



**Republic v Gaitho (Criminal Case E004 of 2022)
[2025] KEHC 13621 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE E004 OF 2022
CW MEOLI, J
SEPTEMBER 24, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

ROBERT GAITHO ACCUSED

RULING

1. Robert Gaitho, the Accused herein is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The information states that on 18th October, 2018 at Kitengela Town, Kajiado East Sub-County within Kajiado County, he murdered Derrick Shinini.
2. The Accused denied the charges. During the trial, the prosecution called 15 witnesses. The duty of the court at this stage is to determine whether a prima facie case has been established against the Accused. Section 306 (2) of the Criminal Procedure Code provides as follows:

“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.”

3. Briefly, the prosecution case was that on 18th October, 2018, Moses Ndirangu Kibiru (PW3), a resident of Kitengela employed as a carpenter was at his workshop situated along Mount View Road. Five young men including Derrick Shinini, the deceased, were seated on his display bench chewing miraa. Suddenly several police officers arrived and without engaging in any conversation ordered the five men



- to lie down. Four of the young men escaped and only one lay down. The deceased who was among those fleeing the scene was shot and fell. Stating that he knew the Accused as a police officer, he identified him as the one who shot the deceased. At about 6:00pm police collected the body. He stated that he.
4. Hannah Wanjiru Wanjiku (PW4) testified that she lived in Kitengela and that on 18th October, 2018 was at her Kiosk at 4:00pm when the deceased whom she had known for 3 years by the street name Ero, and as a well behaved person, came and sat opposite her kiosk. He was chewing miraa and was soon joined by one Mohammed. That suddenly at about 6:00pm, she heard voices ordering the men to lie down before the sound of gunshots rent the air. She then saw the deceased lying down holding a phone and miraa; he had been shot and the police were guarding the body. She stated that because it was not dark, she was able to identify the people who had ordered the young men to lie down. She identified the Accused among them.
 5. Abdi Abdikadir (PW5) testified that on the material date he was at his water shop along Mount View Road. At around 1:00pm he saw and exchanged greetings with the deceased who said that he had come from KCA College. Later at 6:00pm he heard a loud sound and thought it was caused by an electric fault, but then heard an order by police officers requiring him to lie down but he did not comply. He noted that two people were lying down and later learned that the deceased had been shot. He stated that he knew the three police officers who had given the command to lie down, and among them was the Accused.
 6. Police Constable (PC) Denis Waima Njeru testifying as PW6, stated that in the material period, he was attached to Kitengela Police Station. On the material date, he together with fellow officers, including the Accused responded to intelligence earlier received that an M-Pesa shop situated along Mount view road about to be robbed. The team of officers split into two groups while approaching the scene, where they encountered four men whom he described as suspicious. Upon hearing gunshots, he took cover, and while one suspect, the deceased, was shot dead, three others fled. He stated that a firearm was later recovered from the deceased and that the OCS, IP Koskei, was called to the scene, before the body was removed to the mortuary. He stated that the Accused did not admit to firing the fatal shot.
 7. CIP Joseph Kiprono Koskei (PW7), then Deputy OCS Kitengela Police Station testified that on the material date he received a call from PC Mwai and the Accused who informed him about intelligence that four men were planning to rob M-Pesa shop at Mount view road. And that PCs Mseche (PW9), Waima (PW6) with IP Mwangi (PW8) had joined the two officers to proceed to the scene. Shortly after, having been informed that one suspect had been shot dead by the Accused, he proceeded to the scene and found a body with a gunshot wound to the forehead, lying face down. Having instructed officers to preserve the scene he notified the area OCPD. He said that an unloaded pistol bearing defaced serial numbers was recovered from the deceased, while the Accused's firearm was handed over to the DCI. The body was later escorted to the mortuary in a police vehicle.
 8. IP Peter Mwangi (PW8) attached to Kitengela Police Station in the material period, testified that on 18th June 2018 at 6:40pm he joined several police officers including PC Mwai, PC Wainaina, the Accused and PW9, in response to information received concerning a plot to rob an M-Pesa shop along Mount view Road. The team split into two groups as they approached the suspects, and that while he was armed an AK-47 rifle loaded with 30 bullets, PC Mwai and the Accused each carried pistols, but PW9 and PC Wainaina were not armed.
 9. He further testified that upon being confronted, the suspects fled, as gunshots were fired. One suspect was shot and fell while running. The said suspect was bleeding from the head and appeared dead while the other suspects escaped. That after PW7 came over, the scene was processed, and the body was taken away. A pistol was found on the deceased as the body was being removed and that the team of five



- police officers then present at the scene did not inquire as to who among them had fired the fatal shot. The evidence of P.C. Mseche (PW9) contained a similar narration of the material events, save that he said he heard “gun shots from the other side...and could not tell who fired”. While in his evidence-in-chief he said he did not tell who had fired the shots, during cross-examination, he asserted to have observed the Accused shoot.
10. Alex Mudindi Mwandawiro (PW10) is a firearm examiner attached to the Directorate of Criminal Investigations (DCI) Ballistics Laboratory, with 23 years of experience. He testified that on 20th March 2019, the laboratory received and examined several exhibits under exhibit memo no. 57666, including two pistols, two magazines, and thirteen rounds of ammunition marked as follows. Exhibit A1 (Exh.3) was a Chinese Type 68 pistol, calibre 7.62×25mm. The serial number had been obliterated and could not be restored. Several critical parts of the pistol were missing, namely, the side stock, trigger assembly, returning pin of the firing pin, and back sight — rendering it incapable of being fired. Exhibit A2 (Exh4) was a magazine compatible with A1, in fair condition, with a capacity of 8 rounds of 7.62×25mm ammunition.
 11. As regards Exhibit B1 (Exh. 5), he said it was Ceska CZ pistol manufactured in the Czech Republic, calibre 9×19mm. It was in good mechanical condition, with all components complete and properly assembled, making it capable of being fired and compatible with Exhibit B2 (Exh. 6), a Ceska magazine with a capacity of 16 rounds Exhibit B3 (i–xiii) (Exh. 7 (i) - (xiii) being thirteen rounds of 9×19mm ammunition. Three of these rounds (B3 i–iii) were test-fired successfully in B1, confirming its functionality.
 12. He concluded that both pistols Exh. 3 and 6 are legally classified as firearms under the *Firearms Act*, while the 13 cartridges (Exh.7 i–xiii) are ammunition under the same Act. However, Exh.6 was not in working condition, while B1 was fully functional. He produced his report, dated 4th May 2020 as P. Exh. 8.
 13. Dr. Peter Ndegwa, a pathologist, testified as PW11. The sum total of his evidence was that upon examination of the body of the deceased on 19th October, 2018, he observed that the face and head were blood soaked, and bore an entry gunshot wound 3cm above left ear, exiting at centre of the face with obvious skull fractures. He concluded that the cause of death was due to severe head injuries due to a single gunshot. He completed the post mortem report, which he tendered as P.Exh.1.
 14. PW12 was Dr. Peter Ndegwa, a pathologist who conducted the postmortem examination on the body of the deceased. He noted a gunshot wound with entry at just above the left ear, and exiting at the centre of the face, accompanied by fractures. His opinion was that death as due to severe head injuries due to a single gun sht. His report was produced as Exh. 1
 15. PC Jeremiah Chelimo (PW13) of Kitengela Police Station, produced several records including the arms movement register, the Occurrence Book, and the Duty roster for August–October 2018. The witness highlighted the following entries. The Arms Movement Register (P.Exh. 9) entries of 18.10.2018 showed that a Ceska pistol, serial no. F1507 (Exh.5), was issued to the accused, Robert Gaitho, with 15 rounds of ammunition. It was returned on the same day with 2 rounds missing. A shooting incident in which police were called to a suspected robbery scene where suspects allegedly fired at the officers, and one suspect was killed was recorded in the Occurrence Book on (P.Exh. 10) on 18/10/2018 at 7:20 pm. Whereas entries in the Duty Roster (P.Exh. 11) confirmed that the Accused, PC Gaitho, was on duty during the week ending 20/10/2018.
 16. The final witness was Walters Omondi (PW 15), at the material time an investigator at the Independent Police Oversight Authority (IPOA). His conclusions were that there was no threat to the police officers



involved in the shooting incident or any other person and the shooting of the deceased amounted to an unjustified and excessive use of force in the circumstances. He produced his letter dated 28.11.2018 to the OCS Kitengela, and the response being a signal dated 18.10.2018 as Exh. 12 and 13 and his sketch of the scene as Exh. 14.

17. The court has reviewed the evidence on record. At this stage, all that is required of the court is to consider whether a prima facie case has been made out against the Accused person. In the case of *Wibiro alias Musa V. Republic* (1960) E.A. 184 the Court of Appeal for East Africa defined the term “prima facie case” as follows :-

“By his use of the phrase “prima facie case” the learned judge has left this court in doubt as to his precise meaning. It is a phrase more commonly used at the close of the prosecution’s case than at the end of the whole case at which stage the only question is whether the prosecution has proved its case, on the whole of the evidence, beyond reasonable doubt. The question of what constitutes a prima facie case was dealt with by this court in 1957 in the case of *Ramanlal Trambklal Bhatt V. R.* (1957) EA 332 (E.A.) and the following passage was taken from the judgment of the court at page 334 and p. 335:-

“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 true as WILSON J, said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It 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.” (Emphasis added)

18. Having considered the prosecution evidence in light of the relevant provisions of law and the case law above, the court notes the following. According to PW3 and PW4, on the evening of 18.10.2018, they witnessed the arrival of the police at the scene where five men were chewing miraa, and immediately ordered them to lie down. PW 6,7, 8 and 9 alleged that the ambush was a response to intelligence received concerning an imminent robbery. However, like PW3 and PW4, PW6, PW8 and PW9 stated that while four of the young men escaped upon being confronted, one lay down.
19. It was their testimony that the deceased was among those who fled the scene but was shot, according to PW3 and PW4 at the back of his head while running, as a result of which he fell and died. PW7, PW8 and PW9 claimed that a pistol (Exh3) was thereafter found on the person of the deceased. However, according to PW10, the said pistol though a firearm was not capable of being fired due to the fact that some key components were missing.
20. PW12 confirmed that the cause of death was severe head injuries due to a single gunshot wound. Among the police officers was the Accused person who according to his companions PW6, PW8 and



PW9 was armed with the ceska pistol marked as P.Exh.5, and confirmed by PW10 to be a firearm capable of being fired. According to the Arms Movement Register (P.Exh. 9), this firearm, had on the same date been issued to the Accused together, with 15 rounds of ammunition. It was returned on 19th October 2018 with 2 rounds missing.

21. The court is satisfied, in view of this evidence, that the prosecution has established a prima facie case against the Accused, and will proceed to place him on his defence.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 24TH DAY OF SEPTEMBER 2025.

C.MEOLI

JUDGE

In the presence of:

For the State: Mr. Kilunda

For the Accused: Ms. Wairimu h/b for Mr. Omwenga

Accused: Present

For the Victim Family: Mr. Kibet h/b for Mr. Serpepi

C/ A: Lepatei

