



**Republic v Kimwetich (Criminal Case E020 of 2023)  
[2025] KEHC 11981 (KLR) (13 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11981 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE E020 OF 2023  
RN NYAKUNDI, J  
AUGUST 13, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**COSMAS KIMWETICH ..... ACCUSED**

**JUDGMENT**

1. The accused was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 1<sup>st</sup> day of August, 2023 at Kabatu area, in Moiben Sub-County within Uasin Gishu he murdered one Ruth Mutai. The accused was presented before this court and a plea of not guilty was entered.
2. The prosecution called a total of 8 witnesses to discharge its burden of proof whose evidence is summarized as hereunder:
3. PW1 was Hillary Kiplagat Keino who testified that on the morning of 1<sup>st</sup> August 2023, he heard screams from his neighbor, Eliud Sigilai and upon inquiring found that Eliud’s elderly mother (the Deceased) was missing from the house. Together with another herdsman – Koech, they went to the Deceased’s house and found that the clothes the deceased was wearing on the previous day being a skirt, petticoat and a cap were at the door entrance. The Deceased was not in the bedroom and her bedding was filled with mud. PW1 observed a masaai ring in the kitchen of the Deceased. The duo also observed blood marks on the wall of the main house and on looking further found the body of the Deceased at least 10 meters away. PW1 notified the Chief at this point.
4. Next was Peter Kipchumba Nambale who testified as PW2 stating that upon getting information that the Deceased who he referred to as Gogo had been killed, teamed up with the village elders in doing their own independent investigations. He noticed that one of the Herdsmen in the compound, being the Accused, who was known to wear masaai jewelry was missing from the Compound and yet there



was already a crowd at the home that was eager to find out what had transpired. Efforts were made to look for the Accused and he was found and interrogated in the presence of PW2. When asked if the maasai ring belonged to him, he agreed.

5. Philemon Kitur took the stand as PW3, and the Accused's employer since 2020. He confirmed that he had heard rumors of the Accused's behavior of trespassing into people's houses in the dead of the night. Although he had not taken any action at the time, he was planning to let the Accused leave employment.
6. PW4 – Viola Chemeli who is the Deceased's daughter in law is among the first people to have noticed that the Deceased was not in her home and that her windows were open which was unusual and therefore raised the alarm.
7. PW5 was Thomas Kimeli Koech who testified thereafter confirming PW4's testimony. He too worked as a herdsman in the compound and was used to finding the Deceased's milking bucket outside every morning for him to fill it, however on the morning of 1<sup>st</sup> August 2023, this was not the case. He tried calling out the Deceased but she did not respond. He checked inside the house and found the clothes she was putting on the previous night by the door. He tried looking for her inside the house but did not find her. It was then that he notified PW4.
8. Hezekiah Ruto who is the Assistant Chief of the area testified as PW6 stating that when he was notified about the incident, he immediately made his way to the scene while also notifying the officers at Moiben Police Station. He confirmed that the Deceased was indeed dead and ensured the scene was secured to await the visit by the OCS. He convened a meeting with the members of the public with a mission to uncover the owner of the maasai ring. In his independent investigation it was established that the Accused had been spotted on several occasions wearing that same ring. The Accused himself was not present at the scene and therefore efforts were made to try and look for him. PW6 confirmed that the Accused was found at the dairy bay sleeping with a blood stained trouser and which had a lot of mud. He also did not have his ring but when asked where it was claimed to have lost it the previous evening while attending to cattle. Further that the jacket that the Accused was wearing on the previous day was found in a plantation next to PW3's home with blood stains and mud. He yielded the Accused together with his close friend – Hillary Kipsang, who had similarly been apprehended, to the police for further interrogation.
9. The Government Pathologist testified as PW7 and produced the Post Mortem as exhibit 3. The Deceased was noted to have a number of external injuries such as multiple bruises on her whole face, her upper limbs, her left gluteal and right filial bone as well as a number of lacerations on her upper lip and arms. She had similarly fractured her 3<sup>rd</sup> to 9<sup>th</sup> left ribs and there were signs of internal head bleeding indicative of a lot of suffering prior to her death. The expert opinion of PW7 was that the cause of death was suffocation with chest injury.
10. Finally, the Investigating Officer testified as PW8. He confirmed having visited the scene upon being informed of the incident. He further confirmed having received the Accused's jacket and blood-stained vest and a masai ring and bangle that was retrieved at the scene. Another individual known as Hillary Kipsang had equally been arrested and while at the scene, he got a white soil stained trouser and a grey stained jumper. In his investigations, he established that the Accused and some of his friends were drinking the previous evening where the other two Josephat and Hillary started fighting where the Accused was inciting them. The conflict between the accused, Josephat and Hillary apparently stopped by themselves and they proceeded to their respective homes. It is not known where the Accused went to because he was not seen in his house after this incident. The Investigating Officer furnished the masai ring and bangle and the photos taken at the crime scene as exhibits 1, 2 and 4 respectively.



## The defense

11. In his defense, the accused person denied the ownership of the ring and bangle found at the deceased's home which was linked to him. He stated on the material day, he was with his friends drinking at around 9:00PM namely Hillary, Gilbert and Josphat. He was a herd's man for one Philemon. He was taking alcohol from 7:00PM to 9:00PM when Hillary and Gilbert started fighting so left the place and he proceeded to go to sleep. At 6:30AM the next morning, he performed his normal morning duties which included milking cows and taking the milk to stage thereafter came back home. He drunk his chang'aa and he went ahead to feed the cows. He testified that later, a group of around 20 people came and told him that someone had been killed and they went to the deceased's compound alleging that he was the main suspect. Simultaneously, the members of the public started interrogating him on the events surrounding the death of the deceased alleging that a ring which had been found at the scene was the one usually worn by him places him squarely at the scene. He testified that he did not commit the offence and that the whole thing was a fabrication.

## Prosecution Written submissions

12. The Learned Prosecution Counsel Ms. Kirenge filed written submissions dated 6<sup>th</sup> August, 2025 in which she highlighted the essential elements required for the offence of murder to pass.
13. On the fact of death and unlawful cause of death, Ms. Kirenge submitted that the evidence herein indeed confirms that the deceased died. Further that the evidence of the pathologist is that the same was as a result of suffocation. That deceased similarly had so many unexplainable injuries on her body and for a person her age (88 years) indicative of the fact that someone purposely inflicted these injuries on her.
14. As regards to the element of malice aforethought, learned counsel submitted that to determine whether the death was executed with malice aforethought, consideration comes from the interpretation and application of section 206 of the Penal Code which defines malice aforethought as the intentional killing or to do grievous harm to any person whether that person is the person actually killed or not or knowledge that the act or omission will result into the death of a human being. Learned Counsel cited the decision in Republic v. Tubere S/O Ochen (1945) 12 EACA and invited this court to note that the deceased suffered great and terrible injuries before she died. The prosecution pointed out that the mortem indicated that the deceased had haemorrhagic conjunctiva, a lacerated upper lip, multiple bruises on the whole face and both upper limbs, bruises on her left gluteal and an abrasion over her right iliac bone. Internally, her lungs were shrunk and there were fractures from her 3<sup>rd</sup> to 9<sup>th</sup> left ribs. The pathologist further noted that the deceased has been raped. That it was not enough to suffocate the 88-year-old helpless woman, the accused suffocated her in the process. The state submits that the nature of this attack shows the dark and twisted thoughts ran through the mind of the accused showing his pre-meditation.
15. Ms. Kirenge cited various relevant authorities and urged this court to consider the following facts:
  - a. His Clothes (trouser and jacket) were found to have a lot of blood stains and yet he was not in the fight with his 2 friends that took place the previous night. It was established in the course of these proceedings that one Josphat Mutai and Hillary Koech Kipsang fought the previous night and were separated by Mary Koech, however the accused was never a part of that fight he only witnessed it. There was no reason for him to have blood on his person.



- b. His Masai ring was found in the house of the deceased. Initially when probed by other witnesses, he claimed to have lost it at the grazing field but it was never found there. Later at his defense, he denied ever owning it or knowing how it arrived at the scene of the crime.
- c. His absence from the crime scene on the morning was glaringly visible knowing well how such an incident would cause intrigue to members of the public in a bid to find out what was going on.

### **The accused's written submissions**

- 16. Learned Counsel Mr. Tarigo submitted that the prosecution must prove beyond reasonable doubt the essential elements of murder under Section 203 of the Penal Code, namely: that there was death of Ruth Mutai; that the cause of such death was unlawful; that the death was caused with malice aforethought; and that the accused is responsible directly or indirectly in causing the death of the deceased.
- 17. In establishing the requisite standard of proof, counsel cited the authority in *Miller Vs Ministry of Pensions (1947)*, submitting that while the degree of proof need not reach certainty, it must carry a high degree of probability, and that proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. Counsel further referenced *Joseph Kimani Njau v Republic (2014) eKLR*, where the court emphasized that both the actus reus and mens rea are required for the offense charged and must be proved by the prosecution beyond reasonable doubt.
- 18. Learned counsel Mr. Tarigo submitted that there was improper identification of the accused as the perpetrator. Counsel argued that the prosecution's case heavily relied on circumstantial evidence, primarily the ring found at the crime scene and alleged blood-stained clothes, but that the reliability of this identification was questionable.
- 19. Counsel submitted that the accused had never seen the ring found at the crime scene, and crucially, the prosecution failed to produce credible evidence showing that the ring belonged to the accused. Counsel noted that while PW1 Hilary Kiplagat Keino found the ring and stated he had never seen anyone with such a ring, and PW4 Viola Chemeli, the deceased's daughter-in-law, stated she knew the African bead rings but did not know who they belonged to, this lack of conclusive evidence regarding the ring's ownership significantly weakened its probative value in identifying the accused as the perpetrator.
- 20. Regarding the blood-stained clothes, counsel submitted that while PW6 Hezekiah Ruto testified that Hilary's clothes had blood stains, and PW8 Evans Kilonzo recovered stained clothing from both the accused and Hilary Kipsang Koech, only the accused was charged. Counsel argued this selective prosecution created reasonable doubt, particularly when coupled with alternative explanations for the accused's stained clothes, including a fight over chang'aa the previous night.
- 21. Counsel submitted that as the prosecution relied mainly on circumstantial evidence, the court should apply the established legal principles. Citing *Abanga alias Onyango v. Republic CR. App NO. 32 of 1990(UR)*, counsel argued that circumstantial evidence must satisfy three tests: the circumstances from which an inference of guilt is sought must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; and the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else.
- 22. Counsel further referenced *Sawe Vs. Republic [2003] KLR 364*, where the Court of Appeal emphasized that to justify conviction on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other



reasonable hypothesis than that of guilt, with no other co-existing circumstances weakening the chain of circumstances relied upon.

23. Learned counsel submitted that the prosecution failed to produce or adequately describe any murder weapon used to cause the death of the deceased. While PW7, the government pathologist, testified that the cause of death was suffocation with chest injury, counsel argued that the prosecution did not provide any item or object that was used to suffocate the deceased or inflict the chest injury. Counsel submitted that this absence of the described murder weapon left a critical gap in the prosecution's narrative, making it impossible to ascertain the means by which the unlawful act of murder was committed and directly impacting the prosecution's ability to prove actus reus of the murder.
24. Counsel submitted that the prosecution's failure to file a forensic report for the DNA tests conducted on the accused and deceased created a reasonable doubt. While PW8 Evans Kilonzo testified that he collected HVS and blood specimens from the deceased for genetic relationship and DNA sampling, and also recovered clothing from both the accused and Hilary Kipsang, no DNA results were produced in court despite these collections.
25. Counsel argued that the absence of DNA results meant no forensic link was established between the accused and the crime scene or the deceased, and that had DNA analysis been conducted and presented, it could have potentially confirmed or refuted the presence of the deceased's blood on the accused's clothing or connected the accused to the ring. Counsel cited *Sawe vs the Republic (2003) eKLR*, emphasizing that circumstantial evidence must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis of guilt.
26. Regarding the mental element of murder, counsel submitted that the accused person did not act with malice aforethought. Citing Section 206 of the Penal Code and referencing *Republic v Eyanee (Criminal Case E002 of 2022) [2024] (KLR)*, counsel argued that to establish malice aforethought, the prosecution must prove either that the accused had the actual intention to kill or cause actual harm, or knowledge that his acts could likely cause death or grievous harm to another human being.
27. Counsel submitted that the prosecution had not submitted anything to show that the accused had the intention to kill the deceased person, noting that none of the prosecution witnesses testified that the deceased and the accused person knew each other or that the accused harbored ill intentions towards the deceased. In support of the requirement for clear evidence of motive, counsel cited *David Kiokemboi Ngetich v Republic, Nakuru Cr. Appeal No. 276 of 2006 (CA)*, where the Court of Appeal stated that the relevance of motive is to contextualize the circumstances in which the offense charged was committed.
28. Learned counsel Mr. Tarigo concluded by citing Section 107 of the *Evidence Act* on the burden of proof and Section 111(1) of the *Evidence Act*, submitting that the prosecution failed to prove its case beyond reasonable doubt and therefore failed to discharge its duty of burden of proof. Counsel argued that the circumstantial evidence produced by the prosecution was weak and inconclusive, with the prosecution failing to produce evidence that directly linked the accused to the death of the deceased person, and notably, there being no single eye witness that could positive

### **Analysis and determination**

29. The burden of proving guilt in a criminal trial lies squarely on the prosecution to establish its case beyond reasonable doubt. This doctrine on the standard and burden of proof is enshrined in Article 50(2)(a) of *the Constitution* and detailed in Sections 107(1), 108 and 109 of the *Evidence Act*. In any criminal charge, there is a rebuttable presumption that by the Director of Public Prosecution making a decision to charge an accused person(s) for any offence on any of the Penal laws in Kenya which power



is exercised under Art. 157(6) & (7) of *the Constitution*, there is prima facie evidence inconsistent with his/her innocence which right is constitutionally protected and guaranteed under Art. 50(2)(a) of *the Constitution*. This prove of existence of facts is what is provided for in the legislative scheme under Section 107(1), 108 and 109 of the *Evidence Act*. As way back in 1876, learned author Thomas Starkie in "A practical treatise of the law of evidence," observed:

“What circumstances will amount to proof can never be matter of generation of definition; ..... On the other one hand, absolute, metaphysical and demonstrative certainty to the exclusion of every reasonable doubt: ... On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matter of the highest concern and importance to his won interest.....” see also the principles as illuminated in the cases of Republic versus Nyambura and four other (2001) KLR 355, Sekitoleko v Uganda (1967) EA 531, Msembe & another versus Republic (2003) KLR 521, Mbuthia v Republic (2010) 2 EA 311.

30. The evidential burden test was formulated in Cross and Tapper on Evidence 12th Edn (Oxford: OUP, 2010):

“The test is to determine whether there is sufficient evidence in favour of the proponent of an issue, is for the judge to inquire whether there is evidence that, if untainted and uncontroverted, would justify men of ordinary reason and fairness in affirming the proposition that the proponent is bound to maintain, having regard to the degree of proof demanded by the law with regard to the particular issue.”

31. For the prosecution to secure a conviction on the charge of murder contrary to Section 203 of the Penal Code, it must prove four essential ingredients:

- i. The death of the deceased Ruth Mutai
- ii. The death was unlawfully caused.
- iii. The death was caused with malice aforethought
- iv. The accused person participated in or caused the death

32. The following passage from the learned Author Kenny’s Outlines of Criminal Law (16<sup>th</sup> Edn.), at p. 416 seems to be speaking directly to the facts of this case as read before me by the Director of Public Prosecution;

“A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature. ... in criminal cases the burden rests upon the prosecution to prove that the accused is guilty ‘beyond reasonable doubt’. When therefore the case for the prosecution is closed after sufficient evidence has been adduced to necessitate an answer from the defence, the defence need do no more than show that there is reasonable doubt as to the guilty of the accused. See R v. Stoddart (1909) 2 Cr. App. Rep. 217 at p. 242. ... .. In criminal cases the presumption of innocent is till stronger, and accordingly a still higher minimum of evidence is required and the more heinous the crime the higher will be this minimum of necessary proof.”

33. This offence as investigated by the National Police Service and accused recommended for prosecution for the offence of murder was purely based on circumstantial evidence to discharge the burden of proof



of beyond reasonable doubt. The use of circumstantial evidence in proving an offence emphasizes admission of strong evidence. It must meet specific legal standards. It must be evidence which allows the trial court to draw inferences from established facts which must be inconsistent with the accused's innocence and lead to no other reasonable conclusion other than his or her guilt for the offence committed. The key principles regarding circumstantial evidence for it to carry the day in favour of the prosecution and the trial court to proceed to make a finding of guilt and conviction the threshold issue must be tested within the spectrum of the following guidelines: The prosecution must prove the accused's guilt beyond a reasonable doubt, even when relying on circumstantial evidence. The evidence must be closely examined to ensure it is consistent with the accused's guilt and inconsistent with any other reasonable explanation. The court must be satisfied that the evidence, when taken as a whole, points conclusively to the accused's guilt.

34. The Supreme Court on this legal issue addressed itself as follows in the case of Republic vs. Mohammed & Ano. [2019] KESC 48 (KLR);

“The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is “indirect (or) oblique evidence ... that is not given by eye witness testimony” It is “(a)n indirect form of proof permitting inferences from the circumstances surrounding disputed questions of fact.” It is also said to be evidence of some collateral facts from which the existence or nonexistence of some facts in question may be inferred as a probable consequence ....

To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, “the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established ....” As was stated in the case of Kipkering Arap Koskei & Another v. R (1946) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilty to be inferred from circumstantial evidence, “...the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, ...

As was further stated in the case of Musili v. Republic CRA No. 30 of 2013 (UR) “to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt.” The chain must never be broken at any stage. In other words, there “must be no other co-existing circumstances weakening the chain of circumstances relied on” and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. “Suspicion however strong, cannot provide a basis for inferring guilt.”

This Court in Mwangi & Another vs. Republic [2004] 2KLR 32 stated that:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of events as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge.”

35. These are the principles which will apply in making a finding on the above elements which constitutes the offence of murder contrary to Section 203 of the Penal Code as punishable under Section 204 of the same Code.



36. Concerning the first element, there is overwhelming evidence from PW1-PW8 on admissible evidence that Ruth Mutai died on 1<sup>st</sup> August 2023 at Kabatu area, Moiben Sub-County. Before her death there is convincing evidence which is credible and truthful that she was alive and not suffering from any ailment or terminal disease. According to circumstantial evidence she went about doing her normal chores without any interference from any quarters. However, as fate would have it the neighbors who went to check on her noticed some suspicious elements within her homestead. She was also missing from her house. That is when a search and find Ruth was commissioned by the Area Chief and other members of the village. The body was thereafter discovered away from her house and her right to life no longer sustainable. This was now a criminal offence. The National Police Service was involved and the conclusion reached was that she had been unlawfully killed. The post mortem report admitted in evidence in support of the prosecution case confirmed the death of the deceased. This element was therefore proved beyond reasonable doubt.

37. With regard to the second element on unlawful causation of death, it is settled law that every homicide is unlawful unless excusable as stipulated in Article 26(3) of *the Constitution*. In the case of *Republic v Joseph Chege Njora 2007 eKLR*, the court held:

“A killing of a person can only be justified and excusable where the accused’s action which caused the death was in the course of averting a felonious attack and no greater force than this necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or part arising from a sudden and serious attack by his victim. It must also be shown the reasonable force was used to avert or forestall the attack.”

38. In Article 26 of *the Constitution* (1) (3) it provides as follows:

1. Every person has the right to life.
3. A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.

39. The breakdown of legal principles on causation include the following: ‘But-for’-test:

A fundamental principle is the “but-for” test. If the victim’s death would not have occurred “but for” the accused’s actions, a casual link is established, according to Burger Hyser Attorneys.

Novus Actus Interveniens:

A break in the chain causation (novus actus interveniens) occurs when an independent event, unrelated to the accused’s actions, becomes the direct cause of death.

2. Cases and Legal Principles:

R v Louw 1926 CPD 198:

This case established the principle that the accused’s conduct need not be the sole cause of death, as long as it is a contributing cause, according to Burger Huyser Attorneys.

R. v Blaauw 1952 (1) SA 157 (O):

This case highlighted the potential for intervening acts to break the chain of causation.



This case emphasized the importance of legal policy in determining causation, particularly when considering whether an accused's conduct should be regarded as a legal cause of death, according to Burger Huyser Attorneys.

40. My evaluation of the evidence on this ingredient as presented by the prosecution witnesses establishes that the death of the deceased was unlawful. My reading of the post mortem report provides strong grounds of the unlawfulness of acts of omission causing the death of the deceased. They include: Hemorrhage conjunctiva Lacerated upper lip on the right side Multiple bruises involving whole face Laceration left frontal Multiple bruises both upper limbs Bruises left gluteal Abrasion over right iliac bone
41. The evidence therefore demonstrates beyond reasonable doubt that the deceased met her death through unlawful acts of assault. The post-mortem findings revealed extensive injuries consistent with a brutal attack, including multiple bruises, lacerations, fractured ribs, and evidence of sexual assault. The pathologist concluded that the cause of death was suffocation with chest injury. There is no cogent evidence that the deceased's death falls within the exceptions contemplated in Article 26(3) of *the Constitution*. This element has been established beyond reasonable doubt.
42. Concerning the third element of malice aforethought, Section 206 of the Penal Code defines this as being established by evidence proving any one or more of the following circumstances: an intention to cause the death of or to do grievous harm to any person, knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, an intent to commit a felony, or an intention by the act or omission to facilitate the flight or escape from custody.
43. In *Rex v Tubere s/o Ochen* (1945) 12 EACA 63, the court held:
- “The court has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick.”
44. The nature and extent of injuries inflicted upon the deceased, as revealed by the post-mortem examination, demonstrate clear malice aforethought. The extensive nature of the assault, including sexual violence, multiple fractures, and ultimately suffocation, indicates a deliberate intention to cause grievous harm or death.
45. The law on malice aforethought is now well settled and besides the *Tubere* case the courts have pronounced themselves to anchor this element which is one of the critical feature which distinguishes murder from manslaughter. In this line of jurisprudence the court in *Republic v Kasila* (Criminal case 59 of 2013 [2025] KEHC 2438 (KLR) (21 January 2025) (Judgment) and in the persuasive authority of *S. vs Sigwahla* 1967 4 SA 566 held that:
- “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 as a result. This form of intention is known as a *dolus eventualis* as distinct from *dolus directus*”
- As was observed by this Honourable Court in *Republic v Lokutan* (Criminal Case E013 of 2021) [2025] KEHC 3469 (KLR) (10 March 2025) (Judgment)



“The definition of intention as laid down in *Cutcliffe v. Goodman* (1950) 1 ALL ER 720, 724 is on point and applicable to the facts of this case if the following statement of the court is anything to go by: “An intention to my mind connotes a state of affairs which the party intending does more than merely contemplate. It connotes a state of affairs which on the contrary, he decides so far as in him/her lies, to bring about, and which, in point of possibility, he/she has a reasonable prospect of being able to bring about by his/her own unlawful act of volition”

46. The evidence establishes that the deceased was raped, physically assaulted and finally suffocated to death. The medical evidence in form of the post mortem report corroborates the prosecution evidence that this was an offence purely committed within the provisions of Section 206 of the Penal Code. This element no doubt has been proved beyond reasonable doubt. The death of the deceased was unlawful executed with malice aforethought.
47. The last element of significance is whether the accused before court committed the offence of murder as alleged in the charge sheet. As stated earlier the identification evidence to place the accused at the scene of the crime is based on Maasai ring stated to have been recovered at the scene and apparently initially seen being worn by the accused. The other evidence that the prosecution presented before this court involved characteristic of blood stained clothes and stained with mud worn by the accused at the time of his arrest. There is no direct evidence that the accused was the one who killed the deceased. For purposes of this element, I once more reiterate the characteristic and features of circumstantial evidence.
48. The Court of Appeal in *Abanga alias Onyango v R* Cr. App. No 32 of 1990 set out the conditions for circumstantial evidence:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”
49. The prosecution's case on the fourth element faces significant challenges. While PW2 Peter Kipchumba Nambale testified about community investigations that led to the accused, and PW6 Hezekiah Ruto testified about finding the accused with blood-stained clothing, the evidence chain contains several problematic gaps. The identification evidence, while seemingly linking the accused to the scene, is not as compelling as required for a murder conviction. The accused was found sleeping at the dairy bay with blood-stained clothing, and his jacket was found in a plantation with blood and mud. However, the defense correctly points out that no DNA evidence was presented despite specimens being collected, which represents a significant prosecutorial failure. More critically, another individual, Hillary Kipsang, was also found with blood-stained clothes but was not charged, raising questions about the strength of the identification evidence against the accused specifically.
50. A central piece of evidence is the Maasai ring found at the scene. PW2 testified about community investigations establishing that the accused was known to wear such a ring and was found without it after the incident, claiming to have lost it while herding cattle. However, the defense submissions correctly identify weaknesses in this evidence. The ring was not forensically analyzed, and while witnesses claimed the accused was known to wear similar jewelry, the prosecution failed to establish



definitive ownership beyond circumstantial inference. In *Sawe Vs Republic* [2003] KLR 364, the Court of Appeal emphasized that circumstantial evidence must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

51. When applying the Abanga test to the circumstantial evidence in this case, certain circumstances are firmly established including that the accused was known to wear Maasai jewelry, he was found without his ring after the incident, blood-stained clothing was found in his possession, his jacket was found concealed with blood and mud, and he was conspicuously absent from the crime scene when the community gathered. While these circumstances point toward the accused's involvement, they do not do so unerringly. The absence of DNA evidence, creates reasonable doubt. The chain of evidence, while substantial, contains critical gaps. The missing DNA evidence and the failure to adequately exclude alternative explanations prevent the formation of a complete chain that excludes all reasonable doubt.
52. The prosecution failed to establish any clear motive for the accused to harm the deceased, an 88-year-old elderly woman. The absence of established motive, while not fatal to the prosecution's case, weakens the overall circumstantial evidence.
53. Having carefully considered all the evidence presented, including the testimony of prosecution witnesses, the documentary evidence, and the comprehensive submissions from both learned counsel, I find that while the prosecution has presented a case that is proven beyond reasonable doubt on the following elements; the death of the deceased, the death was unlawfully caused and the same was actuated with malice aforethought.
54. The million dollar question which was never answered was on identification and placing the accused at the scene of crime and to be held culpable for these heinous crime. The prosecution placed reliance on the maasai ring, the blood stained clothes worn by the deceased but all these would have made sense if they were to be corroborated with scientific evidence of a DNA profile. How the Investigating Officer side stepped this critical piece of evidence is a story for another day. The accused person in his defence denied any wrong doing with regard to the death of the deceased. As for the threshold for a case proven beyond reasonable doubt, that duty is vested with the prosecution and it never shifts to the defence at any one time. It is a constitutional right of the accused person to be presumed innocent unless the contrary is proved by the prosecution beyond reasonable doubt. What is the doubt here who really committed this offence? My answer to this not the accused person before court. If indeed he was the one, then the prosecution has failed the public in presenting such evidence capable of placing the accused person at the scene of the crime. As things stand now, no one can faithfully and truly convince this court that the maasai bling or ring apparently being connected with the accused had any distinct marks to rule out that the aforesaid ring found at the scene belonged to someone else other than the accused person before court. These suspicions cannot be taken for granted by this court given the fundamental rights and freedoms likely to be infringed or violated if the accused was to be found guilty on the basis of the maasai ring which is not supported by another independent material probative evidence to bring the case to the well settled doctrine of beyond reasonable doubt. This prosecution case on identification stands on sinking sand and it must drown and lost for poor investigation and trying an accused person without first establishing the cogency and credibility of the holistic evidence recorded against the accused. The charge of murder contrary to Section 203 of the Penal Code be and is hereby dismissed for want of merit thereby restoring to the accused the liberty of which he had been deprived during the period of this painful trial. He is free for now until otherwise lawfully held.
55. It is so ordered.

**SIGNED, DATED AND DELIVERED AT ELDORET THIS 13<sup>TH</sup> DAY OF AUGUST 2025.**



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**R. NYAKUNDI**

**JUDGE**

In the presence of:

Mr. Okaka for the DPP

Cosmas Kimwetich the Accused

