



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Katiwa (Criminal Case E014 of 2021)
[2025] KEHC 12485 (KLR) (8 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12485 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE E014 OF 2021
TM MATHEKA, J
SEPTEMBER 8, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

SYLVESTER NDAKA KATIWA ACCUSED

JUDGMENT

1. The accused person Sylvester Ndaka Katiwa is charged with murder c/s 203 as read with section 204 Penal Code . The particulars are that on the night of 26/ 27th day of April, 2021 at Syotuvali market Syotuvali sublocation Kathulumbi location, Mbooni East sub county within Makueni County he murdered David Makindu Mutua.
2. He denied the offence and the trial commenced before Dulu J who heard 7 of the 9 prosecution witnesses. I heard the I.O and the defence case.
3. The case for the for the prosecution is that the accused was former boyfriend of PW3 Euphrasia Ndinda Mutua alias Tabitha who had started a relationship with the deceased . That the attack on the deceased was out of jealousy. That the accused had previously threatened the PW3 with death over that relationship through a text message and that she had reported the matter. The prosecution led evidence to demonstrate that the accused was known to be a violent person who threatened even other people.
4. In his defence the accused admitted the relationship but denied any involvement in the death of the deceased. The accused told the court that he was at home sleeping with his family that night, that he was the key suspect because he had previously had a relationship with the PW3.
5. PW1 John Kala Mutiso told the court that on the 26th of April 2021 he was in the company of the deceased. They drove in his car and went to several drinking places. They were with PW3



6. In the last bar, which belonged to PW 3 they had their last drink at 10:00 PM when was closed. They came out and got into the vehicle, and he PW1 sat in the back seat. The deceased who was drunk fell asleep. PW3. Left for her house.
7. That the deceased slept for about 30 minutes, got up, went to relieve himself , came back , slept for about 10 . That during the second nap the PW1 says that he saw Ndaka appear . That there was moonlight, and that he recognized him and that in any event the person identified himself as Ndaka by saying that they would know that it was Ndaka. He said he saw he had a white shirt but did not see the trouser that he was wearing. He said, this person came to the driver's door, opened the vehicle and held the hand of the deceased and pulled him out. That the deceased stepped out. That the attacker asked him where his friend was , that the deceased did not answer but it was then that the attacker took a stone and hit the deceased who fell to the ground. He said that the hit him on the head. He sat on him and continued to him. That he PW1 opened the door, screamed for help, no one responded and he ran away into some farm where he hid till about 5:00am when he went to a nearby homestead, woke up the owners and asked them where he was. He then requested the owner to go to the market to check if the vehicle was still there, he said this owner of that homestead when to check, came back and told him that the vehicle was there, but the person who he saw there was not in a good condition. Then he told him (the owner of the homestead) to take him to the place where they went together, and that's where he saw the deceased and saw blood oozing from the nose of the deceased.
8. According to him, it was the accused person who beat up the beat up the deceased because of Tabitha .
9. On cross examination, he said he was afraid because the attacker asked for him in name. That he knew Ndaka but they were not immediate neighbors.
10. PW2's testimony that on the material night at 2:00am he heard A vehicle alarm outside which went on for about 20 minutes. It was about 20m from the club where he was , there was moonlight and the m/v hazard lights were blinking. He stepped on a stone to peep over the 7ft perimeter wall. He said he saw Sylvester in a white shirt. He appeared to be stepping on a person on the ground. He saw another young man who was in the same plot peeping across the window. The young man told him Sylvester was known for his violence and it would be better if they both went back to sleep. He said they did just that and did not report to anyone.
11. He said hazards were at the front and the back of the m/v. The person was lying on the side .
12. He said he did not witness anyone hit anyone with a stone, he did not see anyone escaping from the car, He said he knew that Sylvester used to assault Tabitha but that those were their affairs. That he did not report that issue to anyone that night because he was afraid.
13. On cross examination. He said he knew Tabitha and the accused. He said he and another by the name Kingee had stepped on a stone to peep that it was about seven feet high. That the deceased was on the driver's side. He looked above the wall The vehicle in front of us facing. His right side that the deceased lay on the side and he could see the vehicle was about 20 meters away. That it was about 2:00 AM and there was moonlight that it was the rainy season and it was dark. However, that the hazards at the front and the back he was not able to identify the person who was lying down that night . That he was able to identify Sylvester because he was standing. He did not hear any screams from the one who was being staked. He did not witness the use of any stone. He did not see anybody escaping from the scene. He did not make any report because he said he was scared.
14. PW3's testimony was that she and accused were living together for over two years. They broke up. She moved to a different house; the accused went back to his village. She became friends with the deceased. The accused threatened her and she reported. She could not say that the accused killed the deceased.



- She said she was with the deceased and PW1 when they went drinking around but that she did not take any alcohol herself. She said she left deceased and PW1 at her club with the barmaid and went to sleep.
15. That she learnt about the death of he deceased the next morning after her daughter went to the shops to buy breakfast and came back to tell her about it.
 16. She said the people who gathered at the place where the body lay outside her club were violent towards her and the police had to rescue her. Her club was attacked, and broken into the roof was removed when she got there.
 17. PW4 was PW3's bar maid. She is the one who sold the last drinks to deceased and the PW1. She said the three arrived together but PW3 left immediately. That the two each took a drink and they paid and left. When she left, they were in the car. She leant about the death the following day.
 18. PW5 brother to deceased attended the post mortem.
 19. PW6 Moleen Kaunda produced the Postmortem report on behalf of Dr. Alex Makau. Cause of death was severe head injury.
 20. PW7 was the government analyst Kipngetch Bernard. The government chemist was supplied with a black trouser belonging to the accused and a sample of his blood, the deceased's blood-stained clothes and a sample of his blood. The analysis was to check for DNA. The only DNA found was that of the deceased. There was none of the accused.
 21. PW8 no. 259537 PC Peter Nakaya was among the officers sent to arrest the accused person. The OCS told him and others that he had been notified that the murder suspect was in his house. They went to home of accused and found him in what the officer described as a deserted semi-permanent house . he was not wearing a shirt ; inside that house they found blood-stained trousers. They also recovered a T-shirt, light blue with red collar, white stripped shirt. They took him to Kalawa police station.
 22. PW9 no 67026 was CPL John Ateka the I.O. He received the instructions to investigate the matter on 27th April 2021 at 0715 HRs and proceeded to the scene at Syotuvuli Market . he confirmed that the deceased was in the company of PW1 and PW3 on the material night before he met his death.
 23. According to his investigations PW3's house was just within the Bar . After PW4 closed the bar, she noted that the two PW1 and deceased were drunk and they decided to sleep inside the car. That PW1 asked that the go to Kathulumbi Mkt but deceased continued to sleep and that is when the PW1 saw one in a stripped shirt arrive, pulled the door, pulled out the deceased while saying, 'utanijua leo mimi ni Ndaka' while demanding to know the whereabouts of John Kangee PW1, who was seated in the rear seat. That the intruder had a stone hit the deceased who fell near the front wheel, and the intruder sat in the deceased and continued to beat him. That he Pw1 ran away and from a distance began to call for help. That the next day t 6:00am he found his friend in a pool of blood. His theory was that accused attacked the deceased out of anger at PW3 for being unfaithful and had threatened her.
 24. On cross examination he confirmed that the m/v was not dusted for the accused person's finger prints, the accused black trouser did not have any blood stains . None of the items sent to government analyst connected the accused with the offence. The PW3knew about the death the following day when she was told that a person was killed near her bar.
 25. In his defence the accused denied the offence and told the court that he was at home that night and was only charged because of suspicion having been the previous lover of the PW3 who was now lovers with the deceased. He told the court the had broken up and he had left her alone.
 26. He contended that there was no evidence to connect him with the offence.



27. His counsel Mr. Muthiani in his final submissions demonstrated that the matter was reliant on circumstantial evidence which had fallen short of the requirements as per precedents he cited.
28. I have carefully considered all the evidence, the submissions and authorities cited by counsel. The issues are whether the prosecution has established beyond a reasonable doubt the ingredients of murder. See Anthony Ndegwa Ngari v R [2014]eKLR.
29. The prosecution established that the deceased died. They established the cause of death.
30. Did the accused commit the offence , and if so, with malice aforethought?
The only evidence we have is all is that of PW1 and PW2 .
Each claims to have seen the accused and to have identified him.
31. PW1 told the I.O he saw a person, an intruder in a white striped shirt. PW2 said the person he saw was in a white shirt. Pw1 said he ran away because the accused specifically asked for him and that as he ran away the attacker was sitting on the deceased, hitting him with the stone.
32. At that same time PW2 was peeping from the top of 7-foot wall heard the car alarm going on. It did so for 20 minutes. The hazard lights were blinking. He saw a person stepping on another who was on the ground. He was told by another ‘peeper’ that accused was dangerous, so they went back to sleep, and did not call for help.
33. It was at night, PW2 conceded it had been raining and it was dark despite there being a moon. In what light could he identify the person he named as Sylvester?
34. PW1 also said he used the moon light. That Ndaka identified himself. He did not explain why Ndaka would be looking for him by name yet proceed to attack the deceased.
35. The evidence of identification is risky here. PW1 was drunk. He denies it but PW4 said both were drunk and decided to sleep in the car. The wo had been drinking together and the deceased’s sleeping in the car was proof that both were not sober.
36. If indeed the deceased’s car alarm went on for 20minutes, in a market, not far from where PW3 was sleeping, it is not believable that she did not hear the same. It is also not believable that the PW1 would hide in a farm at night when the club they had just left was also the place where the PW3 was sleeping.
37. Neither is it believable that he did not hear the car alarm as he hid in the bushes or see the car hazard lights blinking.
38. The evidence on identification from these two witnesses is not reliable.
The evidence of pw1 and pw2 does not corroborate.
39. Pw2 said he and his co witness who did not testify did not go to the scene because of fear as the accused was known to threaten people. The prosecution did not provide any evidence to prove this allegation that the accused was a violent man. It was alleged by pw3 that he had sent her a message threatening to kill her because of her relationship with the deceased. However, no such evidence was availed to show that the real reason for the accused to attack the deceased was jealousy over her relationship with the deceased. The prosecution presented through their witnesses the motive that the accused had attacked the deceased because of PW3. Yet the only proof of an alleged threat was not produced in court- the alleged text message.
40. According to the I.O PW2 told him he ran away because the intruder was asking the deceased for him, PW2. Yet he did not have any grudges with the accused.



41. Pw2's testimony was peppered with hearsay from the young man he alleged they were peeping over the wall together . It is that young man who told him about the violent nature of the accused yet he was never called to testify.
42. Pw1 said that the accused hit the deceased with a stone and sat on him. The deceased bled profusely. The deceased's clothes were blood stained . His orange polo shirt, his khaki trousers were all blood stained. Yet not a single blood stain was found on the accused person's white shirt or striped or his trouser or clothes that that were allegedly worn by the accused when he committed the offence to place him at the scene.
43. The DNA evidence was crucial to place the accused at the scene. If PW1 and PW2 were to be believed. That the accused sat of the deceased hitting him seriously while in a long sleeved white of white striped shirt. Considering that the deceased's clothes were blood stained then it would be expected that some blood would get to the accused's white shirt. None was found even on the trouser. This is where gap in the case for the prosecution gets wider after the unreliable evidence od identification /recognition.
44. The evidence of the government was the next best evidence. The police recovered the clothes they say the accused was wearing when he committed the offence. The DNA evidence would have placed the accused at the scene. No explanation was given for not dusting the deceased's m/v for finger prints as the attacker was said to have opened the door.
45. The evidence of the prosecution witnesses clearly shows that the accused was arrested as the key suspect due to his previous relationship with PW3. It is also evident that the members of the public suspected that PW3 had something to do with the murder. PW1 & PW3 were the last people with the deceased . The last place they took alcohol was in PW3's bar. What happened there only the four of them know but the accused was not there. Neither was he with them in any of the other drinking places. There is no evidence that they had any confrontation at all with the PW1 or the deceased. The alleged text threat was not produced and there is no reason placed before court why the accused would attack the decreed.
46. The accused person told the court he was home that night and not at the scene.
I am guided by the following authorities.
47. In *Ahamad Abolfathi Mohammed & another v Republic* [2018] KECA 743 (KLR) the court citing several previous decisions stated:

However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence
48. The Court in *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 set out the conditions for circumstantial evidence as follows;

“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 guilt of the accused;



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 evidence is not cogent. The identification/recognition evidence is unreliable , no evidence placed the accused at the scene and his testimony that he was at home remained unchallenged. The alleged reason for suspicion was not established . In any event, no amount of suspicion can be proof.

50. And in *Dhalay Singh v Republic*, Cr App. No. 10 of 1997, the Court of Appeal reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”

51. I have carefully looked at all the evidence before me.. There are gaps in the case for the prosecution breaking the requisite chain that would answer to beyond a reasonable doubt.

The accused gets the benefit of doubt.

52. The charge of murder is dismissed and the accused is accordingly acquitted.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 8TH SEPTEMBER 2025

MUMBUA T MATHEKA

JUDGE

CA Mwanatumu

Accused present

Mr. Muthiani for accused

Ms. Mary for Prosecution

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