



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Kichwen (Criminal Case 83 of 2016)
[2023] KEHC 18904 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18904 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 83 OF 2016
JRA WANANDA, J
JUNE 16, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

JOASH KICHWEN ACCUSED

RULING

1. The accused person was 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 November 29, 2016 at Kapkures village, Kapkures sub location in Eldoret West Sub County within Uasin Gishu County he murdered one Joel Yego.
2. The accused was first presented before Court on November 30, 2016 before a Deputy Registrar and was then taken to the Moi Teaching and Referral Hospital for a mental assessment. After a series of hiccups, he was finally availed before Court on 8/03/2017 for plea taking after being certified fit to plead. The plea was taken before Githua J. The information and ingredients of the charge were read and explained to the accused in the Kiswahili language, he denied the charge and a plea of not was entered guilty.
3. After further hiccups, the hearing eventually commenced on 3/03/2021 before Sewe J who took the evidence of PW1 – PW5. Upon the Judge being transferred, a new Judge, Ogola J took over the matter on and took the evidence of PW6 and PW7. The Prosecution then closed its case. Upon Ogola J also being transferred, I took over this matter. Pursuant to my further directions, the proceedings were typed and availed.
4. I may just mention that in both instances of taking over the matter from previous Judges, Directions were taken under Section 200(3) of the *Criminal Procedure Act*. In both instances, the Defence elected not to ask for recall for any witnesses and to therefore proceed with the hearing from where it stopped.



5. Regarding the evidence presented, PW1, Isaac Chiroch Bor, the Assistant Chief, Kapkures village testified that on November 29, 2016, he was visited by two young men who were the sons of his neighbour Joash Kichwen (accused), they told him that they had come to collect him to take him to their home, he accompanied them and on arrival there, he found the deceased lying on the floor tossing from side to side as if he was in pain, the wife to the accused was also seated on the floor with her back against the wall, he tried talking to the deceased but he did not respond, he asked him to get up but he said he could not, he then sent two young men to go and get the village elder, he advised the brothers to take the deceased to hospital, they then escorted the accused to the police station to report what had taken place, they left him in custody, he later got to learn that the accused had found the deceased in the bedroom with his wife, at 9.30 am the next day he received a report that the villagers had surrounded the home of the accused home and were threatening to beat them, they were angered by reports that the deceased had died. He stated that he did not recall the clothes that the accused was wearing on that night.
6. PW2, Alfayo Kuruna Tum testified that on November 29, 2015, he woke up at around 1 am as the Assistant Chief, Isaac Chiroch Bor had called him and told him to proceed to the home of the accused, on arriving at the home, he found the deceased lying outside, he did not know whether he was already dead or not, they took him to the hospital and thereafter, they took the accused to the police station, he did not know if the deceased and the accused had a grudge, it was said that the accused had found the deceased in his house at night with his wife.
7. PW3, Titus Yego, testified that the deceased was his elder brother, on November 29, 2016 he received a report that the deceased had been assaulted at the home of the accused, he rushed there and found the deceased lying outside the home unable to speak, they took him to Ziwa hospital, on arrival they were informed that he was dead, he attended the post mortem on 5/12/2016, they were told that the deceased had died of a head injury, he was not aware of any grudge between the accused and the deceased.
8. PW4, Philemon Biwott, testified that on November 29, 2016 he received a report that his brother, the deceased, had been found at the home of the accused, when he proceeded to the house they found the deceased lying on the floor, he did not check to confirm his condition, they carried him to the sitting room as he was not in a condition to walk, he stated that they then took him to Ziwa hospital for treatment but the doctor told them that he was dead, they then went and reported the incident to the police station, he was present when the post mortem was conducted, the doctor did not tell them what had caused the death.
9. PW5, Dr Benson Macharia testified that he was a pathologist at Moi Teaching and Referral Hospital. He testified that he was requested by one PC Moses Kabutu to carry out an autopsy on the body of the deceased, external examination revealed multiple defence wounds on the upper and lower limbs with extensive soft tissue clots, there were multiple small bruises in the lower and upper limbs, internal examination revealed presence of a bruise on the scalp on the front side and there was bleeding onto the left side of the brain. He formed an opinion that the cause of death was the extensive soft tissue injuries and head injury due to blunt trauma. He stated that he also took a blood sample which was handed over to PC Kabutu.
10. PW6, Richard Kimutai Langat a government chemist stated that he received a police exhibit from Moi's bridge police station being a blood sample from the accused, he subjected the sample to gas chromatography and found that there was 42.56 milligrams of alcohol, he wrote a report to that effect on February 20, 2017. He stated that the amount of alcohol was not sufficient to make someone drunk.



11. PW7, Police Constable Moses Kabutu, testified that on November 29, 2016 at about 7.30 am he was directed by the OCS to investigate a case which had been reported by the Kapkures Assistance Chief, the accused had been booked for an act of assault, he had assaulted the deceased whom he found at his home with his wife, in the course of the day they received information that the deceased had died at Ziwa hospital, he visited the crime scene and recovered one pair of sports shoes and a red cap which belonged to the deceased, he also recovered two pieces of a broken stick that had blood stains on it. He produced the items as exhibits and also stated that he took statements of the witnesses and later, he attended the post mortem.
12. The prosecution then closed its case. The parties elected not to make any submissions on whether the accused person had a case to answer.
13. At this stage, the Court is only considering whether the accused has a case to answer. A case to answer was described in the case *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.”
14. The procedure in determining whether an accused has a case to answer 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 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.”
15. The trial Court is however 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, the Court held that:

“...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.”
16. I have considered the evidence on record and the testimonies of the witnesses including the testimony that when the witnesses responded to reports that the deceased had been attacked at the home of the deceased, they indeed found the deceased lying injured at the home of the accused in the presence of the accused and his family. Without delving further into the testimonies, I only state that I find that the accused has a case to answer.
17. He is therefore informed of his rights under Article 50(2)(i)(j)(k) of *the Constitution* and also his rights under Section 306(2) of the *Criminal Procedure Code* to address the Court. Accordingly, he is informed that he has a right to address the Court either personally or by his Advocate or to give evidence on his



own behalf or to make unsworn statement and to call witnesses in his defence. The accused is therefore placed on his defence.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023

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WANANDA J.R. ANURO

JUDGE

