



**Republic v Tarus (Criminal Case 1 of 2019) [2024] KEHC 8694 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8694 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE 1 OF 2019  
JRA WANANDA, J  
JULY 19, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOSEPHAT KIPRONO TARUS ..... 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 17/12/2018 at Setek village in Keiyo South sub-County within Elgeyo Marakwet County, he murdered one Luka Komen Cheserio.
2. The accused was initially represented by Ms Nalisoli Advocate who was however later replaced by Mr. Omboto Advocate. The accused took plea on 5/02/2019 and pleaded not guilty. The case then proceeded to trial wherein the prosecution called 10 witnesses. PW1 to 5 testified before Hon. H. Omondi J upon whose elevation to the Court of Appeal, the matter was taken over by Hon. E. Ogola J who then took the evidence of PW6 to 9. Upon Ogola J’s transfer, I took over the case and PW 10 therefore testified before myself. The Prosecution then closed its case on 13/02/2024.
3. I did not therefore see or hear the first 9 witnesses and I am therefore 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 to begin the case “de novo”.
4. PW1 was one Divina Chepkemboi Korir. She stated that the deceased was her lover, that on 13/12/2018, she was at her home at preparing supper, and that the accused was also present, that she later left to join the deceased at his home at about 7.00 pm, that she was at the home of the deceased with the deceased when after supper, they heard someone lock the door from outside and when the deceased climbed out through the window to check, he realized that it was the accused who had locked



the door and the that the accused fled. She testified that the deceased and herself then went to bed but after some time they again heard someone hit the mabati roof and push the door open, that when the deceased went to check, he found that it was again the accused, that the accused then held the deceased, smashed his head, slapped and kicked him on the stomach. PW1 stated that the accused was wearing akala shoes, that she saw the accused because he came into the house and that although there was no light inside the house, there was a bright moonlight which illuminated the room. She stated further that the accused hit the deceased on the chest and teeth using a rungu and that the accused was wearing a maroon marvin and a white cap. She added that she screamed and neighbours came over and upon which the accused fled, that by then, the deceased was vomiting blood and was taken to hospital in the morning but died 2 days later after his condition deteriorated. She then identified the rungu, cap, maroon marvin and the akala sandals referred to above and also stated that the confrontation took place at about 8.00 pm. In cross-examination, she stated that the accused was her herdsman and he did not like the deceased since both men were in love with her.

5. PW2, Isaac Kipchumba Komen, stated that he was a son to the deceased and that on 13/12/2008 at around 8.00 pm, he was in his hut with PW3 sleeping when they heard voices among which he recognized his father's voice among those screaming and that they rushed to the scene (PW1's house) and spotted an assailant fleeing. He stated that his father (deceased) used to work for PW1 by gathering grain for her cows but he could not explain the circumstances under which his father was with PW1 on that night. He stated further that he noticed that his father was vomiting and told them that someone had hit him without a reason, and that he was also complaining of pain in the chest and teeth. He stated further that they recovered a rungu at the scene. He also testified that they took the deceased to hospital in the morning where he was treated and returned home but died 2-3 days later. He stated that the person he saw fleeing from the scene on that night was the accused since they had a torch which they used to see him and that he knew the accused as he was a neighbour. He, too, stated that at the scene they recovered a rungu, a cap, a marvin and also akala sandals. In cross-examination, he stated that he too, had heard the sound of mabati roof being hit, that the houses are about 300 metres apart, that they saw the accused but he ran away, and that the accused was wearing a white jacket. He then confirmed that PW1 was his father's lover since the father had separated with his mother. He also stated that he did not know the reason why the accused had attacked his father (deceased).
6. PW3, Kelvin Kiprono, stated that he was with PW2 in their house sleeping when at round 9.00 pm, they heard screams outside. He then echoed the testimony of PW2 including that they recognized the voice of the deceased (PW1's father) among those screaming and when they rushed to the scene, they found the deceased with PW1. He testified further that the deceased told them that the accused had beaten him, that the accused had forced open the door and assaulted him, and that the deceased complained of injuries to the teeth, chest and stomach. He added that the deceased told them that the accused had also forced him to sit on coals of fire and also showed them a rungu which, the deceased stated, the accused had used to hit his teeth and also showed them a marvin, a cap and akala sandals alleged to have been left behind by the accused. He, too, reiterated that the deceased was vomiting blood, and that he was taken to hospital in the morning but later died. He, too, reiterated that he knew the accused even before the incident as he was a fellow villager. In cross-examination, he stated that he heard the accused, while fleeing, proclaiming that "If I had a knife, I would have stabbed him". He also stated that PW1 and the accused lived in the same house and that the deceased used to work for PW1.
7. PW4 was Joseph Kimaiyo Chepkong, a village elder. He testified that he knew both the accused and the deceased, that the fight between the two was reported to him on 14/12/2018, that the deceased was taken to hospital and that on 17/12/2018, he was informed that the deceased had died at home. He stated that he went to the home and found the deceased lying dead, that he reported the death to the Chief and the body was taken to the mortuary. He stated that he did not see any visible injuries on



- the deceased. It was also his testimony that he also knew PW1 and he was also aware that the deceased “used to go” to PW1’s house. In cross-examination, he stated that both the accused and the deceased used to work for PW1, that the deceased used to herd PW1’s cows and the accused used to brew liquor for PW1.
8. PW5, Richard Kigen Barsampen, the area Assistant Chief stated that he too knew both the accused and the deceased, that he received a telephone call on 17/12/2018 informing him that the deceased had died in his home, that he rushed there and found the deceased lying dead on a bed, that he called the police who came and took photographs of the scene before taking the body to the mortuary. He stated that the deceased had injuries on the right side and bruises around the buttocks. In cross-examination, he stated that he was present when the accused was arrested.
  9. PW6 was one Daniel Kiprono Chesusio. He stated that he is a brother to the deceased and that he also knew the accused since he was a neighbour, that on 13/12/2018, PW1 came to his house - about 100 metres away - at around 9.30 pm and told him that the accused had come and beat up the deceased. He stated that he rushed to the scene and found the deceased sitting on a bed while coughing and bleeding from the mouth, and that the deceased told him that the accused had come to the house, beat him up and left. PW6 stated further that he went and called PW2 and PW3 who were sleeping in a near house, that he arranged for the deceased to be taken to hospital in the morning but that he later died on 18/12/2018. In cross-examination, he stated that the accused used to live with PW1 who used to sell alcohol and that they were lovers. He however denied that there was any relationship between the deceased and PW1 but conceded that he had suspected that the two were lovers.
  10. PW7 was Beatrice Kipchirchir. She stated that the deceased was her cousin and the accused was a neighbour, that on 15/12/2018 he had gone to visit the deceased who told him that the accused had beaten him, that she saw injuries on the deceased’s buttocks with fire like burns. She stated that the deceased told her that the accused beat up the deceased because the accused had found his wife in the deceased’s house, and that the accused beat him up with a stick and made him sit on fire. PW7 stated further that he then went and asked PW2 to take the deceased to hospital, that the deceased passed by PW7’s house on his way back from hospital and that on 17/12/2018 he went to the deceased’s house and knocked on the door but no one opened, that she then pushed the door and found the deceased dead on the bed and that she informed people around. In cross-examination, she stated that the deceased was living alone as he had separated from his wife and that PW1 was his lover. She stated that she used to go to the deceased’s house in the mornings to get tobacco.
  11. PW8 was one Benjamin Toroitich who stated that the deceased was his cousin. He testified that he was present during the post-mortem on 26/12/2018 at Iten Referral Hospital and that he identified the body. He stated that the body had deep injuries all over the body, the fingers were injured and there was a burn on one of the thighs.
  12. PW9 was Dr. Sharon Anyango who stated that she was a medical officer at the Iten Referral Hospital, that she performed a post-mortem on the deceased and filled and signed the Form on 26/12/2019. She stated that external examination revealed that the body had multiple bruises on the shoulders, elbows, limbs, wrists and fingers, the back and on the chest, and that on the gluteal region (buttocks) there were signs of superficial burns ruptured blisters. Regarding internal examination, she stated that there were features of chronic lung infection which however did not cause the death, and that there were ruptures on the spleen, kidneys and intestines and fractures of the 6<sup>th</sup> and 7<sup>th</sup> ribs. Her conclusion was that the cause of death was due to massive internal bleeding as a result of the rupture of the internal organs as aforesaid and which could possibly have been caused by an assailant or by being hit with a blunt object. She then produced the post-mortem Form. In cross-examination, she stated that the injuries were fresh



and ruled out the lung infection as a cause of death since there was no bleeding in the lung. According to her, the bleeding was in the abdomen.

13. The last prosecution witness, PW10, was the Investigating Officer, Police Constable Christopher Karuba. He stated that he was previously attached to the office of the DCIO Keiyo North, that on 17/12/2018, he was instructed to visit the scene which he did and found the lifeless body of the deceased. He stated that he then interviewed witnesses and obtained accounts of how the incident occurred and also what caused the death. His testimony on what the witnesses told him therefore mirrored the evidence already given by previous prosecution witnesses. He stated that after the death of the deceased, on 19/12/2018, with the help of the Assistant Chief, they arrested the accused at the home of a relative. He then produced the rungu, cream cap, maroon marvin and akala sandals referred to hereinabove. He also stated that on 27/12/2018, the accused came to the police station and reported that he had been assaulted by the deceased, that the accused was taken to hospital and given a P3 Form which PW10 produced. He further produced photographs of the deceased's body taken when he was found lying on the bed dead. In cross-examination, he stated that the accused could be said to have had the intention to kill since he went to confront the deceased while armed and that he planned it since he also forced the door open. He however did not rule out the possibility that the accused was acting in self-defence.
14. At the close of the prosecution's case, I gave the parties liberty to file written Submissions on "case to answer" but both sides informed the Court that they would not be filing any Submissions.

### **Determination**

15. This Court is now called upon to determine whether, at this stage, based on the evidence adduced by the 10 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 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 manner in which a determination on whether an accused has a case to answer is to be made, was discussed in the case of *Republic vs 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."



17. Further, in the case of *May vs. 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.”

18. 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 vs 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.”

19. In this case, doctor (PW9) formed the opinion that the cause of death was massive bleeding caused by rupture of internal organs including the spleen, kidney and fractures on the ribs. According her, the ruptures and fractures were the result of a blunt trauma suffered by the deceased around the stomach area and which according to her could have been caused by an assailant. Regarding the blunt trauma, the witnesses placed the accused at the scene of crime and PW1 claims to have witnessed the accused attacking the deceased. Other witnesses also claim that although it was at night, they spotted and identified the accused fleeing from the scene as there was bright moonlight. Some witnesses also claim that after the assault, the deceased on various occasions informed them that it is the accused who assaulted him. The rungu alleged to have been used to beat up the deceased was also identified by witnesses and produced in evidence. A motive for the killing was also advanced, namely, that it was an alleged “crime of passion” or a result of a “love triangle”. The allegation was that the accused and the deceased both had love affairs with PW1 and that this was the cause of the confrontation or assault. Although all these matters may still be debunked in the course of the defence trial, they lay a basis for the prosecution case.

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

21. Pursuant to the finding above, the accused 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, 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 19<sup>TH</sup> DAY OF JULY 2024**

.....

**WANANDA J.R. ANURO**

**JUDGE**



Delivered in the presence of:

Ms Limo for Respondent

Accused – Present in Court

N/A for Advocate

Court Assistant – Brian Kimathi

