



**Republic v Chemotwo (Criminal Case 5 of 2019)  
[2025] KEHC 14584 (KLR) (15 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14584 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CRIMINAL CASE 5 OF 2019  
RPV WENDOH, J  
OCTOBER 15, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**TOPORENG CHEMOTWO ..... ACCUSED**

**RULING**

1. The accused Toporeng Chemotwo faces a charge of Murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the charge are that on 30/3/2018 at Kamologon Forest, Moino Location, in West Pokot County, with others not before the court murdered PC Erick Mwashumbe.
3. The accused denied the offence and the case proceeded to full trial with the prosecution calling a total of four (4) witnesses.
4. PW1 PC John Irungu Macharia of Kacheliba Police station recalled that between February 2017 to 2019 he was attached at Kamalei Anti-Stock Theft Unit (ASTU); that on 30/3/2018, his in-charge Inspector Gitau informed them that they were proceeding to an operation at Kamologon Forest where the Pokot were said to have stolen goats and sheep from the Marakwets and they were to recover them. They were fifteen (15) Administration Police (AP), fifteen (15) from Kenya Forest Service (KFS), six (6) National Police Reservists (NPR) and five (5) Pokot elders. Police were armed but not the elders. They parked their vehicle and the elders led them into Kamologon Forest where they found stolen animals that were identified by the elders; that they were in a boma-shed. As they led the animals away, they heard gun shots, then they saw people coming towards them shooting at them and they were many. They too opened fire and during the shooting, PC Mwashumbe was hit. PW1 said that at the time the deceased was hit, he was about one (1) metre from him; that he saw the shooter who was about hundred (100) metres away and that the time was about 5.30a.m. to 6.00a.m.; that it was drizzling but he was



able to see the accused because he was wearing night vision glasses that enabled him see well; that since the group attacking them was big, they retreated leaving the animals and deceased. They regrouped after about an hour and after they got reinforcement, they went back to the forest at 2.00p.m. and found the body of the deceased which was beheaded and animals had been taken away.

5. PW1 said that he identified the accused, after he was arrested at Kamelei Market a year later. He did not know the accused before. He recorded his statement after accused's arrest.
6. PW2 PC Moses Mungai Gitau was based at Kamelei AP Specialized Stock Theft Prevention Unit in 2018. He recalled that on 25/4/2018, he was instructed by his in charge that a stock theft suspect had been spotted at Kamelei Market. Assisted by PC Kiprono and KPR who knew him, they arrested accused and took him to the police station.
7. PW3 Chief Inspector Samuel Gitau Njuguna was on 25/3/2018 working as the Deputy OCS of the Administration Police ASTU Camp at Kamelei. He received a report of cattle theft which were said to be held in Kamologon Forest in Moino Area. He sent a spy to the area to establish the truth of the report and on receiving a positive feedback, he assembled forty one (41) officers from the Kenya Forest, Police Reservists from Pokot & Marakwet and AP Officers and on 31/2/2018 at 4.30a.m. they proceeded to the scene in a lorry.
8. They left the lorry at a distance and proceeded to the scene on foot arriving there at 7.00a.m. They found only men with some make
9. shift structures that the men lived in. They found cattle, sheep and goats; that the men walked off on seeing them and that some were armed with AK 47 but they did not attack them. After they disappeared into the bushes, they collected the animals and left for the camp as the forest rangers burnt the make shift houses. They then heard native calls that the Rustlers were going to lay ambush at the bridge. They left the scene and called for reinforcement to enable them cross the bridge. On arrival at the bridge, they found six (6) or more men armed with AK 47 rifles and they opened fire at them. They were engaged in a shoot out for about 45 minutes and they managed to suppress the enemy and they left the bridge. They killed one of the bandits but lost one officer, the deceased who was shot on the head. They then returned to the camp but recovered the body of the deceased later. He said that later, he was able to identify the accused on an identification parade after he was arrested. He said that he had seen the accused at the scene where cattle were recovered in the forest and at the time of attack at the bridge. PW3 also said the accused is a person he had seen at Kamelei before.

PW4 Cpl. Lawrence Kidisia was the Investigating Officer in this

10. case having taken over the matter after the Accused's arrest. A miscellaneous application had been made to the court to enable the police conclude investigations. He got information that accused was a leader of cattle rustlers in the area and had hidden stolen cattle in Kamologon area where the deceased met his death when police went to recover the stolen cattle. After preparing the file and forwarding it to the DPP, it was recommended that the accused be charged with the Offence of Murder.
11. At the close of the Prosecution case, the defence Counsel Ms. Chebet filed submissions whose gist is that the prosecution had not established a prima facie case to warrant accused to be placed on his defence pursuant to section 306 of the Criminal Procedure Code.
12. On the fact of death of the deceased, Counsel submitted that neither PW1 nor PW3 saw Accused kill deceased; that it was not clear whether the deceased died of a gun shot or decapitation and the Doctor was not called as a witness to confirm how deceased met his death.



13. On whether the Accused caused the death, it was Counsel's submission that PW1 did not know the accused before; that the police officers were under attack with shooting and they must have been taking cover and it was not clear how he saw the accused.
14. As regards PW3, although he had claimed to have seen the accused severally before the incident, he never recorded in his statement of 6/4/2018 that he recognized one or some of the assailants; that PW3 purported to describe the accused after his arrest yet; that PW3 took part in a parade but that evidence was not tendered in court;
15. The Prosecution closed their case and the question is whether the prosecution has established a prima facie case against the accused to warrant him defend himself.
16. What is a prima facie case? prima facie is a Latin word defined in Black's Law Dictionary 8<sup>th</sup> Edition as "sufficient to establish a fact or raise a presumption unless disproved or rebutted. "Prima facie case" is defined by the same dictionary as "The establishment of a legally required rebuttable presumption", hearing that it is the establishment of a rebuttable presumption that an accused person is guilty of the offence is charged with. This definition was better
17. explained in the case of Ramanlal Trambaklal Bhatt -V- Republic (1957) EA 332 at 334-335 where the court stated "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 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".
18. The offence of murder is defined in section 203 of the Penal Code as "Any person who with malice aforethought causes death of another person by an unlawful act or omission is guilty of Murder".
19. The three ingredients that need to be established in a charge of Murder are: -
  - (1) Proof of death;
  - (2) Proof that the accused caused the unlawful act or omission that led to the death;
  - (3) Malice aforethought.
20. Proof of death: - In the instant case, PW1 and 3 testified to have been with PC Erick Mwashumbe when he met his death. According to them, he was shot by cattle rustlers, then beheaded. The Prosecution failed to produce the post mortem report that was prepared by the Doctor who conducted the post mortem despite a wait of over five (5) years from 2019 when the Accused was charged upto 2025 when the prosecution closed their case. The person who identified the deceased's body before post mortem also failed to testify. Not even a relative of the said PC Mwashumbe testified to confirm the said death.  
Whether the Accused caused the death: -
21. PW1 and 3 are the only witnesses who were at the scene where the deceased allegedly met his death. However, I find there to be so many glaring discrepancies in their testimonies that I wonder whether they were at the said scene.



22. First PW1 told the court that they were attacked at about 5.30a.m. to 6.00a.m. and he was enabled to see by use of night vision glasses which enable one to see clearly as if it was day time. PW3 on the other hand describes the time of attack as 9.00a.m. which is bright daytime. What time was the attack? The time of attack has a bearing on the issue of identification.
23. PW3 told the court that on arrival at the scene where they recovered the animals it was daylight and there were only men and animals; that the men walked away into the bushes as they watched leaving the animals. PW1 seems not to have witnessed such an incident because he said the men found at the scene where the animals were found are the people who immediately attacked them.
24. According to PW1, they were attacked by a huge group of people and when the deceased was hit, they retreated leaving the animals and deceased to go and regroup. To the contrary PW3 said that they were attacked by about 15 men armed with rifles, they killed one, recovered a rifle, and that they suppressed the enemy. The
25. question is who of these two officers is telling the truth. Were they ever overwhelmed such that they had to flee and come back at 2.00p.m. or they defeated the enemy at once?
26. PW 1 did not know the accused person before but that he saw him during the attack. In his statement to the police, he never disclosed that he would have been able to identify some of the bandits from that huge number he talked about. In my view, since the accused was arrested over a year later, an identification parade should have been done. What PW1 did was dock identification. In the case of Hassan Abdallah Mohammed -V- Republic (2017) eKLR, the court stated “visual identification in criminal cases can cause miscarriage of justice and should be carefully tested.” The court in Wamunga - V- Republic (1989) KLR 424 had this to say; “Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and from possibility of error before it can safely make it the basis of a conviction.”
27. Guided by the above decisions, the circumstances described by PW1, the time being about 5.30a.m. to 6.00a.m. and the fact that the police were under attack by a huge group of people with shooting going on, I doubt that a year later, PW1 would, with certainty claim to have seen the accused at the scene of attack in Kamologon Forest.
28. As regards PW3, he said he saw the accused twice, at the forest where the animals were found and later during the shootout, After arrest a year later. PW3 purported to identify the Accused on an identification parade in the case of Francis Karuiki Njiru & others -V- Republic CRA 6/2001 the court addressed the importance of an identification parade as follow: -
 

“..... the whole essence of an identification parade is to test a witnesses alleged visual identification of a subject during the commission of a crime. If the witness says that apart from visual identification he also identified the suspect by voice, he should be allowed to confirm that.....”
29. First the officer who conducted the parade did not testify and produce the parade form for the court to ascertain from his evidence whether the parade was properly conducted in accordance with Police Standing Orders.
30. PW3 claimed to have seen the Accused in Kamelei area about three (3) times before the accident. If he did know the accused by appearance, then it would have been expected that he would have recorded



that he saw a person in the group of bandits whom he knew by appearance in his first statement but he never did. In the Njiru case (Supra) the court said

“.... It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so., the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the Prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omissions of evidence of this nature at investigations stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal, this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.” See Julius Kalewa Mulinge -V- Republic CRA.3/2005 (2006) KECA.

31. The scene of crime was in Kamologon Forest. The court was not told whether the witnesses had a clear view of the assailants all the time; PW3 told the court that there was a lot of running about at the scene with people trying to take cover as well as see the enemy. It was important that PW3 should have recorded in his first statement to police that he was able to recognize some of the assailants which he did not do. He could not purport to identify the accused a year later in the dock.
32. Further, having considered the glaring contradictions in the evidence of PW1 and 3 as to what transpired at the scene of the attack, the identity of the accused cannot be without error.
33. The accused was arrested as a suspect of stock theft. He may be the one. However, I find that the prosecution evidence on the identity of the culprit is too weak to warrant the Accused to defend himself and he is acquitted under section 306 (1) of the Criminal Procedure Code for want of sufficient evidence.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAPENGURIA THIS 15TH DAY OF OCTOBER, 2025.**

**R. WENDOH**

**JUDGE**

In the Presence of:-

Mr. Majale – Prosecution Counsel

Ms. Chebet for accused

Accused – present

Juma/ Hellen Court Assistants

