



REPUBLIC OF KENYA



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**Republic v Peter & another (Criminal Case E004 of 2021)
[2025] KEHC 9379 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 9379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE E004 OF 2021
TM MATHEKA, J
MARCH 7, 2025**

BETWEEN

THE REPUBLIC PROSECUTION

AND

BRIAN KYALO PETER 1ST ACCUSED

PAUL MUVEA NDUNGAI 2ND ACCUSED

RULING

Ruling (S. 306 Criminal Procedure Code)

1. On 26/01/2021 Kakui Ndiso was found dead inside the house in the sitting room of his mthonua the father in-law of his daughter. He had a rope round his neck, and part of it was tied to the pieces of timber on the roof.
2. According to Pw1 Beatrice Katima Kakui his wife, the deceased and the Mzee of that home had agreed that he, her husband could graze his goats there. On the day before her husband came and told her that someone had tried to break into the houses in that home stead. It was then agreed that the items of value be removed from the house for safekeeping. This was done by the young man who was living in the house but was school going.
3. On the material day she and her husband had breakfast together. Then he sent her to sell goats at the market. She was able to sell one goat. On her way back home, while walking on the road, she heard children screaming, they were children of A3, whose elder sister is married in her family. The children were saying that granny had been strangled. She collapsed. Some people assisted her and took her to where he was. The assistant chief was there and he told her not to touch anything. She identified the pieces of rope – a short one and a long one. The police later came and took the body away. She could not believe that her husband had any reason to take away his wife. She testified that her husband used to talk about Kyalo, A2 being idle and bringing to the house A1 and A3 and that A3 had disappeared



- after the death. She said that when she went to the market her husband was in a good mood. She said she did not hear that anyone had seen anyone killing her husband. She said she saw the body on the cement floor, that there was a piece of rope round his neck and another hanging from the roof. She told the court that her husband did not have any grudge against the three accused persons. That he used to say that he lived them.
4. On cross examination, she told the court that she did not see Redempta PW2 at the scene. She told court she had not heard that anyone had seen anyone kill her husband, and that whatever Redempta may have told her mother, only her mother knew. She observed that the rope she had seen could not have contained her husband who she described as tall and big.
 5. PW2 Kalekye Redempta was put on the stand through the intermediary, her mother. The Hon Judge was informed that the witness had not learnt any sign language from school. He was of the view that the witness could hear but could not speak as words uttered could not be deciphered- “were not very audible”
 6. PW3 Dennis Muteti Kakui the son of deceased Kakui Ndiso attended the postmortem on 3/2/2021. He said he was not present when the body was recovered. He only saw an injury on the upper back of the head.
 7. PW4, James Mbithi, nyumba kumi elder from Katuu in Kilungu knew Kakui Ndiso as a village elder. He knew the accused persons by appearance. On 26/1/2021 he was told by one Kalekye Muoki, his niece that a person had died in the home of David Mbunza which was about 100 metres away from his. He said Kalekye does not talk but she communicated to him in signs which he understood. He said he did not understand the signs very well. He accompanied the girl to the home. He said at the gate they found a dead body – he phoned the assistant chief who told him to identify who the dead person was. He said that there was an iron sheet house – the body was in the sitting room. He and the girl did not enter inside the house. He rang the chief again. When he came (assistant chief) he came with the police. It is then that he entered the house, he saw a cut on the neck of the deceased. He testified on cross examination that Kalekye told him that there was a person lying down somewhere. He said she did not tell him anything else. He testified that Kalekye did not tell him that she saw people tying the deceased with a rope nor was he the one who told the police that Kalekye said so. He said he was the first person to go to the scene with Kalekye and that they did not meet anybody else, and did not enter the house before the chief came. He said he went with Kalekye to the village elder Joyce Ndanu. He said his first impression was that the deceased had committed suicide.
 8. PW5 Joyce Ndanu Ndung’ui was in her shamba on 26/1/2021 at 1:00 pm when two children – B K and E M told her that at Matayos there was a dead person she went there in the company of one Philip Kimenye and found that Kakui was dead. He was lying down, there was a rope at his neck and in the roof – and there was a chair beneath the rope. She identified the piece of rope and the chair in court. She testified that Kalekye, her cousin who is deaf, and speaks with her hands came to her house. She appeared to be in shock. She said she did not always understand what Kalekye was saying. Police later came and took the body away.
 9. On cross examination she said she had known Kalekye for long time She said 1st accused was her brother, that when she spoke with Kalekye they were just the two of them.
 10. On 20th March 2023, the state sought to recall the PW2, and to expunge from the record all her previous testimony. The defence sought for a neutral intermediary. These prayers were granted.
 11. PW6 Dr. Patrick Mugonyi Kilumi performed the postmortem on the body of Kakui Ndiso on 3/2/2021. There was a sisal rope round his neck, one knot on the front, there was a ligature mark



circumferentially, bruise below the jaw. He found deep red discoloration of the lungs, fracture of the hyoid bone, dislocation of the arc side of the neck, blood clot, occipital region, dislocation at the arc side of the neck – the joint between the atlas and axis bones, there was no fracture, blood clot on the occipital region 10 cm in size. Cause of death – asphyxiation by ligature strangulation, lack of oxygen in the body. He said he could not tell whether this was self-inflicted or by 3rd party.

12. On cross and re –examination, he told the court that his observation was that the results of the examination pointed towards suicidal strangulation.
13. PW7 was David Mwangangi Mbunza. He attended the post-mortem with the son of the deceased. According to him the doctor told them that the deceased was killed and that he only had the issue of suicide in open court. It was his evidence that the deceased Kakui was his father in law as his daughter was married to his youngest brother. He told the court that the deceased’s home was like 300m from his (PW7’s) home but used to graze his goats in their farm. He said the deceased’s body was found in their homestead in his father’s house and that there was no one else in the home at the time. He testified that he was not aware of any issue that would have caused the deceased to kill himself in their home.
14. On cross examination he told the court that he had last seen the deceased three weeks prior to the incident. He stated that he did not know what was going on through his head and that it was normal for the deceased to come to the house in which his body was found. He insisted that the deceased had not died by way of suicide and that though he was not a medical officer his evidence was based on the words he had heard from people. He however said that though he attended the post-mortem he did not see anything on the body that would indicate that the deceased had not died by suicide.
15. PW8 Charles Musembi was the assistant chief Ndiani s/location. He told the court that on the 26th of January 2021 around noon he received a call from the Mzee wa Nyumba Kumi, Ndithi Nzyuko telling him that that there was a mzee who had been killed in the neighbourhood. He proceeded there and found the Mzee wa Nyumba Kumi in the company of villagers. At the house he stood at the entrance where he saw the elderly man hanging from the roof with the rope tied on the roof rafters, there was a chair also at the scene. He rang the police who came.
16. On cross examination he told the court that when he arrived the elderly man was still hanging from the rafters and that it was the police who removed the body when they came. He was shown his statement in which he recorded that the body of Kakui Ndiso was lying on the floor lifeless, and he rejected that part of the statement insisting that what he had told the court is what he had seen and not what was recorded in the statement. Counsel drew his attention to the evidence of other witnesses who had said they had found the body on the floor but this witness insisted that he had found the body of the deceased still hanging from the rafters.
17. He was further cross-examined as to whether the accused persons were related to one another and he told the court that the father of the first accused and the mother of the third accused were brother and sister. Asked whether there were any disputes among the families of the three he told the court that in the recent past the mother of Dickson the third accused had made allegations that the father of Paul the first accused had attempted to rape her. He further told the court that it was one Redempta the sister of Dickson the third accused who told the village elder that she had spotted Dickson and Paul at the scene. He said that Brian the 2nd accused was never mentioned by anybody. He said that he however did not hear Redempta telling the village elder this. He said he was aware that Redempta communicated through sign language but confirmed that she had never been to any school of sign language.
18. PW9 Peter Charles Mambo was at the material time in secondary school and living in the homestead of PW7. He knew the deceased who would bring his goats to graze and he PW9 tie them for him. He said he had last seen the deceased on the 15th of January 2021. On that day he met him going home. When



- he reached the home himself he found that someone had hit all the padlocks in the homestead with a stone in the apparent effort to break into the houses. He rang P W 7 and told him about the incident.
19. On the 26th January 2021 on his way home from school he met his sister one Nancy Peter who told him that the deceased had been killed in the sitting room of the house where he used to sleep in the homestead of PW7. By the time he got home the body had already been removed.
 20. One cross examination he said he had spoken to the deceased on the 25th of January 2021 and he had not sensed any issue with him. He told the court that the deceased had never told him that he had any issues with the persons of that homestead. He told the court that the padlocks were hit on separate days and on the 26th when he arrived home the padlock to the house was not there.
 21. An issue arose as to where the prosecution sought to recall PW2 who had been stood down over a dispute as to who would be the intermediary. The prosecution submitted that this witness was ‘dumb’ but she could hear. The prosecutor said that she was not deaf and asked the court to declare her a vulnerable witness and to enable them to avail an intermediary despite the fact that she was an adult.
 22. It was also submitted by the prosecution that the witness had not gone to any sign school language and therefore she was not communicating in any known sign language However that under article 50(4)(d) of *the Constitution* as a person with disability she was entitled to her rights to communicate through whatever appropriate means. The prosecutor submitted that she had through a pre- trial been able to communicate with the witness and asked the court to allow them to call that witness.
 23. Counsel for the defence Mr Kithuka had a few issues with this. That first the defence would need to interrogate the intermediary to ascertain the relationship between the intermediary and the witness; that the defence had been informed that this witness was deaf and could not hear. In response the prosecution submitted that the witness could hear the Kikamba language but could not speak it and would respond in sign language.
 24. Upon considering the issues, it was determined that the witness could be recalled, that the intermediary would be sworn and examined, and the court would establish whether or not the intermediary could hear Kikamba herself and if not whether she would require an assessment.
 25. So the intermediary was sworn, one Miriam Mutuku the village elder village and she testified that she had known the witness since she was a child. She also testified that she knew her parents and she was not related to the witness and that she also knew the accused persons. She told the court that she knew the disability of the witness and stated and I quote “she does not hear...hasikii, na anaongea lugha huwezi sikia”. She added “ tunaangalia vile anafanya mdomo hivi, utaelewa. Utajua anaelewa kwa sababu atajibu na sign”.
 26. We proceeded to take down the testimony through the intermediary, and the court interpreter. The record will reflect that we did this for two days. The witness testimony was in shrugs, sounds and words that we could not decipher. The prosecutor Ms. Nyakibia attempted to read her statement to her but the intermediary told the court that the witness could not hear.
 27. The prosecutor proceeded to try and communicate directly to the witness but the intermediary told her and the court severally that the witness could not hear. The court could actually sense the frustrations of the intermediary every time the prosecutor tried to ask a direct question to the witness. It got to a point where the prosecutor requested the court to be given time to find a different intermediary. This application was denied because the investigating officer had told the court that the only person he was aware could understand the language of the witness was the mother. The matter proceeded and the witness was asked several questions by the prosecution.



28. On cross examination the same answer came from the intermediary that the witness could not hear but she made some gestures and made some sounds which indicated that she could identify the first accused, when the others were pointed out to her she shook her head. At some point the Counsel for the accused persons asked her through gestures whether she saw anybody hanging by the neck, she shook her head. Using gestures, counsel asked whether the witness saw the accused persons at the scene she shook her head. She made a sound which was interpreted to mean 1st accused's name, and that he was her brother.
29. PW10 Corporal Alfred Kimithi Kimunduu, the investigating officer told the court that the case was reported at Nunguni police station vide OB no. 9/26/1/2021 as a case of suicide kujinyonga. That the crime scene officers visited the scene and took photos; there was one witness by the name Redempta Kalekye Muoki who had a communication challenge. He testified that he recorded her statement with the assistance of her mother one Ruth Nzilani Muoki. That according to the witness statement she found the first suspect Paul Muvea in the house where the incident was happening but she was fearful because Paul is a relative.
30. He proceeded to the scene where they he found the body, there was a chair which he identified in court and he testified that the rope on the neck of the deceased and the rope that was tied to the rafters were two different types of rope which caused him to doubt us to whether there was suicide. He produced the chair in the ropes as exhibits
31. On cross examination by Mr Kithuka for the accused persons he said he could not recall who reported the case as suicide but that the police records reflected suicide. He was shown PEx 4 the statement of Redempta and asked whether he was aware that she was deaf. He responded that he was aware that she was deaf but could not recall whether or not he had indicated that in her of his statement. He stated that it was an oversight on his part that he had not included in his statement that this witness was deaf he went on to say that the witness was versed in sign language that was only understood by the mother. According to him he could see that the two of them: the witness and her mother who could understand each other but he couldn't and he confirmed that the mother of the witness was the mother of the 3rd accused. He also confirmed that the witness had not attended any formal school and that he did not find any other person who could understand the sign language that the witness was speaking. He told the court that from the mother of the witness he learned that the witness was near a fence and that's how she saw what she said she saw. He testified that during the interview he would relay the question directly to the mother and the mother would relay the question to the witness and the mother would expound the answer to him. Asked what language he asked the questions in, he said it was in the Kikamba language. Asked what language the mother relayed the question to the witness he said it was through that sign language using hands. He stated further he said that she was using the Kikamba language. He said he could not put the questions to the witness because the mother was putting the questions to the witness through both the 'sign' language and the Kikamba language. He said he did not attempt to put questions directly to the witness and at no time did he ever communicate directly to the witness. He said he did not understand the language that was used between the mother and the daughter. He confirmed there was no way he could establish that the mother was relaying the same questions that he had asked to the witness and that the witness was giving the answers that the mother was giving to him He also confirmed that this was the only eyewitness to the alleged offence and that is the only the 1st accused was adversely mentioned. He said that the other accused persons were mentioned by other witnesses but he could not verify who those witnesses were. He confirmed that he did not have witness statements in court that mentioned the other two accused persons.
32. This witness was asked whether there was any witness who had found the deceased hanging and he said no. He stated that he found the body on the floor and that the rope in the rafters and the rope



- around the neck of the deceased were two different types of ropes. He could not explain how come that evidence or that information about the ropes was not in his statement or in the preliminary report. He stated that it was an oversight on his part and that he was now telling the court what he saw under oath
33. He was cross examined on the evidence by the doctor who conducted the post-mortem he was asked whether the doctor was able to confirm whether it was homicide or suicide. His answer was that the doctor did not per se rule out suicide. That the doctor came to the conclusion that the deceased met his death by lack of oxygen which could have been caused by many factors. Asked who the court should believe whether it was his testimony that it was homicide or whether it was the doctor's testimony that he told the court that it was up to the court to decide who to believe. Asked whether he heard the alleged eyewitness mention the first accused directly he said no; that the name was delivered through the mother; asked whether he conducted an identification parade he said no. Then he was asked how he could ascertain that the witness was able to identify the first accused person he said he could not do so because the first accused and the witness were related he also said there was no ID parade for the other two accused.
34. On examination he was asked whether he recorded the questions he asked the eyewitness and he said no he only recorded the answers.
35. On this note the prosecution closed its case and the issue for determination is which option under s. 306 of the *Criminal Procedure Code* applies. The section states inter alia:
1. When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
 2. When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.
36. It is from the evidence that I have set out herein above that the prosecution preferred the charge of murder/s 203 as read with s. 204 of the *Penal Code*. That on 26/01/2021 at Katuu village, Ndiani s/ location within Makueni County they jointly murdered Kakui Ndiso.
37. Each of the accused persons pleaded not guilty to the charge.
38. I have considered the evidence on record and the state is required to establish a prima facie case, a case upon which the accused persons can be put on their defence.
39. Even without going any far, the evidence is clear that none of the witnesses herein mentioned the 2nd and 3rd accused persons. The I.O was clear. He did not have a single witness statement mentioning the 2nd and 3rd accused persons in connection with this offence. On that aspect alone, there would be no reason to continuing considering the evidence with respect to the two.
40. Regarding the 1st accused, it was the prosecutions' case that Kalekye PW2 was the sole eye witness to the murder.
41. The case for the prosecution is that the deceased was killed and the PW2 saw the act taking place.



42. The ingredients for murder have been set out: there is a dead person, whose death was caused by the accused through unlawful means, with malice aforethought.
43. We have a deceased person, we have evidence that death was by lack of oxygen to the body, and the pathologist's view was that it was more suicidal than homicidal.
44. The alleged eye witness evidence was very difficult for the court because the prosecution insisted that their witness could hear but could not speak, the intermediary said she could not hear, the village elder, her own uncle said she spoke through signs which he did not always understand, and the I.O testified that in his view only the mother understood the signs.
45. It is noteworthy that no witness told the court that the PW2 told them that she had seen the 1st accused kill the deceased. PW4 told the court he was the one to whom PW2 told she had seen someone lying down somewhere. However, she never told him she had seen the 1st accused at the scene or that she had seen the 1st accused doing anything. PW4 was there with PW2 before anyone else came. PW4 is the uncle to PW2 hence it would not be farfetched to draw the conclusion that had she seen anything else she would have told him everything at the time she told him she had seen a person lying down.
46. Her evidence is unreliable for the reason that the I.O who took the statement could not vouch for what he recorded. He said he could not state with certainty that the questions he asked, which he did not record were the ones the witness answered, or that the answers he got were the answers of the witnesses and not those of her mother. He failed to establish whether or not the witnesses could hear, whether or not she could speak, and the fact that the language was not standard sign language, he did not take any steps to triangulate her statement.
47. I say this alive to the Constitutional rights of a person with disabilities as set out under Article 5; Persons with disabilities (1) A person with any disability is entitled—
 - a. to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
 - b. to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
 - c. to reasonable access to all places, public transport and information;
 - d. to use Sign language, Braille or other appropriate means of communication; and
 - e. to access materials and devices to overcome constraints arising from the person's disability.
48. The PW2's disability has not been categorised because the prosecution relied on the I. O's assessment. It may have been necessary to have an assessment of their witness before they presented the witness before court. In addition, though the witness communicated with the mother through the appropriate language with respect, that evidence though admissible is not reliable and cannot be the sole evidence to determine the guilt of the accused persons.
49. The intermediaries in both instances gave conflicting evidence with regard to the alleged eye witness of the incident.
50. Has the sate established a prima facie case?



51. In Republic v Kipchumba & another (Criminal Case E058 of 2020) [2024] KEHC 8184 (KLR) (9 July 2024) (Ruling) the Judge in determining whether or not a prima facie case had been made out to warrant the accused being put on the defence took guidance from the following authorities;

In Republic v. Abdi Ibrahim Owl [2013] eKLR a prima facie case was defined as follows: -“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. Prima facie case is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] EA 332 at 334 and 335, the court stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence...It is may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

52. Those principles hold true. In this case I have set out the evidence and considered it. It is evident to me that the prosecution brought charges against the 2nd and 3rd accused without any evidence; and for first accused the alleged eyewitness denied seeing anything when she was recalled to testify afresh. In any event her testimony by itself having come through the intermediary in the manner it did, - through would not, without collaboration, be sufficient to convict.

53. In the circumstances, I find that the prosecution has failed to establish a prima facie case against each of the three accused persons and proceed under s. 306(1) of the CPC to, record a finding of not guilty.

54. Each accused person is acquitted accordingly.

55. Right of appeal within 30 days hereof

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH MARCH 2025

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

JUDGE

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2025-03-07 23:42:49

Ms Nelima Court Assistant Accused persons 1 present 2 present

3 present



Mr. Kioko holding brief for Mr. Kithuka for the accused persons For State: Mr. Kazungu

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