



Republic v Kosgei (Criminal Case 38 of 2023) [2025] KEHC 9761 (KLR) (4 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL CASE 38 OF 2023**

JRA WANANDA, J

JULY 4, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

NANCY KOSGEI ACCUSED

RULING

1. The accused person is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the are that on 16/03/2019 at Kiptingo village, Keiyo North Sub-County, she murdered one Marko Changwony Boit.
2. The accused is represented by Dr. Chebii as her Counsel. She took plea on 2/05/2019 before H. Omondi J (as she then was), and pleaded not guilty. After a series of adjournments caused by various factors, the trial eventually commenced on 16/03/2022 in which the Prosecution called 6 witnesses. PW1-5 testified before E. Ogola J upon whose transfer I took over the matter. Around the same time, a High Court sub-Registry had been launched in Iten and this matter, emanating from that jurisdiction, was thus transferred to Iten. PW6, the Prosecution’s last witness therefore testified before me. Needless to state, directions under Section 200(3) of the Civil Procedure Rules were taken, whereof the defence, with the concurrence of the Prosecution, elected to proceed with the case before me from where it stopped.
3. PW1 was Mary Jepkemoi, the accused’s 70-year-old mother. Led by Prosecution Counsel Ms. Okok, she testified that the deceased was her lover while the accused is her daughter, that on 16/03/2019, around 2.00 pm as she was taking a nap in her brother-in-law’s house, (Alexander Kimeli), that the deceased also went into the house and proceeded to sleep, that she was later woken up by her in-law’s son, one Timothy, who told her that there was a fight and that the accused was quarrelling with the deceased. She stated that when she enquired from the deceased about the reason for the fight, the accused ran away without saying anything and that she was informed that the accused had used her fists to fight the deceased. According to PW1, the deceased was still well after the fight and although



they wanted to take him to hospital, he declined and told them that he was fine. At that point, she insisted that the deceased was stable after the fight and stated that the contrary views appearing in her Statement were exaggerated and that some of the contents did not come from her. She testified that she then returned with the deceased to their home in Keiyo that evening. She also stated that she had 2 children with the deceased but the accused was not one of them. She stated that at home, the deceased started complaining about a problem with his legs, that the second week after the quarrel, she took the deceased to a dispensary as he was still complaining of pain in the leg, that he was given anti-malaria drugs and he also complained of dizziness amongst others, which persisted for about a week but still the deceased refused to be taken to hospital and then one day he woke up PW1 and started vomiting. She stated that they took him to hospital at 8.00 am the next morning at Iten but he was not treated as the hospital stated that his condition was very bad and he was then taken to hospital by his brothers, Peter and Albert, that she did not see the deceased again and was later informed that he had passed away after 3 days. According to her, the accused and the deceased had a good relationship. Under cross-examination by Dr. Chebii, she clarified that when they were taking the naps, herself and the deceased were sleeping in different rooms. She stated that she never reported any case of assault to the police before the death of the deceased, that after the fight, she and the deceased left at about 10.00 am walked back to their home in Keiyo where they reached at about 2.00 pm. She also stated that both the deceased and herself were drunk on the day of the fight.

4. PW2 was Peter Kurgat Boit. He testified that he was a brother to the deceased and that the accused was a step-daughter of the deceased. He testified that on 26/03/2019, he was called by PW1 at about 10.00 am who informed him that the deceased was unwell, that he told her to take him to Iten Hospital and later went to meet her there where he found the deceased in bad condition and unable to talk and that he was with his 2 other brothers, Wilson and Albert. He stated that the doctor referred them to Moi Teaching and Referral Hospital (MTRH) in Eldoret, they took an ambulance to MTRH but upon reaching, were told that the hospital was full and for that reason, they took the deceased to Mediheal Hospital where the deceased was admitted for 3 days but died on 29/03/2019. He stated that the deceased had no visible injuries and that before that, the deceased did not have any health problems. However, in cross-examination, he conceded that he did not know much about the health of the deceased. According to him, too, the accused and the deceased had a good relationship.
5. PW3 was Albert Korir, who stated that he, too, was a brother to the deceased. He testified that on 26/03/2019 at about 9.00 am he was called by PW1 who told him that the deceased was unwell and needed to be taken to hospital, that he told PW1 to take the deceased to hospital at Iten and that he would meet them there. He stated that when he reached the hospital, he found the deceased was unable to talk and that his other brother, PW2, was also there and he was told that the deceased had been hit by the accused on the head. He testified that they then took the deceased to MTRH but since the x-ray machine there was not working, they took him to Mediheal Hospital where the deceased was admitted from 26/03/2019 to 29/03/2019 when he passed away. He stated that he was not aware of any bad relationship between the accused and the deceased.
6. PW4 was Alexander Kimeli Arap Ruto who stated that PW1, the 2nd wife of the deceased was his (PW4) wife's sister and the accused was a daughter of PW1. He stated that on 16/03/2019 he was at home with the deceased and PW1 at about 12.00 pm as the two had been on a mission to buy maize somewhere and had passed by the night before to spend the night at his home. He stated that he left home at about 11.00 am and the two were also preparing to leave and that the deceased was well and fine. He testified that when he returned in the evening at about 5.30 pm, he was told by neighbours that there had been a fight and the accused and the deceased also confirmed that there was such fight and he told them to go to hospital. He stated that the deceased was unwell and was sleeping, he had an injury on the head and was bleeding from the ear but PW1 was fine. He testified that he spoke to the deceased who told



him that the accused had attacked him while he was sleeping and dragged him outside by his leg. He testified that before he left that morning, the deceased had requested him to phone the accused and ask her to go and pick some money from the deceased as he had sold some parcel of land, which he did, and that the deceased told him that while the deceased was asleep, he was woken up by the accused who was dragging him outside and was also beating him. He stated that he asked the deceased to go to hospital but he did not do so and only went on the following day and then left his home on the following day. According to him, the deceased was visibly sick but he never saw him again and about 4 days later he heard that the deceased had died. In cross-examination, he disowned the part of his Statement which alleged that the deceased and the accused had taken alcohol on the date of the incident. According to him, they had not. He also stated that when they left his home they used a motor-bike although he conceded that he was not present when they left. He also stated that the deceased complained of feeling unwell, and had blood on the right ear which he told him the accused had stepped on. He also stated that the deceased and the accused left his home on 18/03/2019.

7. PW5 was Inspector Samson Ojenge attached to the Iten Police Station, the Investigating Officer in this case. He testified that on 30/03/2019 in the afternoon, a Report was made by PW1 that her husband, the deceased, had been assaulted by the accused on 16/03/2019, and that he later recorded statements from witnesses as the deceased had already died in on 29/03/2019 at Mediheal Hospital. He stated that he gathered that the deceased and PW1 were at the home of PW4 on 16/03/2019 at around 3.00 pm when the accused visited the home and found the deceased resting in bed, pounced on the deceased with blows and kicks, the reason being that the deceased was misusing proceeds from the sale of a parcel of land they had sold and that he also established that the deceased was the accused's step-father. He testified that a post mortem was later conducted on the deceased, that he later visited the crime scene but did not find any weapon as the accused used her legs and hands in assaulting the deceased, and that the accused was later arrested on 13/04/2019 in Uasin Gishu County. In cross-examination, he confirmed that no report of any assault had been reported to the police before the death.
8. PW6 was Professor David Chumba, the Pathologist from MTRH. Led by Prosecution Counsel Ms. Mwangi who had now taken over prosecution of the matter after the file was transferred to Iten, PW6 testified that upon request, he conducted an autopsy on the deceased on 04/04/2019 who had been referred from Iten but died during treatment at MTRH. According to him, he observed that the deceased, a male adult of about 58 years, had 2 stitched wounds on the right side of the head measuring 3 cm and 4 cm, and defence injuries on the upper limbs, and that internally, he had a massive subdural spine hemorrhage – subdural space hemorrhage on left temporal and occipital area - and that he formed the opinion that the deceased died of severe injuries from a blunt object and that the injuries were consistent with assault. He then produced the Report as PExh1. In cross-examination, he stated that the injuries could not have been caused by slaps, that the weapon used must have been a blunt object, and that a lot of force was applied and it must therefore have been a rod or a baton.
9. At this point, the Prosecution closed its case. Although I granted the parties leave to file written Submissions on the issue of “case to answer”, Prosecution Counsel Ms. Mwangi informed the Court that she would not be filing any Submissions. On his part, Dr. Chebii filed the Submissions dated 17/03/2025.

Defence Submissions

10. Counsel for the accused recounted the testimonies given by the witnesses and urged that the evidence is insufficient to establish a prima facie case. He observed that although the case hinges on the allegation that the accused assaulted the deceased by raining kicks and blows on him which allegedly caused severe head injuries leading to his death, the evidence adduced does not conclusively link the accused's actions



to the fatal injuries sustained by the deceased. He submitted that PW1, the deceased's wife, testified that the accused assaulted the deceased by kicking and punching him but she did not witness any severe injuries at the time of the alleged assault, and that she further testified that the deceased complained of leg pains and was treated at a Health Centre on the same day and that the deceased's condition worsened days later, leading to his admission at Mediheal Hospital, where he died on 29/03/2019.

11. According to him, this cannot clearly be traced to the alleged kicks and blows. He submitted that PW2 and PW3, the deceased's brothers, testified that the deceased was admitted to the hospital in a coma and later died, and that although they relied on the post-mortem report which indicated that the cause of death was an assault caused by a blunt object, no witness directly linked the accused to the use of a blunt object or the infliction of the fatal injuries. He submitted that the evidence of PW4 contradicts the Prosecution's assertion that the accused caused severe head injuries at the time of the alleged assault, and that PW5, the Investigating Officer, testified that no murder weapon was found at the scene and that the allegations were limited to kicks and blows. He also pointed out that although the post-mortem Report indicated that death was caused by a blunt object, there is no evidence linking the accused to the use of a blunt object or proving that the kicks and blows allegedly inflicted by the accused could have caused the fatal injuries. Counsel urged further that although PW6, the Pathologist testified that the deceased suffered a severe head injury caused by a blunt object, there is no evidence linking the accused to the use of a blunt object or establishing that the injuries were consistent with kicks and blows. He reiterated that there is no scientific or medical evidence to suggest that kicks and blows could have caused the severe head injuries described in the post-mortem Report. He cited the case of *Republic v Margaret Ndunge Mutua* [2015] KEHC 1613 (KLR) and urged that the Prosecution has failed to establish a causal link between the accused's alleged actions and the fatal injuries sustained by the deceased.
12. Counsel also urged that the Prosecution's evidence is riddled with inconsistencies and contradictions, which further weaken its case. He reiterated PW1's testimony that she did not witness any severe injuries at the time and only took the deceased to hospital days later when his condition worsened. According to him therefore, this raises doubts about whether the injuries sustained by the deceased were caused by the alleged assault or by some other intervening event. He also pointed out that according to PW4, the deceased only complained of pains on the head and back and declined to seek medical attention, insisting that the injuries were not severe. Counsel submitted that this contradicts PW1's testimony that the deceased sustained serious injuries during the alleged assault. He submitted that inconsistencies in the Prosecution's evidence create reasonable doubt, which must be resolved in favour of the accused. He cited the case of *Woolmington v. DPP* [1935] AC 462, and submitted that the prosecution failed to discharge its burden. He contended that the Prosecution's case is based on speculation and conjecture, which is insufficient to sustain a conviction for murder. He concluded by urging that the accused should be acquitted under Section 306 (1) of the [Criminal Procedure Code](#).

Determination

13. What this Court is called upon to do is to determine whether, at this stage of the proceedings, based on the evidence adduced by the witnesses, the Prosecution has established a prima facie case to warrant the accused person to be placed on her defence to answer to the charge.
14. Section 306(1) and (2) of the [Criminal Procedure Code](#) requires the Court, after closure of the Prosecution's case, to make a determination on whether an accused person has a case to answer. The Section provides as follows:

“(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

15. At this stage therefore, the prosecution is required to only establish the existence of a prima facie case. “Prima facie” means the establishment of a rebuttable presumption that an accused person is guilty of the offence he/she is charged with. At this stage, the Court is only considering whether the accused has a case to answer. A case to answer was described by G. Dulu J in the case of Republic vs Joseph Shitandi & Another (2014) eKLR as follows:

“A case to answer is a case where if the accused keeps quiet, the evidence of the prosecution should be such that a conviction will result.”

16. The procedure in determining whether an accused has a case to answer was also analyzed by J.B Ojwang J(as he then was) in the case of Republic vs Samuel Karanja Kiria (2009) eKLR, in which he stated as follows:

“The question at this stage is not whether or not the accused is guilty as charged but whether there is cogent evidence of his connection with the circumstances in which killing of deceased occurred. That the concept of prima facie case dictates as a matter of law that an opportunity created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled ... The Court of Appeal in Criminal Appeal No. 77/2006 expressed that too detailed analysis of evidence stage at no case to answer stage is undesirable if the court is going to put accused on his defence as too much details in the trial court’s ruling could then compromise the evidentiary quality of the defence to be mounted.”

17. As observed above, the trial Court is therefore cautioned that at this stage, it should not make definitive findings should it conclude that the accused has a case to answer. In this regard, E. Trevelyan J in Festo Wandera Mukando vs Republic [1980] KLR 103, stated as follows:

“...we draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of “no case” to answer is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the court or counts concerned.”

18. For the offence of murder to be proved, the prosecution is required to establish proof of death of the deceased and the cause thereof, proof of an unlawful act or omission on the part of the accused resulting



in the death of the deceased, and malice aforethought on the part of the accused. In this case, that the deceased died and the cause of death are not in dispute.

19. Regarding the alleged events leading to the death, PW1, the deceased's partner-lover and also the accused's mother testified that on 19/03/2019, while visiting her brother-in-law's home together with the deceased, she was asleep in one room and the deceased in another, when she was woken up by her host's son and told that there was an ongoing fight involving the accused and the deceased and that when she went out to check and asked the accused about the same, the accused simply ran away. She stated that despite the alleged fight, the deceased appeared well and declined medical assistance insisting that he was fine and they left for their home but the deceased, later, began complaining of pains and subsequently his condition worsened and despite some medical intervention, he did not improve and was eventually transferred to hospital in Eldoret where he died a few days later.
20. PW4, the host in whose home the incident is alleged to have occurred, stated that on 16/03/2019, he left home at about 11.00 am and left the deceased and the accused preparing to leave and that the deceased was well and fine. He testified that when he returned in the evening at about 5.30 pm, he was told by neighbours that there had been a fight and the accused and the deceased also confirmed that there was indeed such fight. He stated that the deceased was unwell and was sleeping, and that he had an injury on the head and was bleeding from the ear. He testified that he spoke to the deceased who told him that the accused had attacked him while he was sleeping and dragged him outside by his leg. He stated that the deceased told him that while the deceased was asleep, he was woken up by the accused who was dragging him outside and was also beating him. According to him, the deceased was visibly sick and a few days later he heard that the deceased had died. In cross-examination, he stated that the deceased complained of feeling unwell, and had blood on the right ear which he told him that the accused had stepped on.
21. PW5, the Investigating Officer, stated that he gathered that the deceased and PW1 were at the home of PW4 on 16/03/2019 when the accused visited the home and found the deceased resting in bed, pounced on him with blows and kicks, the reason being that the deceased was misusing proceeds from the sale of a parcel of land that they had sold
22. On his part, PW6, Professor David Chumba, the Pathologist, testified that the deceased had 2 stitched wounds on the right side of the head, and defence injuries on the upper limbs. Internally, he stated that the deceased had a massive subdural spine hemorrhage, subdural space hemorrhage on left temporal and occipital area, and that he formed the opinion that the deceased died of severe injuries from a blunt object and that the injuries were consistent with assault. According to the post-mortem Report, the death occurred on 29/03/2019.
23. At this stage of the proceedings, the standard of proof is not yet one of proof beyond any reasonable doubt. The Supreme Court of Canada in *R -v- Morabito* [1949] SCR 172 drew attention to this fact when it held that:

“When assessing the prosecution case in consequence of no case submissions, the question of reasonable doubt does not arise at that stage.”
24. What is therefore required is evidence that would prima facie establish the possible guilt of the accused and call upon him/her to be heard before final determination.
25. As aforesaid, the death of the deceased and the cause thereof are not in dispute. There is also testimony which possibly places the accused person at the scene of the crime. There is also testimony that the accused was possibly involved in a fight with the deceased and also that the deceased may have named



the accused as being his assailant. However, I must caution myself that at this stage, I should not make definitive findings should I conclude that the accused has a case to answer.

26. With the above caution in mind, I will only state that considering the testimonies of the witnesses and without delving into the depths of their testimonies, and although the defence Counsel has raised pertinent and weighty issues against the Prosecution case, I am satisfied that the Prosecution has established a prima facie case against the accused person to warrant her being placed on her defence. As aforesaid, a prima facie case does not at all mean that the accused has been found guilty, but merely means that there is some evidence of her connection with the circumstances in which the killing occurred. I therefore find that the accused – Nancy Koskei - has a case to answer and she is accordingly placed on her defence.
27. Pursuant to my findings above, the accused is now informed of her rights under Article 50(2)(i) and (k) of *the Constitution*, and also under Section 306(2) as read with Section 307 of the *Criminal Procedure Code*, to address the Court. Accordingly, she is informed and it is explained to her, in the presence of her Advocate, that she has a right to address the Court either personally, or by her Advocate, and to give evidence on his own behalf or to give unsworn statements, and to call witnesses in his defence.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF JULY 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

The Accused (present virtually from Iten High Court)

Mr. Kipkoech h/b for Dr. Chebii for the Accused

Ms. Mwangi for the State

C/A: Brian Kimathi

