



REPUBLIC OF KENYA



**Republic v Mutisya (Criminal Case 8 of 2016)  
[2025] KEHC 12371 (KLR) (28 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12371 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL CASE 8 OF 2016**

**FR OLEL, J  
AUGUST 28, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**TOM MUTISO MUTISYA ..... ACCUSED**

**JUDGMENT**

**A. Introduction**

1. The accused person was charged with the offense of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) of the Laws of Kenya. The particulars of the offence were that:-

“On the 16<sup>th</sup> day of January, 2016, at Kwa Koko village, Kithimani location, Yatta sub-county within Machakos County, he murdered Pauline Mumbua Mutuku”.

2. The accused person denied the charge faced and pleaded not guilty. The case proceeded to full trial with the prosecution calling Eight (8) witnesses in support of their case.

**B) Prosecution Case**

3. PW1 B.M.M., the deceased/accused son, underwent voire dire examination and was adjudged to be sufficiently intelligent, thus able to testify. He gave unsworn evidence and recalled how on the material night, the accused came back home, while drunk, and he was awoken from his sleep by his parents' quarrel, which escalated, forcing them to go out of the house where the accused chased after them and at some point, threw a beer bottle at the deceased, but luckily, the same did not hit her. They took refuge at a neighbor's house and stayed there until they heard the accused leave the plot, before going back to their house to sleep.



4. Later during the same night, the accused came back again and started to demand for his personal items. His mother refused to open the door and called the landlady, who came and mediated between them, resulting in the deceased giving the accused his blanket and other personal belongings. She then came back inside the house and locked the door. A few moments later, the accused hit their rented house window with a stone and on impact, he instantly heard his mum scream out in pain, while holding her neck.
5. He noticed that she was bleeding profusely from her neck and immediately opened the main door. The deceased walked out, took about 5 steps, and fell down. The accused stood over her, hurling abuses before leaving the scene. Using the deceased's phone, he called his uncle Eliud Wambua (PW4) and informed him of the emergency that had occurred. Unfortunately, they were unable to help the deceased, and she bled to death at the scene.
6. Under cross-examination, PW1 confirmed that his parents' marriage was turbulent and was sure that it was the accused who had hit their window using a stone, as he had just been handed over his personal belongings and was the person standing outside their door. The accused had also verbally threatened to kill the deceased, and told her as much when he left the incident scene.
7. PW2 - Agnes Mutheu Mwatu confirmed that she was the deceased landlady and corroborated PW1's evidence that on the material night, she intervened to help resolve the domestic row, which was raging between the couple. The deceased was inside the house, while the accused was outside along the corridor, and they were abusing each other. Based on her intervention, the deceased gave the accused his blanket and battery through a broken window, and at that point, decided to go back to her house.
8. She had hardly walked a short distance towards her house when she heard a piercing scream. She rushed back to find the deceased seated down and was bleeding profusely from a wound on her neck. PW1 was standing beside her while the accused continued to verbally insult the deceased. Neighbours came out to assist the deceased, whilst she rushed to call a vehicle owner to come assist to take the deceased to hospital. Unfortunately, by the time she came back, it was too late, as the deceased had lost her life.
9. PW2 confirmed that the accused was drunk and had a bottle of Kenya cane Alcohol in his hand. Further, she confirmed that it was the accused who had rented the house and was later joined by the deceased and her son. The unfortunate incident had occurred barely two weeks into the said tenancy. Under cross-examination, PW2 confirmed that she was about 400m away when she first heard the piercing screams made by the deceased, but did not witness the actual incident. She reaffirmed her evidence that the accused was very drunk and was holding a bottle of Kenya Cane Vodka, but did not see any broken pieces of glass at the scene.
10. PW3 - Joseph Kyengo Munandi testified that he was a member of the community policing group and recalled that on 16<sup>th</sup> January, 2016 at about 4.30 a.m., he received a call from PW2, who informed him that there was a problem at her plot and requested him to come over. He took his motorcycle and, while enroute, picked a young man to accompany him before riding to the said home. On arrival, he found a woman lying outside her house, facing upward, and was bleeding profusely from a neck injury she had sustained. Next to her was her child, who was also crying hysterically.
11. He dashed to report the matter at Yatta Police station and also tried to get an ambulance to help evacuate her, but was not successful. When he went back to the scene, where he found that the injured woman had already passed on. PW3 also confirmed that he did not know the accused person and had not seen him at the scene.



12. PW4 - Eluid Wambua Mwasu confirmed that the deceased was his sister in law (younger sister to his wife) and recalled that on 16<sup>th</sup> January, 2016 at about 5.00 a.m, he was called by his nephew (PW1), who informed him that his father had stabbed his mother and requested him to come assist in salvaging the situation. Accompanied by his elder sister, Juliana, they left for Kithimani, and on reaching the scene, found many people had gathered and the deceased body, which had a deep cut on her neck region, had been placed on the police land cruiser. He also had the chance to view the scene of crime and saw blood-stained clothes, a blood-stained mattress, and a pool of blood on the floor.
13. Later, they accompanied the body to Motezuma funeral home and on 19<sup>th</sup> January, 2016 returned to identify the body and witness the post-mortem process. PW4 confirmed that the relationship between the deceased and the accused had been tumultuous, and mentioned several incidences, where he had assaulted the deceased, intimidated her to drop criminal charges, and/or had caused a breach of peace.
14. Under cross-examination, he confirmed the accused person was well known to him and recalled an incident when the accused had abrasively trespassed into his compound while searching for the deceased, forcing him to roughed him up and had him arrested and charged with the offence of trespass, but later withdrew the said charge when he promised not to repeat the same mistake. He also confirmed that he was not present when the stabbing incident occurred.
15. PW5 - Daniel Makau Mutuku recalled that on 16<sup>th</sup> January, 2016, at about 6.00 am, he had been called by PW4, who informed him that his sister had been stabbed and had unfortunately passed on. On 19<sup>th</sup> January, 2016, when the post-mortem was scheduled, he did go to Montezuma funeral home, and identified the deceased body before the said process was undertaken. The doctor confirmed that the deceased had died as a result of excessive bleeding caused by the stab wound to her neck.
16. PW6 - Damaris Mutheu was the deceased's immediate neighbor and recalled that on the day of the incident, at about 1.00 am, she heard PW1 asking his dad why he was assaulting the deceased. Shortly thereafter, as she peeped through the window, she saw the deceased and her son leave the house with the accused in tow. Later, the accused returned to the house and left riding his motorcycle.
17. Later on during the night, the accused came back and demanded to be allowed into the house. The deceased refused to open the door, which act infuriated the accused, and he resorted to hurling abuses at the deceased and also broke the window to their rented house. The deceased called the landlady (PW2), who came and intervened to calm the situation. The deceased then gave the accused his clothes through the window, and she then heard him tell PW2 that he would leave and return in the morning.
18. After about 10minutes, she heard PW1 scream that the accused had killed his mum. As she opened her door, she saw the deceased stagger out of her house and fall. The accused stood over the deceased's chest and told her that he had killed her before leaving the scene. She reiterated that this had occurred in her presence as she and PW1 stood next to the deceased.
19. Under cross-examination, PW6 confirmed that she was the deceased's immediate neighbor and had heard and witnessed the couple quarrel on the fateful night, as she had not slept, having just arrived back home from her bartending job. She reiterated her earlier evidence as to the sequence of events and stated that their plot had a security light which enabled her to see the accused clearly, as he created a scene/spectacle.
20. PW7 Dr Geoffrey Mutuma stated that he was a qualified medical doctor and a trained Forensic Pathologist. On 19<sup>th</sup> January, 2016, he conducted a post-mortem on the body of the deceased, and his findings were that the deceased had a cut wound on the left neck region 10 cm in length. Upon opening her body, he discovered that her left carotid Artery and vein were cut, leading to excessive blood loss.



He formed the opinion that the cause of death was hemorrhage following a cut wound on the neck involving a major blood vessel. He produced the post-mortem report as an exhibit.

21. PW8 - SGT Geoffrey Mboya testified that on 19<sup>th</sup> January, 2016 at about 5.30 a.m., he was on duty at Yatta Police Station, when two boda boda riders came and made a report that a certain woman had been assaulted by her husband at Kwa Makaa area, Kithimani Market, and was bleeding profusely thus in need of urgent help. He mobilized his colleagues and rushed to the scene of the crime, where they found that the lady who had been assaulted had died.
22. They interviewed eyewitnesses who told them that the accused and the deceased were married, and that on the material night, they had been engaged in a domestic dispute. At some point, PW2 intervened and ordered the accused to leave, and he had insisted on being given his belongings, which were thrown out to him through the window.
23. The accused, before leaving, in a fit of anger, had then stabbed the deceased through the window with a sharp object, inflicting a fatal wound to her neck. They processed the scene, recovered the accused motorcycle as well as an LG Mobile phone, but did not get any murder weapon. A few days later, on 25<sup>th</sup> January, 2016, the accused surrendered himself at Lunga Lunga Police Station, where they went and picked him up. PW8 produced the scene of crime photographs as exhibits.
24. Under cross-examination, PW8 reiterated his evidence in chief and confirmed that from the evidence of PW2 and PW6, it was evident that the accused stabbed the deceased whilst he was standing outside the house and had used a sharp object, which they did not recover at the scene of the crime. He had also viewed the crime scene and noted that there were blood stains on the floor where the deceased stood next to the window, coming towards the door, and also outside where she finally collapsed.
25. The accused was placed on his defence and opted to give sworn evidence. He stated that he was a teacher by profession, though was on suspension by TSC. He acknowledged that the deceased herein was his wife and that they were blessed with two children, namely Brian Makau and Bellamy Mutiso. On 15<sup>th</sup> January, 2016, he had gone to TSC offices within Machakos town to follow up on a transfer request that he had placed as he wanted to be moved from Chumvi to Kithimani, to enable him join his family.
26. At about 6.00 pm, when he was done with his assignments, he drove to Kithimani using his motorcycle and reached at about 7.00 pm. He stopped by a local pub, where he drank beer as he watched local News, did some shopping, and went home to his family, who were happy to see him. After a while, a quarrel ensued, and they harangued each other for a long time. At some point, he decided to go to a nearby pub to have another round of beer, and when he went back home, they still continued to quarrel.
27. For the second time, he went back to Kithimani shopping center and bought a bottle of Vodka spirit, which he carried and went back home. The deceased at this point refused to open the door for him, and while drinking his alcohol, they kept on exchanging/quarreling through the window. The deceased called her landlady, who came and, after her intervention, the deceased opened the door and threw his personal belongings outside and told him to go away.
28. By this point, he was utterly drunk, and the deceased's action had completely infuriated him. He threw the "spirit bottle" at her through the window and instantly heard PW1 gasp and call out his mother's name. After a few minutes, PW1 unlocked the door, and the deceased came stumbling out, at which point he realized that something had gone horribly wrong. He approached the deceased and noticed that she had a deep cut on her neck, and a lot of blood was gushing out from the said wound. Her neighbours came out and some of them threatened to lynch him, thus fearing for his life, he took off.



29. At the main highway, he boarded a bus to Nairobi and kept on calling the deceased through her phone, but was not able to get through to her. Still in shock over what had happened, he went all the way to the Lunga Lungu border police station, where he surrendered to the police. From there, DCI officers from Kithimani came and picked him up.
30. The Accused regretted this incident and confessed that it had deeply haunted him/psychologically affected him. He no longer stayed with his children and prayed for forgiveness, as he had not intentionally stabbed the deceased. On the material night, he was angry and drunk when he threw the bottle of alcohol, which broke the window pane, and the window pane glass in turn cut the deceased on her neck. He reiterated that he was extremely remorseful for what had occurred and, as a result, had completely stopped drinking alcohol.
31. Under cross-examination, he confirmed that he had known the deceased for over 20 years, but they had been married for about 9 years and were blessed with two children. As a couple, they had normal quarrels, and he blamed it mostly on his “drinking problem” and “the deceased family’s interference in his marriage”. On the material evening, their quarrel had started over small differences, and it escalated as the night went on. At some point, the deceased, who was inside the house, threw his clothes outside through the window, and he overheard her phone conversation with her elder sister, which infuriated him, causing him to throw his “ alcohol -spirit bottle” on the window, which in turn broke and cut the deceased on her neck.
32. He reiterated that he did not intentionally set out to harm the deceased, and what had happened was purely an accident. In re-examination, he emphasized that he was completely intoxicated and had no preconceived ill intention to harm the deceased.

### **C. Determination**

33. I have considered the evidence adduced by both parties and given due consideration to the submissions by the parties’ respective Counsel. The question that arises before this court is whether the prosecution has proved beyond reasonable doubt that the accused person herein participated in the murder of Pauline Mumbua Mutuku, the deceased herein.
34. Section 203 of the Penal Code defines the offence of murder as follows:-

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
35. In Joseph Kimani Njau –vs- Republic (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) case of Nzuki –v-s Republic [1993] KLR 171, where it was held as follows: -

“ 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;
  - iii. 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 vs. Director of Public Prosecutions* (1975) AC 55”.

36. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari –vs- Republic [2014] eKLR, summed up the elements of the offence of murder as follows: -
- i. the death of the deceased and its cause;
  - ii. that the accused committed the unlawful act which caused the death of the deceased; and
  - iii. that the accused had malice aforethought.
37. I will now proceed to interrogate each issue.

#### **The death of the deceased and its cause.**

38. It is common ground that Pauline Mutiso Mutisya died on the early morning of 16<sup>th</sup> January, 2016. PW 7 Dr. Geoffrey Mutuma, who conducted the post-mortem examination on the deceased's body, confirmed that she had a deep cut wound on her neck measuring 10 cm in length, which wound had severed her left carotid artery and vein. He formed the opinion that the cause of death was haemorrhage due to a cut wound on the neck involving major blood vessels. The fact of death and cause of death were thus proved.

#### **Whether it has been proved that the accused committed the unlawful act which caused the death of the deceased:**

39. PW1, PW2, and PW6 were all eyewitnesses to the incident that occurred. The accused person in defence also admitted to harming the deceased and stated that he was extremely remorseful about what had happened, as he did not intentionally set out to harm the deceased. Given this express admission, it is not necessary to further interrogate the evidence adduced, and I find that, based on his voluntary confession before court, it was proved beyond reasonable doubt that he committed the unlawful act, which directly caused the deceased to lose her life.

#### **Malice Aforethought**

40. Section 206 of the Penal Code sets out the circumstances which constitute malice aforethought 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 attempts to commit a felony.

41. In *Joseph Kimani Njau –vs- Republic* [2014] eKLR the Court of Appeal stated that:-

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution...In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.”

42. A charge of murder may therefore not be sustained unless the mens rea for murder is proved. The element of intention in committing the offence was examined in the English case of *Hyam –vs- DPP* [1974] 2 ALL ER 41 where Lord Diplock observed as follows: -

“No distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequent, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act.”

43. In this case, PW1 and PW2 confirmed that the accused was inebriated on the material night. PW2 in particular confirmed that the accused person was holding a bottle of “Kenya Cane- Vodka” as he quarrelled and exchanged harsh words with the deceased, who was inside the house, while the accused was outside the house. In defence, the accused person corroborated this aspect of the prosecution evidence and confirmed that on the material night he was totally inebriated and did not intentionally set out to harm the deceased.

44. As the trial court, I am duty-bound to take it into account and determine whether, under the said circumstances, the Appellant was capable of forming malice aforethought, in the absence of which he could not be guilty of murder.

45. Section 13 of the Penal Code deals with the issue of intoxication in criminal matters and provides that:-

“ 13 (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

- (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –



- (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
- (b) the person charged was by reason of

intoxication insane, temporarily or otherwise, at the time of such act or omission.

- (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.
- (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
- (5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”

46. Under Section 13 of the Penal Code, intoxication is not a general defence to a criminal offence, except in the circumstances set out therein. A person who commits an offence while intoxicated is not ipso facto excused from the consequences of his act. The aforementioned section affords a defence of intoxication in three situations as follows.

47. The first situation is in what is called involuntary intoxication, where at the time of the commission of the act complained of, the accused person does not know that it is wrong or does not know what he is doing, because of intoxication caused without his consent by the malicious or negligent act of another person. In such a case, the court is required to discharge the accused person.

48. The second situation is where the accused person, by reason of intoxication is insane, temporarily or otherwise, so that at the time of commission of the act complained of, he does not know that it is wrong or does not know what he is doing. This situation brings the case within the M’Naghten Rules and the court is required to deal with the accused person in the manner prescribed by the Criminal Procedure Code for accused persons who were insane at the time of commission of the offence, culminating in a special finding of guilty but insane and the detention of the accused person in a mental hospital at the pleasure of the President.

49. In *Rex –vs- Retief* [1940-1943] EA 71, the former Court of Appeal for Eastern Africa explained this aspect of the defence of intoxication as follows:

“The insanity whether produced by drunkenness or otherwise is a defence to the crime charged. The law takes no note of the cause of insanity and, if actual insanity in fact supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. It is immaterial whether the insanity so induced was permanent or temporary and if a man’s intoxication were such as to induce insanity so that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity and the verdict should be as laid down in section 159 of the Criminal Procedure Code ‘guilty of the act charged but insane when he did the act.’”

50. The third situation, contemplated by Section 13(4) of the Penal Code, arises where by reason of intoxication, the accused person is incapable of forming a specific intent, which is an element of the



offence charged. Sometimes this situation is referred to as “intoxication or drunkenness negating mens rea”. In the case of Said Karisa Kimunzu –vs- Republic, CR App No. 266 of 2006 (Msa), the Court stated thus regarding intoxication or drunkenness negating mens rea:-

“But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under Section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant’s drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son.”

51. The evidence presented did prove that the couple had quarrelled on and off during the night, and at the fatal point, PW1 states that,

“My mother called the landlady. The landlady then talked with my father and mother outside the home. My father then asked for his things. My mother gave him a blanket and other thing. My mother then got into the house and closed the door. My father hit the window with a stone and I heard my mother scream..... I saw my mother was holding her neck as she went to the door”.

52. Under cross-examination, PW1 further emphasized that; “ My father threw the stone and I saw him stand outside. I was awake when the window was hit by the stone”. PW2 and PW6’s evidence corroborated PW1’s evidence, though they did not mention whether the accused person used a stone or Kenya cane bottle to fatally injure the deceased.

53. In his defence, the accused person confessed that at some point during his quarrel with his wife, she had opened the door and thrown his personal stuff outside the door. By that point, he was hopelessly drunk and was so mad at her that he threw the spirit bottle at her through the window. He heard his son gasp and call his mother. Instantly, he realized that something had gone wrong, and his worst fears were confirmed when PW1 opened the door, and the deceased stumbled outside holding her neck, while bleeding profusely therefrom.

54. PW8, the Investigating Officer, did visit the scene of crime, but unfortunately did not recover the stone or broken Kenya cane bottle allegedly used to hit the window. Further, there was no evidence presented to prove that the deceased inflicted the fatal blow using any other object.

55. Based on the evidence presented, am not satisfied that malice aforethought has been established in terms of Section 206 of the Penal Code. The spontaneity of how the incident occurred debunks any thought that the accused person had a preconceived motive to inflict fatal injuries upon the deceased

56. Having so determined, the court falls back to Section 179 of the Criminal Procedure Code, which provides:-

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but



the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

**D. Disposition.**

57. In the premises, I find that the offence of Murder has not been proved and accordingly reduce the charge of murder to manslaughter. The accused is acquitted of the charge of murder but convicted of the lesser offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.
58. Sentencing will await the filing of a pre-sentence report by the probation and aftercare services department, within the next 21 days.
59. It is so ordered.

**READ, SIGNED, AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 28<sup>TH</sup> DAY OF AUGUST , 2025.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED VIA THE VIRTUAL PLATFORM, TEAMS THIS 28<sup>TH</sup> DAY OF AUGUST , 2025.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

In the presence of:-

.....Accused

.....For O.D.P.P

.....Court Assistant

