

KENYA / JUDGMENT

Republic v Kariuki [2026] KEHC 10646 (KLR)

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COURT

High Court

BEFORE

EM Muriithi

CASE / FILE NUMBER

Criminal Case 10 of 2017

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[2026] KEHC 10646 (KLR)

Republic of Kenya

In the High Court at Kerugoya

Criminal Case 10 of 2017

EM Muriithi, J

May 14, 2026

Between

Republic

Prosecutor

and

Marclus Machira Kariuki

Accused

Judgment

1. On 20/11/2017, the accused was arraigned in court to plead to 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 7/10/2017 at Kianyaga town in Kirinyaga East sub-county within Kirinyaga County unlawfully murdered Jotham Githobi Mwaniki.

2. After he denied the charge, the prosecution called 6 witnesses to prove its case.

Evidence

3. PW1 Mercy Njeri Mucira, testified that, "I stay at Kariru. I am a farmer. I can remember on 7.10.2017, because I live on my father's plot at Kianyaga town near Motel bar and building called Wanjuguna. When my father died, the plot was given to my brother and after that the family said I move to the plot. I went to the plot in March 2017. I met Jotham Gichobi in that plot. He was living in the plot with three other people. One moved from the plot. In August 2017 Gichobi asked me whether I could allow him to live with his cousin on the plot. I agreed and he brought the cousin that same month. That cousin is the accused in the dock. He came at night and it was raining. He was on a motor bike. He entered the house of Gichobi. Then Gichobi told me they work together in a butchery, Gichobi selling meat and accused samosas at Morokai butchery. I decided to find out. I went to Morokai butchery. When Muchira came I asked him for house rent. Muchira who is accused in the dock told me it was the Gichobi who would be paying rent. Later they told me they would each pay rent. They paid me money. Gichobi had his properties in the house though he never used to be in the house many times. In the month of September 2017 Gichobi telephoned me and asked me if I had a vacant house. I told him there was. He requested me to clean the house so that he could move so that each of them could live in his own separate house. I cleaned the house. On 17.9.17 Gichobi moved into the house. We lived together in the plot though at times they could even take a week without coming to the house. Gichobi moved into the house. The houses, the ones for accused and Gichobi were single rooms and mine was a double room. They were in a row, that is the one of Gichobi, then the one of deceased and mine. The doors to the room and the rooms were adjacent. Mine the front room was my table room and the other a bedroom but the door was one. When I asked them when they were away, they used to say they visited their wives. When they were there, they used to cook and eat together in the house of Muchira at times. On 6.10.17, they came and found me in the house. They had come from town. We talked and they told me they had come to look for photocopies of their identity card from house of Muchira the accused. They found them and told me to lend them Ksh. 200/= as they wanted to go to Mwea to look for money. I told them I was in the market and had only Ksh. 50/= which I gave them. They told me they had 50/= and would look for 100/= they go to Mwea. They then left. They left at about midday. They did not return on the morning of 8.10.2017 when I wanted to wake up to go to church, before I opened, I was called by a child who was outside. The child was from a plot below ours. He told me to wake up as Gichobi was dead. I was surprised. The child led me to the place and I saw it was Gichobi. I went back to my house. I saw Gichobi had an injury on the back of the head and lay facing down. His both hands were blood

stained. From my house to the place where deceased was is about 60-70 – metres - indication from court to the reception. After I confirmed it was Gichobi and he was dead I went back to my house. On the night of 6th, I did not see them because they used to fail to come home so I just slept. When police came, they went to the house of accused and that of Gichobi. The two rooms had the doors wide open- ajar. I never entered because accused was not there and one was dead. I entered when police came. I did not see anything unusual. Police did not get anything. Both rooms were not locked. After that, police carried the body away. Later I recorded a statement with police. When the two lived together, I never had any quarrels or grudges. They lived well.”

4.On cross examination, she stated that, “The house was left to me. Gichobi is the one who brought accused and said they would pay rent jointly. We did not write an agreement because Gichobi is the one who said he had left the house to his cousin Muchira, the accused. Later Gichobi left his house to the accused and requested me to give him another house. We did not enter a written agreement. Gichobi made a call to me when he requested for the house. I don’t know the number of head. I did not see anybody that night. We were living the three of us in the plot. We were friends because we lived in the same plot but we did not write agreement. That is why they borrowed money and gave them. I can’t remember how they were dressed. I don’t know the name of the child who called me that morning. When I saw the deceased, I just looked and left immediately. I did not want to look at the body when I saw he was dead and had injury on back of head. I did not see anything unusual in the house when police came.”

5.In re-examination, she stated that, “The deceased and accused were living in my father’s room. I was managing them. Marclus Kariuki was one of my tenants. The deceased Jotham Gichobi Mwaniki was one of the tenants in the houses I was managing.”

6.PW2 Beatrice Wangithi Muchira, testified that, “I stay at Rwambiti. I am a farmer. On 8.10.2017 I went to my brother’s house at 7.00 a.m and he told me he had received a call saying that our brother’s son Jotham Gichobi was murdered at Kianyaga. My brother is called Bernard Mugo. He is the one who told me about my brother’s son Jotham Gichobi. The deceased Jotham Gichobi is the son of my brother. I screamed. I took a motor bike and proceeded to Kianyaga at Motel. I found that the deceased was there covered with a blanket. It was on the road near the farm. I did not know where he used to stay. He lay facing down. Police came and uncovered the body. They started taking photographs. I saw he had blood stains on the head. They turned the body and I saw it was my brother’s son. I was overcome and cried. Police carried the body away. I recorded a statement at Kianyaga Police Station.”

7.On cross examination, she stated that, “I don’t know what happened to him. I had met the deceased on a Friday before he died. I had seen him when he came home on Friday before he met his death.”

8.PW3 Benard Mugo Machira, testified that, “I stay at Rwambiti. I am a farmer. On 13.10.17 I accompanied the doctor to Kibugi Funeral Home to perform postmortem on the body of Jotham Gichobi who had been murdered. The deceased was the son of my elder brother. He had a stab wound on the chest which I saw. He also had an injury on the front side of head near the ear. The doctor performed postmortem.”

9.On cross examination, he stated that, “I had seen the deceased that week as he used to work in a butcher at Kianyaga and used to come home. When coming home he used to pass by my house as it was on the way to his home and would come to greet me. I don’t know what happened, all I know is I was called and told he was spotted already dead. I did not go there.”

10.PW4 Gladys Wanjiru Mwaniki, testified that, “I stay at Kianyaga. I work in a bar. I have worked there for one and half years. I know the accused in the dock as Marclus Muchira. I knew him when he was a friend of the deceased Joram. We are like family. I have known him for about 20 years. On 8.10.2017 at about 7.30 a.m I was going to the shop when I heard people saying somebody was killed opposite Motel Bar. I saw people going towards there. I also decided to go there. I found somebody lying down on his stomach. He had a stab wound on his back and the jacket was torn. On the face he had an injury on the face. I saw the clothes were of my brother. I looked at him properly and saw it was my brother. I screamed and collapsed. When I came to some people assisted me. Wanjiru and Mbuki are the ones who held me. Police then came and checked around. They then went to the house of my brother. The door was open. There was a tray with meat and ugali. The police asked whether anybody knows him. I told them he is my brother. I covered him with a blanket. Later we took him to Kibugi mortuary with police. On the date of burial, the chief Mr. Mithamo called me. He told me the person who killed my brother was at Mwea and he had arrested him. The man was saying he had killed his cousin and wanted to commit suicide. The chief ordered his arrest. The accused and my brother had disagreed over pigs which they had bought. My brother paid for feeds because the accused was unable to contribute. When my brother sold the pigs, the accused demanded half share. My brother refused as accused did not contribute. The accused threatened to kill him. My brother had no dispute with any other person.”

11.On cross examination, she stated that, “I did not record in my statement that I went to my brother’s house and found a dish of meat and ugali. I forgot to write. When I went to record statements, I did not tell police about the dispute involving money. I was told to record what I saw. My brother told me he had sold pigs. My brother told me he had slaughtered a pig. It was that week before he was killed. The accused is the one who told me he killed the deceased because he owed him Ksh. 6,000/=. My brother had told me that the accused had threatened him. We did not report the matter to the police. I am not cheating. I am telling the truth. That is the reason he was killed. I was not there when he was killed. The accused is the one who told me he killed him. The accused was talking like a mad person saying he killed his cousin and wanted to kill him. That is what I was told. The deceased was wearing a jacket and a T-shirt. The jacket was greenish. The T- shirt had black and white stripes. The trouser was black. I am 100% sure that is how he was dressed. He used to stay behind the shop. I had been there. He was staying alone. He

had stayed there but I don't know how long. I had not lived there for long. I have now been there for 1 ½ years. I stayed one year. He had stayed there for more than two years. I know he used to stay there because I removed his clothes from there. I know even the landlord so I know he had lived there. The landlord Njagi told me he had given him the house. I don't know if he was living there. The deceased and accused were doing business together. They started with pigs. They had stayed for three (3) months. My brother had told me he wanted to start a business of rearing pigs. I saw the body of deceased. The injury on the face is the one I saw very well. The head was not facing on the side. The jacket had a tear and blood and I suspected he was stabbed. I looked at him for 2 minutes then fainted. I stayed for 30 minutes. I was not present when body was transported. Boniface, Edward and Mugambi I was with them. There were two policemen. We boarded a police vehicle. We took the vehicle to Kibugi mortuary. When postmortem was done, I did not witness. I was outside."

12.PW5 Dr. Francis Nyamu Tumbo produced the post mortem report as an exhibit in court. He testified that the body of the deceased had cyanosis - that is darkening due to lack of oxygen in the blood, which could be due to strangulation. He had a shallow cut on the neck, 8 stab wounds on the back, a penetrating stab wound on the sternum which had gone directly to the heart and an injury on the chest at the front. The cause of death was cardio pulmonary arrest secondary to severe hemorrhage resulting to injury on the heart and the pulmonary vessels.

13.On cross examination, he stated that, "I am not a Pathologist. I am a medical practitioner and we are allowed to do general pathology. We don't perform all. Pathologist do specialized postmortem. The cause of death in this case was obvious. I did not take photographs. I saw fresh injuries resulting from the assault. I did postmortem on 13.10.17. It was collected on 8.10.17. The body was preserved in the mortuary. There were no post-mortem changes so I can tell it was well preserved. The postmortem was done at 1.36 p.m. the body was preserved immediately as there were no postmortem changes. According to me it was preserved immediately. I can't tell the time. I said there were stab wounds penetrating wounds – it was not self – inflicted or an accident. I don't know who stabbed him. I have indicated the cause of death. The investigations will tell who caused the injuries. I indicated the height of deceased. The accused in the dock is about 5 feet. There was an attempt to cut the neck but there were other stab wounds. I don't agree that a short person could not cause the injuries. The deceased had a good physique. He was of good health. I don't know if he had taken alcohol. I did not take any samples. We take samples where there was poisoning or cause of death is not known. I was not negligence."

14.In re-examination, he stated that, "I did my pathology in my Bachelor's Degree for 3 years and I had done postmortems before. The body was still looking fresh as it was well preserved and there were no postmortem changes, it was preserved immediately. I did not take samples as cause of death was clear and there were injuries."

15.PW6 Julius Waweru Gatere, testified that, "I stay at Kiangdegwa village in Kimuri Sub-location, Wamumu Location in Mwea West Sub-County. I am the assistant chief of the said Sub-location. On 13.10.17 I can remember I was at home at around 09.20 hours. I was at home when I received a call from Nyumba Kumi Julius Gachoki Nyaga who requested me to urgently run to his

homestead as he had confidential and urgent information to pass to me. I did proceed to his homestead which is about 300 metres. I just walked there and I met him together with accused. Julius Gachoki told me accused had some information he wanted to share with me. The accused told me he wanted to confess to a murder he had committed in Kianyaga town on 8.10.16. I was still with the Nyumba Kumi chairman. The confession was that on 8.10.16 he had killed one Jotham Gichobi Cyrus. I did not know Jotham Gichobi Cyrus. I only knew the accused as he comes from my area of jurisdiction. I was taken aback. I asked him how he did it. He told me that himself and deceased were business partners. I enquired the circumstances. The accused told me he and deceased were business associates at Kianyaga and were operating business of selling meat and they were living in the same house as they were relatives. He told me they had disagreed over missing cash which belonged to the accused. The accused never disclosed the amount. After the disagreement the deceased denied taking the money. The accused became enraged while the two were outside the house. The accused took a knife and stabbed the deceased. The accused requested me to be taken to the nearest Police Station saying he feared for his life. He told me it was on 8.10.17 but he did not tell me the time. It was raining by then and roads were impassible. I could not get a 3rd person or a police officer to collect the accused from the homestead. I was also not sure of the confession of the said murder and I wanted to give him a benefit of doubt. We agreed that if he wanted to surrender, he be accommodated overnight by the Nyumba Kumi chairman and the next day I take him to the nearest Police Station. The accused agreed and he spent the night in the house of the chairman. Me I left and went to my house. On 14.10.16 the Nyumba Kumi chairman called me at 6.00 a.m informing that accused was ready and waiting and willing to be taken to the police for he considered it the safest place to be. I, the accused and chairman Nyumba Kumi proceeded to Mutithi Police Post. The accused narrated the same story to the officer on duty and he was booked at the said Police Post. Mutithi is in Mwea West Subcounty. It is Mutithi A.P. Post. The nearest Police Station is Wang'uru Police Station. In my area we are served by Sagana Police Station. The accused did not surrender where the offence was committed. The offence was committed at Kianyaga which is very far from my area of jurisdiction. It is about fifteen minutes. By public means it can take twenty minutes to reach Kianyaga from my area. The in-charge A.P Post called the O.C.S Wang'uru as we did not have the number of OCS Kianyaga. Police Officers from Kianyaga came and arrested the accused and confirmed that the offence had been reported there. I recorded a statement the same day at Mutithi A.P Post in the presence of the officers from Kianyaga Police Station and those of APs Post. I told them what I have told court."

16. On cross examination, he stated that, "I said the accused confessed. I said the accused confessed in my statement but I did not give details that accused told me he disagreed with deceased and stabbed him. I have said it was a self-confessed offence of murder. By then accused was living in his home area, Kiandegwa. The accused said he was insecure. The accused was not new in my area. I never saw him commit the offence. I said I relied on his personal confession, I don't know whether he had committed murder or not. I don't know of deceased was killed on 8.10.13 or not. I did not guard him. I requested the chairman to accommodate him. I did not report to the police. I am a person of authority. My presence is not intimidating. I did not force

the accused to say those things. It us the accused who went to the chairman. I did not expect he would run away. I said in the statement to guard the accused in his house or keep an eye on him. It is not true I intimidated the accused to confess. The murder was at Kianyaga according to accused. Kiandegwa is not near Kianyaga. The deceased is not from my village. The accused said he feared for his life. The fear was not for people beating him. I did not know whether he was sober or drunk. I could not tell. The accused was well known to me. To the best of my knowledge, he had no criminal record. He was a good person as far as I know.”

17.In his sworn defence, DW1 Marclus Muchira Kariuki, the accused herein told the court that, “I reside at Kutus. I work as casual worker. I am charged with murder which happened and I was that it was within. I did not do it on the day I was at home at Kandegwa but on that day I was working at Kianyaga. At night when I came from Kiandegwa and I was tired when I was being searched and I was told to hide. I was at home at Kiandegwa as I wanted to set on my maize farm. We were with Theuri, Benedict Theuri at Kiandegwa. We stayed with him throughout the day and the following day we were together. Kiandegwa is after Mutithi in Mwea. It is far from Kirinyaga. I was not at the area of the alleged murder. When I was told to hide, I went to hiding until I established it is true that he had died. When I came out I went to report to sub-chief that there were some people who wanted to kill me as they claim I killed their father. The sub-chief said he would take me to Kianyaga. I left. He called the Chief Kianyaga and he was told that he should not have let me go and I was the killer. The next day he took me to Police Post at Mutithi Mwea and while there they beat and asked me to confess. Initially I agreed that I was the one who killed so that I would free myself from the beatings. I was then taken by Kianjege Police Post and taken to Kianyaga Police Station. I was beaten and I therefore said I was the one but it is not true that I killed.”

18.On cross examination, he stated that, “I know I will tell the truth. I am holding a cap. I have no report of the beating. I have a witness. He is in Court. [Witness points to a man sitting in Court] I worked with Jotham Gichobi Mwaniki. We lived at the adjacent rooms, at Kianyaga. Felix Waweru Muchira is the Sub-Chief to whom I went to report. When I ran away from Kianjege I went to report to the Sub-Chief. [On 7.10.2017 were far with Felix Waweru Muchira?]. I leased my shamba to Theuri. I do not know his other name. I gave my mother 10,000/=. It had come from the shamba. It is true that I gave my share 10,000/= from the lease money balance 30,000/=. [Defence witness now leave the Court on request by Defence Counsel]. I used to drink beer. On 7.10.2017, I did not go to Makuti Bar. I used to take supper not drinking beer. Gichobi is like my cousin. I had visited him in his area to do the work he was doing there. I was not with him on 7.10.2017 drinking. I surrendered because I was told that I was being searched by Boda Boda people that I had killed. I do not know who was saying that. I surrendered to the Sub-Chief. I went to the Sub-Chief the following day. I cannot recall the month very well as I was confused. He took me to Police Station. When I surrendered to him he said he would take me to Kianyaga. The next day they came to me and took me to the Police Station. We never fought with the deceased. We never even disagreed. I know that he is deceased. I do not know how he died. He had been stabbed? I do not agree. We never disagreed with deceased. Emane Wanja, Dennis, Mary Wambura, Naftali, Gichobi. They are people from his area. Julius Police Officer [The statement of witness]. When I

was taken to the police, I was beaten and I was asked that I had to tell them who did it. Did you record a statement? [Witness hesitates to answer the question]. What I remembered is what I have told the Court.”

19. In re-examination, he stated that, “The Sub-Chief took me to Mutithi Police Post and he and he did not take me to Kianyaga. I was beaten but I did not get a chance to go to report. I went to report that there were people looking for me stating that I had killed their person. That is why I reported the matter.”

20. DW2 Benedict Theuri Kanyoni, testified that, “I reside at Mutithi Mwea. I am a farmer and taxi driver. On 8.10.2017 I remember very well that I was at Mutithi and I went to see a parcel of land that I have been offered and I called Marclus and we went to the shamba. It was (1) Acre tenant No. 3634/WC. I went with Marclus Muchira. After viewing we agreed at Ksh. 40,000/= per year. We agreed that we would complete the deal the next day. We went to refreshment at a place from 4.00 pm to 11.00 pm in the night. We each went to our respective homes. On the following day 9.10.2017, we went in the morning and I gave him the money after signing further note. I gave him 40,000/=. After (4) days I started cultivating on the land. After (8) weeks I heard that we had been accused for the offence of murder. Kiangegwa and Kianyaga are almost 40 kilometres - 50 kilometres. Marclus was joyful and he had no problem. I knew Marclus as a neighbour and rice farmer. I did not know him as bad person. I went to him on 9.10.2017 when I gave him the money.”

21. On cross examination, he stated that, “I have not been paid to come and testify for the Defence. I have the Agreement for the lease of his shamba. [Witness produces Agreement from the pocket]. Ruling dated 9.10.2017 the parties are Marclus and I. There were no witnesses. [DW1's ID Card compared with ID particulars on the agreement [I do not have ID Card for DW1]. The DW1 did not sign the Agreement. I signed. He did not sign. [Agreement by Waweru Muchira] I do not know about it. I was drinking soda. DW1 was drinking beer. From 4:00 pm to 11:00 pm in the night. I do eat miraa. I am miraa farmer. [Plot number - where did you get the number]. I got it from the documents that the accused produced. [Where are the documents?] I do not have the documents. [Are you married?] Yes, my wife left me.] I have not been paid to come and testify in Court. I do not know accused's witness. [I know you are Marclus] We live far apart.”

22. On re-examination, he stated that, “I have not been paid to come and testify. I got the parcel number from the documents the accused brought to show we have that the land belonged to him. I was only concerned with number of his parcel of land that is the agreement we prepared. It has our respective ID Cards. I paid Kshs. 40,000/= cash. I was not drinking. I was eating miraa and soda. I was not drinking.”

Submissions

23.The accused urged that he had been beaten up and forced to incriminate himself, and thus the confession relied on by the investigating officer did not follow the Evidence (Out of Court Confession) Rules. He urged that there was no evidence to link him to the murder herein, and cited *Musoke v R* (1958) E.A 715 and *Musili Tulo v R* ([2014] KECA 412 (KLR)).

24.The Prosecution submitted that it proved all the ingredients of murder by corroborative evidence. It urged that the accused had the intention to cause death or grievous bodily harm to the deceased.

Analysis and Determination

25.The formulation by Etyang, J. in *R. v Nyambura & 4 Others* (2001) KLR 355, and approved by the Court of Appeal in *Antony Ndegwa Ngari v R* [2014] eKLR as to the ingredients of the offence of murder is as follows:“There are three ingredients of murder which the prosecution must prove beyond reasonable doubt so as to earn a conviction, namely:a.The death of the deceased, and cause of deathb.That the accused committed the unlawful act which cause the deceased's death; andc.That the accused had malice aforethought.The issue for determination in this case is whether these three ingredients of murder have been proved by the prosecution beyond reasonable doubt.”

26.There is no doubt the prosecution has been able to prove the fact and cause of death to the required standard. PW5 testified that the cause of death was cardio pulmonary arrest secondary to severe hemorrhage resulting to injury on the heart and the pulmonary vessels.

27.The issue in contention is whether the said death was caused by an unlawful act of omission or commission on the part of the accused.

28.It is conceded that there was no eye witness to the offence herein, and therefore the case is wholly based on circumstantial evidence. As held in *Kariuki Karanja v R* (1986) KLR 190, 193 citing *R. v Kipkering arap Koskei* 16 EACA 135, the foundational requirements for the application of circumstantial evidence to justify a conviction are as follows:“Circumstantial evidence to sustain a conviction must point irresistibly to the accused. In order to justify, on circumstantial evidence the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of guilt. The burden of proving facts which justify the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts: *Rex v. Kipkering Arap Koskei*, 16 EACA 135. An aggregation of separate facts inconclusive because they are as consistent with innocence as with guilt is not good enough evidence.”

29.PW1 testified that the deceased and the accused previously resided together on her plot until the deceased moved out to a separate house, within the same premises. On 6.10.17, they visited her residence seeking Khs. 200 to travel to Mwea, but she was only able to provide Ksh. 50. She did not see either of them again until 8/10/2017 when the body of the deceased was discovered in the vicinity.

30.PW2 learnt about the death of the deceased from her brother, PW3.

31.PW4 testified that, "On the date of burial, the chief Mr. Mithamo called me. He told me the person who killed my brother was at Mwea and he had arrested him. The man was saying he had killed his cousin and wanted to commit suicide. The chief ordered his arrest. The accused and my brother had disagreed over pigs which they had bought. My brother paid for feeds because the accused was unable to contribute. When my brother sold the pigs, the accused demanded half share. My brother refused as accused did not contribute. The accused threatened to kill him." On cross examination, she stated that, "My brother told me he had sold pigs. My brother told me he had slaughtered a pig. It was that week before he was killed. The accused is the one who told me he killed the deceased because he owed him Ksh. 6,000/=. My brother had told me that the accused had threatened him."

32.PW6, the assistant chief of Kimuri sub-location testified that, "On 13.10.17 I can remember I was at home at around 09.20 hours. I was at home when I received a call from Nyumba Kumi Julius Gachoki Nyaga who requested me to urgently run to his homestead as he had confidential and urgent information to pass to me. I did proceed to his homestead which is about 300 metres. I just walked there and I met him together with accused. Julius Gachoki told me accused had some information he wanted to share with me. The accused told me he wanted to confess to a murder he had committed in Kianyaga town on 8.10.16. I was still with the Nyumba Kumi chairman. The confession was that on 8.10.16 he had killed one Jotham Gichobi Cyrus." On thorough cross examination, he stated that, "I don't know whether he had committed murder or not. I don't know of deceased was killed on 8.10.13 or not."

33.In his sworn defence, the accused (DW1) denied committing the offence, and contended that he only confessed due to fear of retribution and physical assault from the members of the public and the police.

34.DW2's testimony has little probative value as he was seated in court during DW1's testimony.

35.The accused was the last person to be seen with the deceased by PW1 two days before his death. See a discussion on the last seen with principle in Samuel Ngugi Ndinguri v. Republic [2000] eKLR where Court of Appeal (Omolo, Shah & Tunoi, JJA) considered the principle of last seen with, as a rebuttable presumption of fact under sections 111 and 119 of the Evidence Act as follows: "We believe the denial by the appellant that the deceased's body was recovered in his latrine was only a mischievous attempt to mislead the court and to avoid the onus which fell squarely on him to explain when, where and how he and the deceased parted company on 18th July 1990., when the deceased was last seen alive. Common sense demanded that the appellant explain where he parted company with the deceased on the material date, since that was a matter

which was peculiarly within his knowledge and only him could be expected to know and explain it (Section 111(1) Evidence Act) and because he did not do so, a rebuttable presumption arises that he knew under what circumstances the deceased was killed. It is a presumption of fact which a court is entitled to make under the provisions of Section 119 of the Evidence Act, Cap 80 Laws of Kenya. ”

36.The space of two days before the death is a lengthy period in the circumstances of this case for application of the doctrine of last seen with as a lot could have happened between the last sighting of the accused and the discovery of the death two days later. In this case the fact that the accused and the deceased did lived separately, and were last seen together by the PW1 as she gave them some money to go to Mwea town on the 6.10.17, and they left and did not return until the morning of 8.10.2017 when PW1 was called by a child and told that Gichobi was dead. Much may have happened in the two days when the two are said to have gone to Mwea to look for money.

37.In this case, the totality of the circumstantial evidence does not sufficiently and irresistibly point to the accused as the only person who could have committed the offence, and the evidence of having been seen together while asking for money from PW1 to go Mea to look for money is not inconsistent with his innocence and or inexplicable on any other hypothesis other than that of his guilt.

38.Whereas section 143 of the Evidence Act is clear that no particular number of witnesses shall, in the absence of any provisions of the law to the contrary, be required for proof of any fact, it behoved the prosecution to call the chief, Mr. Mithamo and the Nyumba Kumi Chairman, Mr. Julius Gachoki Nyaga to testify, because without them, the testimonies of PW4 and PW6 amounted to hearsay, which is inadmissible. Those 2 witnesses constituted the essential thread weaving together the entire prosecution’s case and the failure to call them was fatal.

39.The Investigating Officer in this case did not testify and neither was the statement under Inquiry, where the accused allegedly confessed produced as an exhibit, so that its veracity could be tested on cross examination.

40.In *Bukenya & Others v. Uganda* (1972) EA 349, it was held that:“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

41.On the *Bukenya* principle the Court is compelled to make an adverse inference on the failure to call the Chief Mithamo, the Nyumba Kumi Chairman Nyaga and even failure to formally process and produce the accused’s alleged confession in terms of section 25A of the Evidence Act.

42.This court finds that it would be unsafe to convict the accused owing to the paucity of incriminating evidence adduced.

Orders

43. Accordingly, for the reasons set out above, the Court finds that the Prosecution did not prove the charge of murder and the accused is acquitted of the offence of murder c/s 203 as read with 204 of the penal Code.

44. As the Accused has been out on bond, the sureties will be discharged and the security documents/property returned to their depositors. Orders accordingly.

DATED AND DELIVERED THIS 14TH DAY OF MAY 2026. EDWARD M.

MURIITHI JUDGE
Appearances: Mr. Mwangi for DPP. Mr. Kimotho for the Accused.

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