



**Republic v Michael (Criminal Case E029 of 2021)  
[2025] KEHC 17840 (KLR) (27 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17840 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL CASE E029 OF 2021  
EN MAINA, J  
NOVEMBER 27, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ANDREW KILONZO MICHAEL ..... ACCUSED**

**JUDGMENT**

1. The accused person is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence are that on diverse dates between 12<sup>th</sup> April 2017 and 14<sup>th</sup> April 2017 at unknown time at Kyumbi Area, Mathatani sub-location, Athi –River Sub-County within Machakos County jointly with others not before court, he murdered John Njoroge Njuguna.
3. The accused person pleaded not guilty to the charge whereupon the prosecution called seven witnesses to prove its case.
4. PW1 Juliana Wanjiru Njoroge testified that on 12<sup>th</sup> April 2017 she was at a bar called Kitaani Tavern when the deceased who was her father walked into the club with Anthony Kilonzo, the accused. They sat and ordered drinks. At about 8pm she went where they were sitting and asked the accused, who was also their neighbor and a “boda boda” rider, to take her father home as he was quite drunk. She then continued with her work in the bar. She stated that she later received a call from her daughter who used to take care of the deceased, informing her that he had not gone home since 12<sup>th</sup> April. She tried to call the deceased but his phone was off. She called her cousin and her brother but all she got was confirmation that he had not gone home. When she opened the bar on 15<sup>th</sup> April, one Mwendwa a brother of the deceased went there and said the accused had sent him there to pick a phone he had forgotten there. She confronted Mwendwa and asked him the whereabouts of the accused as her father had gone missing and he had been the last to be seen with him. She stated that Mwendwa told her



- that on the material night the accused arrived home at about 2am and taken his wife and gone with her to their aunt's home. She stated that on 8<sup>th</sup> May 2017 she went to her father's room and was shocked to find his ID card, ATM and brief case on the table. She continued looking for the deceased. Subsequently, on 19<sup>th</sup> May she and her brother went to Mathatani Police Station to file a missing person's report but they were referred to Kyumbi Police Station. It was then that they were informed that there was a mzee who had been found lying by the roadside. Their cousin Gabriel Njuguna was tasked to go the mortuary to check if that was the missing person and get back to the police. According to PW2, Gabriel it turned out that the body was that of the deceased in this case. PW2 testified that the motor cycle which the accused used to operate with was found abandoned at a fuel station at Kyumbi.
5. According to PW2, PW1 told him that between 7-8 pm she asked the accused to take the deceased home and he did not get there. She went to the accused home and his mother told him that he had gotten a job in Nairobi and travelled with his wife. The motor cycle that the accused used was abandoned at Makena Petrol Station-Kyumbi.
  6. Upon cross examination he stated that it was not the accused habit to leave the motorcycle at the petrol station and that night the accused did not take the deceased home. He stated that he had a reason to suspect the accused as he did not take the deceased home and also he disappeared from his home. He also stated that on 12/4/2017 the deceased withdrew money from the bank and had money when the accused was taking him home.
  7. PW3 Josephine Wanjiru Njoroge testified that on 22/5/2017 she received a call from PW2 that his father had been found at Machakos Level 5 Hospital Mortuary, he went to the mortuary and identified the body of the deceased. He did not have any visible injuries.
  8. Upon cross examination she stated that she did not witness how the murder occurred and that she did not notice any physical injuries.
  9. PW4 Dr. Waithera Kithendu testified that on 14/04/2017 she prepared a post mortem report of John Njoroge Njuguna. He had an old fracture right distal leg, on the respiratory area he had one litre of blood in the chest, he had bruised wounds on the head and internal bleeding on the brain in the right hand side and right back side. She concluded the cause of death was head injury secondary blunt force trauma.
  10. Upon cross examination she stated that the deceased died as a result of blunt- force trauma and which could have many causes including an accident. She also stated that she could not ascertain the exact time of the death as the body was in the refrigeration.
  11. PW5 Boniface Muema testified that he had given his motor cycle registration no KMDN 162 N red in colour to the accused which they agreed he would be giving him kshs 300 each day. On 9/4/2017 he was claiming kshs 1800 from the accused but he could not find him. He went to Makena Petrol Station and found the motor cycle abandoned there.
  12. Upon cross examination he stated that he did not know what transpired but that the accused was to pay him some money.
  13. PW7 No 71136 Samuel Wambugu testified that on 19/5/2017 he received a report of a missing person from PW1 and PW2. They told him that he was last seen at Tavern bar where the deceased left at 8pm in the company of the accused who was to take him home. That since 12/04/2017 they did not see neither the deceased nor the accused. signals of a missing person was sent to all senior police all over Kenya.
  14. According to PW7 they then received report from PW1 and PW2 that they found the body of the deceased at Machakos Level 5 Hospital mortuary who had a visible head injury and from the records



- the body was taken there on 14/04/2017 by police officers from Machakos Traffic Department who collected the body along Mombasa-Nairobi road and presumed it was a road accident.
15. It was PW7's testimony that they conducted further investigations which led them to the home of accused and found that he had vacated the house. upon getting into the house all his clothes were missing. He was able to trace PW5 who was the owner of the motor cycle which the accused was using. The deceased was last seen alive at 12/4/2017. The efforts to trace the accused proved futile. He was later arrested on 11/10/2021 and charged with the offence.
  16. Upon cross examination he stated that he was able to talk to the traffic officers who collected the accused body at night while on traffic duties. He was looking to interrogate him on what transpired when he left with the deceased but was only able to find him after 4 and half years. He appeared when his father died and left immediately.
  17. PW7 No 249887 PC Edwin Shilaku testified that he summoned Andrew Kilonzo and interrogated him.
  18. On cross examination he stated that he arrested the accused for the offence of abusive language and not murder. When he went the station the OCS received a report from a village elder that he had information about a murder case.
  19. After hearing of the evidence of the 7 prosecution witness, the prosecution was found to have established a prima facie case to warrant the accused be placed on his defence.
  20. The accused gave sworn testimony and called one witness. The accused testified that on 12/4/2017 he was at home but later went to Kilaani club at 4pm he found the deceased also drinking. He left alone at 7.30 pm and picked a client Patrick whom he left at his home. He stated that he was always at his home and was not the last person seen with the deceased. he denied carrying the deceased on his motorbike nor knowing whether the deceased had money.
  21. Upon cross examination he stated that he knew the deceased as a neighbor and they had no grudge. He insisted that he left the club to drop a passenger and did not see the deceased again. That the deceased was drinking with daughter Juliana and Rosina.
  22. DW2 Anna Mbatha Michael testified that she was the mother of the accused. He was doing a bodaboda business. He was once arrested for insulting a woman. She stated that they have a good relationship with the deceased family. She denied that any family member went to look for the accused at his home.
  23. Upon cross examination she reiterated that there was no bad blood between her family and that of the accused.
  24. DW3 Esther Mwongeli testified that the deceased was their neighbour. She did not know when the deceased died but recalls attending his burial. She had also not heard of any dispute between the accused's family.
  25. On cross examination she stated that on 12/4/2017 the accused was at his home. He left at 7am went back home at 1pm then left and returned at 4pm. He did not leave again.

#### **Submissions.**

26. After the close of the defence case, learned Counsel agreed to sum up their cases by way of written submissions.
27. Counsel for the state submitted that the prosecution through the 7 witnesses had proved their case beyond reasonable doubt that the accused had committed the offence of murder. That through the



doctrine of last seen it was clear that the accused was the last seen person with the deceased, he was properly identified as the person who left with the deceased.

28. Reliance was placed on the case of *Moses Jua vs the state* (2007), *Ronald Nyaga Kiura vs Republic* [2018] *Ramanlal Trambaklal Bhatt v R* [1957] E.A and *R vs Jagjiwan M Patel and others*.
29. Counsel for the accused submitted the prosecution failed to adduce evidence show that there are circumstances in which the court can make an inference of guilty on the accused. The chain of circumstances is broke due to the long duration as to when the deceased was seen with deceased and when the body of the deceased was found on the road, a total of more than 28 hours.
30. Counsel reiterated that the charge of murder against the accused was circumstantially based on suspicion. It is the suspicion of the PW1 and PW2 that the accused being the last person seen with the deceased, he is the one liable for his death. This suspicion was fully rebutted by the Accused who denied leaving with the Accused from the Club. The evidence on the same by PW-2 was hearsay, having heard the same from PW-1.
31. It was the accused's final contention that in totality of the evidence adduced, the prosecution has not proved that the Accused with others not in court killed the John Njoroge Njuguna between 12th April 2017 and 14th April 2017 as per the Information. The evidence by the Prosecution did not prove the crime of murder against the Accused to the required standard, beyond reasonable doubt. They did not discharge their burden of proof. The burden of proof never shifted to the Accused all through the trial.
32. Reliance was made to the case of *Republic v Koech & another* (Criminal Case 63 of 2019) [2024] KEHC 13581 (KLR), *Njue & another v Republic* (Criminal Appeal E020 of 2022) [2023] KEHC 256 (KLR) *Republic v Busuru alias Moreen & 3 others* (Criminal Case E017 of 2023) [2025] KEHC 4025 (KLR).

#### **Analysis And Determination.**

33. This court has carefully considered the evidence on record, the rival submissions, the cases cited and the law.
34. The ingredients of the offence of murder are the fact of death of the deceased, that the cause of that death was by an unlawful act or omission of the person charged and that it was with malice aforethought.. The offence may be proved through direct evidence or circumstantial evidence.
35. As was stated by Nyakundi J, in *Republic v Ismail Hussein Ibrahim* [2018] eKLR and I agree:

“...the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and there is no burden on the part of the accused to prove his innocence at any one given time. The law only permits very few statutory exceptions where an accused person can be called upon to give an explanation in rebuttal. However, this does not shift the burden of proof from the prosecution”
36. There is no doubt as to the fact of death of the deceased. His daughter PW1 and nephew PW2 confirmed he died and was buried. PW2 confirmed that he identified his body at the Machakos Level 5 Hospital. The post mortem report also corroborated that the fact of the death and it is also not disputed.
37. On the cause of death, Dr. Waithera Kithendu(PW4),a human pathologist at Machakos Level 5 Hospital testified that she conducted a post mortem on the body of the deceased on 30<sup>th</sup> May 2017. The body was identified to her by his relatives. Her findings were that he had an old fracture right



distal leg, one litre of blood in the chest, bruised wounds on the head and internal bleeding on the right side and back of the brain. She stated that her conclusion was that the cause of death was head injury secondary to blunt force trauma. She ruled out that it could have resulted from a motor accident.

38. On whether the death was as a result of an unlawful act or omission of the it is evident that there is no direct evidence to connect the accused to the death. The only evidence is circumstantial as led by PW1 who testified that on the day the deceased disappeared he had gone to a bar where she worked with the deceased. That the two of them sat together and ordered some drinks which the deceased paid for. She stated that it was she who then requested the accused to take the deceased home as he was drunk. The accused was a boda boda rider and so he obliged and left with the deceased. He was not seen alive again. The accused was said to have fled with his wife on the same night and abandoned the motor cycle at a petrol station in Kyumbi where it was collected by its owner (PW5). In his testimony the deceased conceded that he was with the deceased on the fateful night. He however denied that he left the bar with him and contended he left him drinking in the bar and that PW2 had lied. He stated that on his way home he picked a passenger by the name Patrick Muli who he dropped off at his home before proceeding to his own home. He also denied fleeing and contended that he worked even on the following day and the day after that. Concerning the allegation that he abandoned the motor cycle it was his contention that it was PW5 who was the owner who had told him to be leaving it there. He further stated that it was him who told PW5 to go for the motor cycle at the petrol station as he had taken another from one Peter Musyoki Masela. He denied that he sent his brother to go for a phone at the bar. He also took issue with the omission to call the traffic policemen who discovered the body of the deceased saying that the death could have occurred anywhere along the Nairobi- Mombasa Highway but not necessarily at Kyumbi area where it was alleged he was last seen with the deceased. He stated that the officers said it was a hit and run. He contended that he had no motive to kill the deceased; that he had no idea that the deceased had money. He admitted that they were neighbours. He called his mother Anna Mbatha Michael and their neighbour Esther Mwongeli who both testified that he did not go into hiding and that he even attended the burial of the deceased.
39. I have evaluated the evidence by both sides carefully and it is my finding that as between that of the prosecution and that of the accused the former is more credible. I say so because whereas the accused disputed that he fled from his home there was evidence from Police Constable Wambugu (PW6) that he went to that home and the accused was not there: that the accused had vacated his house. Unlike the accused's mother and neighbour who had reason to lie so as to save his skin this officer had no reason to lie either in favour of the prosecution or against the accused. He simply was a public officer who was doing his work upon being assigned the case. He neither knew the deceased nor the accused.
40. Further there was evidence which even the accused admitted that the motor cycle that he used to operate and which is what he used to carry the deceased on the material night, was found at a petrol station at Kyumbi. The same had clearly been abandoned but not left there on the instructions of the owner. Was that the case then the owner (PW5) would not have testified how he had frantically looked for the accused only to be told that the motor cycle was at Makena petrol station. I find it a fact that the accused was the last to be seen with the deceased before he disappeared and his body subsequently discovered along the highway. I am not persuaded that the omission to call the officers who found it was fatal to the prosecution's case. The accused alleged that he left the bar with other people and that he in-fact dropped one passenger home. The evidence of such a witness if at all would have gone a long way in convincing this court that the accused was telling the truth. However, no such witness was called. That is not to say that I am shifting the burden of proof to the accused. I am only saying this to reiterate that I found the evidence adduced by the prosecution more credible.



41. In the case of R v ECK, Lessit J, as she then was, stated as regards the last seen doctrine;

“Regarding the doctrine of the last seen with the deceased. I will quote from the Nigeria court case of Moses Jua v The state (2007) (PELR – CA/11 42/2006.

The court while considering the last seen doctrine held: -

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.”

42. Applying the above doctrine to this case, given that the accused did not offer any explanation as to how the deceased met his death, yet there was cogent and credible evidence that he was the last to be seen with him, leaves this court no option but to draw an inference that he killed him. Further, the fact that the accused was the last person to be seen with the deceased, coupled with the fact that he fled his home with his wife on that very night and the fact that he abandoned the motor cycle at a fuel station are all inculpatory facts which point to the guilt of the accused and are not capable of being explained on any other hypothesis other than his guilt. My reasoning finds support in the case of Abanga Alias Onyango v Rep CR. A No.32 of 1990(UR) where the Court of Appeal stated-

“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.”

43. The offence of murder is however not proved unless it is established that the unlawful act or omission causing the death was with malice aforethought. Motive is however not relevant and malice aforethought is proved in any of the following circumstances:

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

- (a) An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.
- (c) An intention to commit a felony.





- (d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.”

44. The above elements were restated in the case of *Nzuki v Republic* [1993] KLR 171 where it was held that:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- 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 v Director of Public Prosecutions* (1975) AC 55”.

45. Apart from giving this court an insight of what the cause of death was, the postmortem results are also useful in establishing whether the person who killed the deceased acted of malice aforethought. In this case the postmortem results show that the deceased sustained extensive injuries to the head which extended to his brain. From the totality of those injuries one can conclude that the deceased was assaulted and that even if the assailant did not intend to kill the deceased or to cause him grievous harm he must have had knowledge that the injury would cause grievous harm. We are told that the deceased was an elderly man and any blows to his head would certainly have been grievous. I am therefore satisfied that malice aforethought was proved beyond reasonable doubt.

46. The upshot is that the charge against the accused has been proved beyond reasonable doubt. I find him guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27<sup>TH</sup> DAY OF NOVEMBER 2025.**

**E. N. MAINA**

**JUDGE**

In Presence Of:

Ms Kaburu for the State

Mr. Mutinda for the Accused

C/A - Geoffrey

Accused person

