



REPUBLIC OF KENYA



**Republic v Wekesa (Criminal Case 95 of 2014)  
[2024] KEHC 1900 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 1900 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE 95 OF 2014  
JRA WANANDA, J  
MARCH 1, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**YOHANA KAPCHANGA WEKESA ..... 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 offence are that on 23/12/2014, in Eldoret West District within Uasin Gishu County, he murdered one James Otuoma.
2. The accused was initially represented by Mr. Nyandoro Advocate but who was later replaced by Mr. Githaiga Advocate. The accused took plea on 22/01/2015 and pleaded not guilty. The case then proceeded to trial wherein the prosecution called 8 witnesses. PW1 to 6 testified before Sewe J upon whose transfer, the matter was taken over by Ogola J who then took the evidence of PW7. Upon Ogola J's transfer, I took over the case and PW 8 therefore testified before myself. The Prosecution then closed its case on 15/05/2023.
3. I did not therefore see or hear the first 7 witnesses and I am therefore only relying on the record. For avoidance of doubt however, I confirm that since the case was part-heard when I took it over, directions were taken under Section 200(3) of the Criminal Procedure Act and pursuant thereto, the parties agreed, by consent, to proceed with the trial before me from where it stopped. There was therefore no demand to recall any witnesses or begin the case "*de novo*".
4. PW1, Rose Zuma Owino, is the mother to the deceased. She testified that on 23/12/2014 at about 11.30 pm at night she heard some noises and stones being thrown onto the deceased's house, she came out of the house and heard people calling the deceased's name, they used the name "manager" and said that they had come to visit the wife to the deceased and that they did not know that the deceased was at



home. PW1 stated that she recognized the voice of the accused as he was her tenant, that she heard her son respond asking them whether they had lost their way or whether they needed help, she heard her son (deceased) open his door and he came out and escorted the accused and his companion to the gate, that when they reached her gate, she saw the accused, his companion and the deceased, PW1 asked the deceased to go back but the deceased insisted on showing them the way, that after a short distance, she heard them quarrelling and struggling. She stated further that there was moonlight and so she was able to see them well, that she heard them pull the deceased away, she ran back to the house and woke up her husband, John Owino, and asked him to go and rescue the deceased, that the husband got up and went to the scene and then asked PW1 to take to him a “lesso”, she took the “lesso” but found the deceased bleeding, that the accused was still there standing near the deceased, the deceased was bleeding from the thigh, she then fetched a wheelbarrow to take the deceased to hospital, she also screamed to raise alarm and alert the neighbours. She stated further that the deceased told her that he had a phone and torch which may have dropped at the scene and asked PW1 to go back and check for them, PW1 went back to check and found the torch but not the phone, that she found a knife at the scene, and that she took the items and gave to her husband. She added that the accused did not run away and that as they were taking the deceased to hospital, the accused tried to speak to her but she ignored him and told him not talk to her as he had wounded her son, she returned to the house and the deceased was taken to hospital, that at around 12:00 midnight, her husband called on phone and informed her that the deceased had died. PW1 then identified the accused in the dock and also identified the knife referred to above. In cross-examination, she conceded that she did not see the accused stab the deceased as she was not there at the time.

5. PW2, Kennedy Chinwani Owino, stated that he was the deceased's uncle and neighbour. He stated that on the material night, he was asleep when he heard noises from two people who were passing by his house, that he recognised their voices, they were asking for the whereabouts of the deceased, he recognized the two people, one was “Anthony” and the other one was the accused, that the accused told PW2 to go back to sleep. He stated further that “Anthony” claimed to be a policeman and threatened to shoot him, he recognized them because there was moonlight and he also recognised their voices since they were people that he knew well. He testified further that the two proceeded to the house of the deceased about 30-40 metres away and he then heard stones being thrown onto the roof of the deceased's house, he could see as he was standing near the fence, that the deceased came out of his house and asked the two why they had woken him up. PW2 stated that the deceased asked the two to go away and escorted them towards his parents' gate, that they continued arguing before he heard PW1 crying while stating that the deceased had been stabbed with a knife, he went to the scene and found the deceased lying down bleeding from the right thigh, he also found the accused at the scene with the parents of the deceased. He further stated that “Anthony” was not at the scene when he arrived, that the deceased was crying out of pain and his mother was trying to dress the wound with a “lesso”, that the deceased was taken to a nearby clinic for first aid and that he was pushed there on a wheelbarrow, that as the deceased was being attended to, he (PW2) returned to the scene with PW1 and found a knife. He added that deceased died while undergoing treatment, that they then reported the matter to the police and that members of the public found “Anthony” and arrested him and he also identified the accused who was also arrested.
6. PW3, John Onyango Owino, is the deceased's father. He testified that on the material night, he was asleep in his house when his wife (PW1) woke him up and informed him that there were stones being thrown onto the roof of the deceased's house. He stated that he heard voices of people whom he recognised as the accused and one “Anthony” who were his tenants, that after sometime his wife who had gone out to monitor the situation came back and asked him to go and rescue the deceased as the two men could cause him harm, that he went to the scene and found the accused lying on top of the



- deceased, he asked the accused to stop the fight, instead, the accused hit him (PW3) on the forehead and he began to bleed from the nose, the accused told him not to get involved in the matter, he moved back and the deceased (his son) warned him to be careful because the two assailants were armed with knives. He testified further that “Anthony” then charged at him with a knife and stabbed him (PW3) on the left shoulder, that he picked a wood for defence and when “Anthony” charged at him the second time, he hit “Anthony’s right hand which held the knife and “Anthony” disappeared, and that he did not realize that the accused had been stabbed and was bleeding. He stated that the deceased never woke up from where he was lying, he had been stabbed on the left thigh, PW3 then called the mother (PW1) and asked her to bring a lesso with which they tied the wound, that as the deceased was too weak to get up, they transported him on a wheelbarrow to the clinic for first aid where he was given first aid and referred to hospital where the deceased was taken but died while undergoing treatment. He stated that PW1 and PW2 returned to the scene and found a knife which PW2 brought to him and he took it to the police and reported the death. He stated that both the and accused and “Anthony” were arrested by members of the public and beaten by a mob and that “Anthony” died as a result.
7. PW4 was Grace Ayuma. She stated that she was an aunt to the deceased and a neighbour to both the accused and the deceased. She testified that on the material night she was asleep in her house when she was woken up by some noise coming from the deceased’s house, that the time was about 8:00-9:00pm, that she got out and saw the accused with another man whose name she did not know, heading towards the side where the deceased resided, that she went back to her house to sleep but then heard the deceased calling out for help, she again went out towards the scene and found people in some open field near her mother-in-law’s house, on arrival he found the father of the deceased crying and the deceased lying down bleeding, and that the accused was also at the scene. She stated that she observed that the deceased had an injury on the left thigh and the father was trying to tie the wound, she called the deceased’s mother but met her coming towards the scene with a wheelbarrow, that they helped place the deceased on the wheelbarrow and he was taken to Lumakanda and that at about 5:00 am, she was informed that the deceased had died. In cross-examination, she stated that she heard the deceased shouting “mummy mummy wananiua.”, that the deceased mentioned the name of the accused “Kapchanga” and also stated that “akina Kapchanga wananiua” She also stated that deceased was still alive and when she asked, the deceased stated that “Kapchanga na Anthony wananiua.”
  8. PW5, Jeremiah Okello Owino, stated that he was the deceased’s uncle and neighbour. He testified that on the material night he was sleeping in his house when he heard some commotion within his homestead, he woke up and opened his sitting room widow to check what was happening but it was dark, he heard somebody state that “sisi ni watu hatari hatutaki mchezo”, that he was afraid and did not go out, he later came to learn that the deceased had been stabbed and that he died while undergoing treatment. He stated that he was present when the post-mortem procedure on the deceased was conducted.
  9. PW6 was one Elisha Opondo Owino. He stated that he is an uncle to the deceased and that he was present when the post-mortem on the deceased was conducted.
  10. PW7 was Dr. Brian Inima Kenyeni. He stated that he did not perform post-mortem on the deceased’s body, and the same was done by one Dr. Nicholas Inwani with whom he had worked with since 2014 at Webuye County hospital and who is currently based in Nairobi. He produced the post-mortem form on behalf of Dr. Nicholas Inwani. He testified that cause of death was confirmed to be cardiopulmonary arrest secondary to haemorrhagic shock secondary due to a penetration wound on the left femoral artery. He explained that the deceased sustained a deep cut wound on the left thigh which carries blood to vital organs, that he lost too much blood which caused shock and which led to his death.



11. PW8 was Police Constable Cosmas Mutinda, the Investigating Officer in this matter. He testified that on 23/12/2-14 he was called by his Senior and instructed him and another officer to accompany the Senior to Lumakanda Police Station following a murder that had occurred within the area, that this was around 9:00 am and when they arrived, they found a police vehicle with a dead body, that the suspect was being held in the cells, he established that the body was of one “Anthony” who was involved in the murder of the deceased herein, that “Anthony” had been lynched by members of the public and the accused had been rescued, that the accused and “Anthony” were said to be involved in the murder. He stated that they proceeded to the scene outside the house of PW5 and found evidence of a fracas, blood was splattered outside and they recovered a blood stained sword, they picked witnesses and proceeded with them to the station where they recorded their statements, most of them witnessed the incident and confirmed that they heard the accused and the deceased shouting at each other, that the mother of the deceased came out when she heard stones thrown at her son’s house, that she saw the accused passing by and according to her, the two were headed to the direction where the deceased resided, that after a while, she heard a commotion outside her son’s house, that her husband PW3 came out and found the suspects pinning the deceased down and who was bleeding on the left thigh, he confronted them, that neighbours who were also part of the family appeared and the suspect disappeared, that in the morning, the suspects were encountered by members of the public at Lumakanda junction, one was killed and the other (accused) was rescued by the police. He testified further that he witnessed the post-mortem conducted on the body of the deceased, that body had stab wounds on the left thigh also bruises on the face. He testified that they took blood samples during the post-mortem and also a piece of cloth and the sword which were all blood-stained. He further testified that the blood samples were tested by at the Government analyst and that a Report was made that the samples taken from the deceased and those taken from the sword matched, meaning that the sword was the murder weapon. He stated that he established that the deceased and the accused were friends and the accused had rented a house from the deceased’s father.
12. At the close of the prosecution’s case, I gave the parties liberty to file written Submissions on “case to answer”. Pursuant thereto, Senior Prosecution Counsel, Ms. Emma Okok filed her Submissions on 7/07/2023. On her part, the Defence Counsel did not file any.

### **Prosecution Submissions**

13. Counsel for State cited Section 203 of the Penal Code and submitted that to prove the offence of murder. Counsel cited and submitted that to proof prove the offence of murder, the following ingredients must be met: (a) the death of the deceased occurred and the cause of that death (b) the accused committed the unlawful act which caused the death of the deceased: and (c) the accused had malice aforethought. She argued that the death is not disputed, that PW3, PW5, PW6 and PW7 saw the deceased’s body and confirmed that the deceased sustained injuries on the left thigh, that the cause of death was also proved by way of medical evidence adduced by PW7.
14. On whether the accused committed the unlawful act which caused the death of the deceased. Counsel submitted that the accused is placed at the scene of crime by PW1, PW2, PW3 and PW4, that PW3 saw the accused and his accomplice attack the deceased and it was at that point that the deceased was stabbed, that PW4 stated that when she spoke to the deceased at the scene, the deceased stated that “Kapchanga na Anthony wananiua”, that “Kapchanga” is the accused person in this matter, that PW1, PW2, PW3 and PW4 all saw the accused on the material night, he was someone who was well known to them and there was no risk of mistaken identity. Counsel argued that identification in this instance was by way of recognition which is the best form of identification and that it is the unlawful act of the accused person – assault – that caused the death of the deceased.



15. On whether the accused had malice aforethought, Counsel cited Section 206 of the Penal Code which sets out the circumstances which must be established for malice aforethought to be proved. She submitted that PW3's evidence was clear that he saw the accused and his accomplice attack the deceased, that the accused and his accomplice went to the deceased's home that night while armed with dangerous weapons with an intention of causing him harm, that the deceased sustained a stab wound on the left thigh which led to his death, that the injury was caused by a sharp object, that PW1 recovered a knife at the scene of crime, that PW8 also recovered a blood-stained sword at the scene and that the government analyst report showed that the blood-stained sword that was recovered by the investigating officer was the murder weapon, and that it is evident from these injuries that the accused intended to cause grievous harm to the deceased and hence acted out of malice. Counsel reiterated that it is these injuries that led to the deceased's death as was confirmed by PW7 and that evidence on malice aforethought is therefore solid.

### Determination

16. This Court is now called upon to determine whether, at this stage, based on the evidence adduced by the 8 prosecution witnesses, the prosecution has established a *prima facie* case to warrant the accused person to be placed on his defence to answer to the charge of murder. It should however not be forgotten that at this stage, the Court is only considering whether the accused has "a case to answer" and which was described by G. Dulu J in the case of *Republic v 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."

17. The manner in which to determine whether an accused has a case to answer was discussed in the case of *Republic v Samuel Karanja Kiria* (2009) eKLR where J.B Ojwang J (as he then was) stated the following:

"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 in 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."

18. Further, in the case of *May v O'Sullivan* [1955] 92 CLR 654, it was held that:

"When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence, as it stands, the defendant ought to be convicted, but whether on the evidence, as it stands, he could lawfully be convicted. This is a really question of law."



19. The trial Court is 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, in Festo Wandera Mukando v Republic [1980] KLR 103, E. Trevelyan J 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 count or counts concerned.”

20. In this case, that the death occurred and the cause thereof are not disputed. The cause of death was established by a pathologist to have been a deep cut wound on the left thigh which caused the deceased to lose too much blood, led to shock and eventually, to his death. That the deceased was stabbed with a sharp object was also established. Several witnesses have placed the accused at the scene of crime and some claim to have witnessed the accused and one “Anthony” attacking the deceased. Although none of the witnesses was emphatic that he/she saw the accused attack the deceased, some of them claim to have seen the accused with a knife. It was also alleged that before he died, the accused kept mentioning the name of the accused and the said “Anthony” as the people who attacked him. It was also stated that a knife and a blood-stained sword were recovered at the scene. The Report from the government analyst concludes that the blood samples in the alleged “weapons” matched that of the accused. Although all these matters may still be debunked in the course of this trial, they lay a firm basis for the prosecution case.

21. With all the above principles and facts in mind, I have considered the evidence on record, the testimonies of the witnesses as set out above and, also the Submissions filed by the Prosecution. Without delving into the merits thereof, I only state my finding to be that the prosecution has established a *prima facie* case to my satisfaction. Accordingly, I find that the accused person has a case to answer. He is therefore placed on his defence.

22. Pursuant to my finding above, the accused person is now informed of his 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, he is informed, and it is explained to him, in the presence of his Advocate, that he has a right to address the Court either personally or by his 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 1<sup>ST</sup> DAY OF MARCH 2024**

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**WANANDA J.R. ANURO**

**JUDGE**

