



**Republic v Mogaka (Criminal Case 37 of 2019)
[2025] KEHC 14765 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 37 OF 2019
JRA WANANDA, J
OCTOBER 3, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

ABEL MOGAKA ACCUSED

RULING

1. The accused person, said to be an Advocate of the High Court, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 18/05/2019 at Annex area in Eldoret South sub-County, within Uasin Gishu County, he murdered one Calvins Ngaira Musachi, said to have been a fellow Advocate.
2. The accused was initially represented by a battery of lawyers but currently, it is Mr. Miyianda who has been appearing as his Counsel, while the Prosecution is also currently led by Ms. Brenda Oduor, assisted by Mr. Okaka. Mr. Wasilwa is watching brief for the family of the deceased, although also initially several Lawyers did so alongside him.
3. The accused took plea on 11/06/2019 before H. Omondi J (as she then was). He pleaded not guilty and was eventually granted bond on 26/06/2019, pending trial, which trial then commenced on 22/10/2019 before the same Judge who proceeded to take the evidence of PW1-PW3 up to 12/05/2021. Upon the elevation of H. Omondi J to the Court of Appeal, I took over the matter as from 23/05/2023 and proceeded to take the testimony of all the remaining Prosecution witnesses PW4-PW13, between 6/12/2023 and 11/06/2025. Needless to state, before I took over the matter, directions under Section 200(3) of the Civil Procedure Rules were taken, whereof the defence, with the concurrence of the Prosecution, elected to proceed with the case before me from where it stopped.
4. PW1 was Edith Chebet Jepkemoi, who testified on 22/10/2019. She described herself as a friend of the deceased and a college student at the Moi University. She testified on how she received missed calls and



text messages from the deceased in the morning of 18/05/2019 asking her to join him at Annex area, which she did at about 2.00 pm, and found that it was the home of one Roy, a friend of the deceased. She described how she found a group of about 15 men and women making merry in the house, how she came to know the accused in the course of the afternoon, when he woke up from sleep, and who was later joined by his two cousins. She narrated how however later in the day, about 5.00-6.00 pm, an altercation arose between the accused and the deceased in respect to consumption of some whisky alcohol which apparently, it is the deceased who had purchased or contributed to, and which he felt the deceased and his said cousins were wasting, how the deceased broke a glass containing alcohol on the ground, some of which splashed on the accused, how the accused, in response, hurled his own glass at the face of the deceased thus also splashing him with alcohol, upon which glass broke and rolled outside the back door, and which altercation then turned a fight, which extended out of the house through the back door. She narrated further how the deceased was overpowered by the deceased, how when the fight extended outside, the accused picked up the broken glass and stabbed the deceased with it on the left side of the neck, and how the accused picked the glass and threw it away towards a shamba. She testified that upon the stabbing, the deceased held his neck and remarked to the accused that “thank you, let us meet in court on Monday for assault”. She further narrated how the accused, too, suffered cut wounds in the hand from the same glass, how the deceased then began to profusely bleed from the neck with high pressure, and how he was eventually rushed to the Mediheal Hospital accompanied by among others, the two cousins of the accused and herself. She then identified the accused seated in Court, and also stated that she is the one who informed the father of the deceased of the incident after the deceased gave her the father’s number when they were in hospital and asked her to phone and inform him about the matter. She disclosed that she also later saw the accused at the same hospital.

5. PW2 was Sila Kiplating who also testified on 22/10/2019. He stated that he was the caretaker of the 3-storeyed “Sirtum Apartments” where the house occupied by the said “Roy”, in which the incident occurred is situated, and that the house is located on the ground floor. He testified that on 18/05/2019 while in the course of his duties, he heard noises and commotion at about 6.00 pm and when he went to check, he found 2 men whom he did not know fighting near the gate, and whom he learnt had come from Roy’s house. He described how the fighting pair were separated but one returned, picked a broken glass and stabbed the other on the left side of the neck, and that the one who stabbed the other also suffered a cut in the hand caused by the same glass. He, too, then identified the accused seated in Court. In cross-examination, he stated that the group of people had been in Roy’s house since 17/05/2019 and were drinking alcohol, that the fighting pair were also both drunk during the fight, and that there was CCTV cameras installed in the compound.
6. PW3 was Roy Wekesa, who testified on 12/05/2019. He confirmed that he was the tenant/occupant of the house where the incident occurred, and stated that he used to live in Eldoret at the Moi University Annex School of Law, that the deceased was one of his best friends, having known each other since school, and the accused, too, was his friend. He confirmed that on 18/05/2019, he was hosting a group of friends for entertainment, among them the deceased and the accused, that the accused came over at around 11.00 am then left but returned at around 3.00 pm, and since the accused was to travel to Kisii, he (PW3) later handed the accused a bottle of whisky “to have on his way”. He stated that in the course of the afternoon, PW1 came running and told him that the accused and the deceased were fighting outside, upon which he rushed there (at the door-step of the house) and managed to separate them, that he noticed that the deceased was holding a bottle of whisky which PW3 had given to the accused, while the accused was holding a glass containing liquor, that the pair were still angrily exchanging verbal words, and in the process, the accused poured the liquor on the deceased and the pair resumed the fighting, which fight extended outside the gate, that as they were being separated, suddenly, the accused hit the deceased with the glass he was holding on the left side of the neck. He testified that upon being



hit, the deceased held his neck and remarked to the accused that “you have hit me, tomorrow let’s meet in court, this is assault”, and narrated how the bleeding increased in pressure and became profuse when the deceased removed his hand from the neck, how he was among the people who rushed the deceased to hospital by a vehicle driven by one of the cousins of the accused, but the deceased later succumbed, and that 6 people, including himself and the accused were arrested and detained by police for investigations. He also stated that they were more than 20 people during the merry-making in his house. He then identified several photographs of the area, including the Apartment, several clothing apparel, and pieces of the broken glass. In cross-examination, he testified that the group of friends had been in his house for the entertainment since 16/05/2019 and there was drinking of alcohol

7. PW4 was Chief Inspector Abel Onyapidi formerly attached to the Eldoret DCI as a Scene of Crime Forensic Officer, who testified on 6/12/2023. He stated that, upon instructions from the Investigating Officer Sergeant Sophia, he attended the post-mortem exercise performed on the deceased at Moi Teaching & Referral Hospital (MTRH), during which he noted that the deceased had a cut wound on the left side of the neck, and he also took photographs thereof. He testified further that he also visited the scene where the incident occurred, which visit he made on 28/05/2019, that he recreated and/or reconstructed the scene, and also took photographs thereof. He stated that he did not however find much evidence at the scene, not even the assault weapon or blood stains or signs of struggle, as the scene had by then been tampered with since the house had since been swept or mopped or renovated, or even a new tenant had moved in. He then produced the photographs.
8. PW5 was Hesbon Ngaira Musachi, who also testified on 6/12/2023. He stated that he is the father of the deceased who was his only son and who had practiced as a Lawyer for only about 3 months before his death. He then narrated how on 18/05/2019 at about 6.30 pm while at home in Kitale, he received a phone call from an unknown number informing him that the deceased had been rushed to hospital after he was stabbed by someone by the name “Mogaka”, that he again received another call from someone who identified himself as ‘Roy” who repeated the same message, and informed him that he was required to go the hospital to give consent for the deceased to undergo surgery. He also narrated how he told Roy to give the consent on his behalf, how he quickly travelled to Eldoret with his wife to the hospital where he met the two callers and was informed that the deceased was in the theatre, and how the deceased succumbed 2 days later on 22/05/2019 around midnight. He also stated that he attended the post-mortem where he noted a cut wound on the left neck of the deceased. He testified that the accused was pointed out to him at the hospital where he was also present.
9. PW6 was Dr. Erick Chesoni, the Pathologist from Moi Teaching & Referral Hospital (MTRH) who also testified on 6/12/2023. He stated that he noted 3 laceration injuries measuring 2cm, 3cm and 4cm, respectively, on the left neck of the deceased, bleeding beneath the soft tissue of the neck, injury to the neck carotid artery that supplies blood to the head, injury on the jugular blood vessel, the vein that supplies blood to the head, that the lungs were congested and filled with blood, and the brain was swollen with a resultant infraction. According to him, then cause of death was pulmonary and brain oedema due to brain infraction due to loss of blood circulation to the brain due to the carotid stab wound. He then produced the post-mortem report. In cross-examination, he stated that he could not determine the weapon used as it is not within his realm of practice, but that it was a sharp object.
10. PW7 was Vivian Wanjiku, who also testified on 6/12/2023. She stated that she was also present at the “house party” at the residence of PW3 on 18/05/2019 where she arrived in the afternoon and they had food and drinking when at about 5.00 pm, she heard a commotion outside and heard a sound of a glass breaking. She stated that when she went to check, she saw the accused and the deceased fighting within the compound, that she did know the accused but knew the deceased, and that Roy was trying to separate them. She testified that she noticed that the deceased was bleeding from the left side of the



neck but she did not know what caused the bleeding, and narrated how the deceased was given first aid, and how she ran and fetched a towel which they used to cover the wound on the deceased's neck to try and control the bleeding. She testified further that she saw pieces of broken drinking glass on the floor, and that the deceased was then rushed to hospital. She therefore stated that she did not know the cause of the fight. In cross-examination, she stated that the party had proceeded for 3 days, from 16/05/2019 to 18/05/2019 when the incident occurred.

11. PW8 was Kelvin Ogembo Julius, who, too, testified on 6/12/2023, and stated that he was also present at the “party” at PW3’s residence on 18/05/2019. He, too, stated that at around 5.00 pm, he heard PW1 screaming from outside as she ran towards the house calling out for help, that when he went to check, he saw the deceased holding the left side of his neck from where he was bleeding, while the accused was standing on the opposite side. He stated that at that point, he did not know what had caused the injury suffered by the deceased, and narrated how they quickly arranged to rush the deceased to hospital. In cross-examination, he admitted that he and the deceased had on the day before also had a scuffle of their own as they were drunk, but which they sorted.
12. PW9 was Polycarp Lutta Kweyu Ogembo Julius, an analyst from the Government Chemist at Kisumu, who testified on 13/06/2023. He stated that he received 5 samples from the Investigating Officer, Sergeant Sophia Ibrahim on 4/06/2019, namely, pieces of broken glass, one green and one clear in colour, pair of slippers, a t-shirt with suspected blood stains, and blood samples from both the accused and the deceased, in respect to which he was required to carry out DNA analysis to determine genetic relationship. He testified that his conclusion was that the DNA profiles generated from the blood stains on the items matched that of the deceased. He then produced the Report dated 20/11/2019.
13. PW10 was Jane Nabututu Waya, also an analyst from the Government Chemist and who also testified on 6/12/2023. She, too, stated that she received samples from the Investigating Officer, Sergeant Sophia Ibrahim on 4/06/2019, namely, a plastic kidney in a container and a syringe containing blood, in respect to which she was requested to ascertain whether there was any poison in the samples. She testified that after conducting the analysis, she did not find any the presence of any poisonous substances therein. She then produced her Report dated 4/07/2019.
14. PW11 was Emily Cherop, the owner of the “Sirtui Apartment” where the incident occurred and who similarly testified on 6/12/2023. She confirmed that Roy Wekesa (PW3) was her tenant in a 2-bedroom house, No. 2, and that the Apartment had 21 houses. She stated that PW3 later vacated the house upon his demand, about 2 weeks after the incident. She testified that she lived nearby and narrated how on 18/05/2019, her caretaker, PW2, phoned and asked her to rush to the Apartment because some young people had fought and injured each other, how she rushed to the scene and found that the injured person had already been rushed to hospital, how she saw a lot of blood around the parking area and behind the house, and how she later heard that the injured person had died. She testified that she had installed CCTV around the Apartment, which the officers from Kiambaa police station, and later, also DCI officers, respectively, came and retrieved.
15. PW12 was Chief Inspector Daniel Kieni, from the Cybercrime and Digital Forensics Unit at the DCI Headquarters in Nairobi. He had attended Court after “a bout of push-and-shove” and failure to honour Summons, upon which I issued a warrant of arrest. When he eventually showed up on 25/09/2024 to explain the whereabouts of the CCTV footage which was of interest in the case, he stated that he visited the scene (Sirtui Apartment) on 30/05/2019, that they had received footage from a Digital Video Recorder (DVR) which captured CCTV footage of the Apartment for the date of 18/05/2019 from 4 cameras, that he personally retrieved the footage in the company of the Investigating Officer, Sophia Ibrahim, to whom he handed over a copy thereof in a CD, and took a back-up back to the headquarters. He testified that they also took photographs of the house at different



angles, they also established that the time of occurrence of the incident was between 1708 hours to 1715 pm, and that he also made a Report. He then stated it was later discovered that the DVD that he had handed over to the Investigating Officer could not play and the copy he remained with was not immediately traceable as it may have been misplaced during the process of the Unit's relocation from the old laboratory to a new one. He stated that he therefore looked for a software known as Video Investigating Portable (VIP) that could assist to scan for the footage through the drives, and which he had finally found but required about 3 months to complete the scanning. He testified that he had also requested PW11 (the Apartment landlady) for the copy of the footage but who had informed him that the copy was with her husband's laptop abroad. He was then stood down to give him time to conclude the footage. Since however, PW11 had only attended Court to explain the whereabouts of the CCTV footage, and had not been formally called as witness, I ordered, after the Counsels argued over the issue, that although what he stated was not formal testimony, since the same is on record, the parties would be at liberty to refer to it.

16. When PW12 returned on 26/02/2025, Mr. Miyenda confirmed that he had now been supplied with a copy of the CCTV footage. PW12 also confirmed that he had since managed to retrieve the footage and had it in Court, and he had identified 13 clips/files which showed the incident including the stabbing of the deceased by the accused, and the aftermath, and which he intended to produce. He then played the 13 clips in Court, which he then produced by way of a CD, together with the consent to search digital media, request for digital forensic expert, report, and the certificate. According to his observation of the clip, the duo is initially seen talking to each other cordially, then later, the accused is seen holding a something in his hand during the fight, that however, none of the intended kicks by the deceased landed on the deceased, and that the duo had been separated and the deceased was walking away when the accused hit him on the left side of the neck. He also observed that a lady is seen taking photographs of something on the ground at the spot where the stabbing occurred, which according to PW12 must have been the murder weapon. He agreed that he would not know what transpired inside the house since the footage only captured the happenings that occurred outside. He however agreed that the footage paints the deceased as the initial aggressor. In cross-examination, he stated that the entire clip is about 2 hours between 1600-1800 hours but what he had produced and played in Court was much less in duration since they were only 13 clips, which he had identified as relevant to this case. He also agreed that what the accused is seen holding in his right hand is not fully visible, and thus not easily identifiable. He also agreed that at 17:08:24, just before the stabbing of the deceased, a third person holding a rungu is seen hitting or prodding or poking the deceased from the back with the rungu. He insisted that the accused was, in his right hand, holding something which he used to hit or stab the deceased on the neck, and also that there was no reason why the accused followed the deceased to stab him after they had already been separated and while the deceased was walking away.
17. At this point, upon Application by the Prosecution, I allowed the recalling of PW1 to return and comment on the incident captured in the CCTV footage as the footage emerged after she had already testified.
18. Upon her return on 9/04/2025, PW1, Edith Chebet, confirmed that she is the lady captured in the CCTV footage taking photographs with her mobile phone of something on the ground at the spot where the alleged glass stabbing occurred. She reiterated her earlier testimony that the deceased and the accused engaged into the fight after disagreeing over the accused's act of dishing out whisky to the accused's two cousins yet it is the deceased who had purchased the same or contributed in doing so. She also testified that the accused had been holding a glass (clear in colour) containing alcohol, and the fight began when the accused poured and/or splashed the alcohol on the deceased's face. She stated that the glass fell down on the floor and broke then rolled towards the gate, that the accused picked it up and went with it outside as the duo continued with the confrontation. She then basically reiterated



the matters she had stated in her earlier testimony. Regarding her taking of the photographs, she stated that she returned to do so after some time as she realized that somebody might want to know how the incident occurred. In cross-examination, she stated that the CCTV footage having commenced in respect to happenings outside the entrance, could not have captured the part where the accused picked the broken glass because he was still inside by then. She then stated that she no longer has the photograph nor the same phone, and that the police never asked for it.

19. PW13 was Inspector Sophia Ibrahim Hassan, the Investigating Officer from the DCI County Headquarters at Uasin Gishu. She stated that she was assigned the case after the deceased succumbed since it then converted from a case of serious assault to one of murder, and that she thus recorded fresh statements separate from the initial statements recorded by officers from the Kiambaa Police Station. She then basically reiterated the matters stated by the earlier witnesses, which, according to her, she established in the course of her investigations. She also confirmed that at the post-mortem, she collected body samples for DNA and toxicology and took them to the Government Chemist. She also confirmed that she accompanied officers from the DCI Forensic Laboratory for retrieval of the CCTV footage which was done in the presence of the owner of the “Sirtui Apartments”. She also confirmed that she accompanied the accused to MTRH for taking of his own samples which she also then took to the Government Chemist. She further stated that she made a copy of her file and sent it to the Director of Public Prosecutions (DPP) for advice, who after reviewing it, gave consent to prosecute the accused. She also testified that she established that the accused and the deceased were not known to each other, but were both mutual friends of the host, PW3, Roy Wekesa. She then produced several exhibits earlier marked for identification. In cross-examination, she stated that processing of the footage was done at the DCI Headquarters in Nairobi which process she did not attend, and after which the same was sent to her via her office’s official email, although she could not recall the email address it was sent from. In cross-examination, she stated that she had not seen the CCTV footage by the time she recorded the statements. Regarding the broken glasses collected from the scene, she stated that by its very nature, broken glass is not capable of being so dusted for fingerprints. She then denied that the footage could have been edited.
20. At this point, the Prosecution closed its case upon which which the Court was called upon to determine whether a case to answer had been established against the accused. Both Prosecution and the defence opted not to file or present any written Submissions on the issue.

Determination

21. What this Court is now obligated to do is to determine, at this stage, whether the Prosecution, based on the evidence adduced by the witnesses, has established a prima facie case to warrant the accused person being put to his defence to answer to the charge. This is in line with Section 306(1) and (2) of the Criminal Procedure Code which requires the Court, after closure of the Prosecution case, to make such determination. The Section provides as follows:
- (1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
 - (2) 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.

22. At this stage therefore, the prosecution is required to only establish the existence of a prima facie case, which means the establishment of a rebuttable presumption that an accused person is guilty of the offence he is charged with. It is about whether the Prosecution has presented sufficient legal or factual evidence that supports a potential conviction. A case to answer 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.”

23. The procedure in determining whether an accused has a case to answer was also highlighted by Prof. J.B Ojwang J(as he then was) in the case of *Republic v Samuel Karanja Kiria* (2009) eKLR, in which he stated as follows:

“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.”

24. As observed above, the trial Court is therefore 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, E. Trevelyan J in *Festo Wandera Mukando v Republic* [1980] KLR 103, 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.”

25. It is also the position that for the offence of murder to be proved, the prosecution is required to establish proof of death of the deceased and the cause thereof, proof of an unlawful act or omission on the part of the accused resulting in the death of the deceased, and malice aforethought on the part of the accused. In this case, that the deceased died, and the cause of death are not in dispute.

26. Regarding the alleged events leading to the death, the evidence of the Prosecution witnesses, on prima facie basis, to an acceptable extent places the accused person at the scene of crime, offers some narration of the manner in which the incident occurred and the cause, and also basically, again, on prima facie basis, implicates the accused in the commission of the act that caused the injury suffered by the deceased, and which eventually led to his death.



27. At this stage of the proceedings, the standard of proof is not yet one of proof beyond any reasonable doubt. The Supreme Court of Canada in *R v Morabito* [1949] SCR 172 drew attention to this fact when it held that:

“When assessing the prosecution case in consequence of no case submissions, the question of reasonable doubt does not arise at that stage.”

28. What is therefore required is evidence that would prima facie establish the possible guilt of the accused and call upon him to be heard before final determination. I must, however, caution myself that at this stage, I should not make definitive findings should I conclude that the accused has a case to answer.

29. With the above caution in mind, I will only state that considering the testimonies of the witnesses and without delving into the depths of their testimonies, and although the defence Counsel raised pertinent and weighty issues during cross-examination of the Prosecution witnesses, I am satisfied that the Prosecution has established a prima facie case against the accused person to warrant his being put or placed on his defence. As aforesaid, a prima facie case does not at all mean that the accused has been found guilty, it merely means that there is some evidence of his connection with the circumstances in which the death occurred. I therefore find that the accused – Abel Mogaka - has a case to answer and he is accordingly put to, or placed on, his defence.

30. Pursuant to my findings 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, 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 3RD DAY OF OCTOBER 2025.

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WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

The Accused (appearing virtually)

Mr. Miyenda for the Accused

Ms. Oduor and Ms. Muriithi for the State

Mr. Wasilwa and Mr. Barmao, watching brief for the family of the victim

C/A: Brian Kimathi

