

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. E022 OF 2023

REPUBLIC.....PROSECUTION
VERSUS
PETER EBONGON.....ACCUSED

RULING

1. This is a Ruling on whether the accused person has a case to answer.
2. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on 22/09/2023 at Kapsoya Stage in Eldoret Township in Ainabkoi sub-County within Uasin Gishu County, he murdered one **Joseph Nyariki Onchiri**.
3. The accused, who is represented by **Ms. Mercy Ruto Advocate**, took plea before me on 11/10/2023, denied the charge and a plea of not guilty was entered. The trial then commenced on 14/02/2024, in which the Prosecution called 6 witnesses, and closed its case on 15/10/2025.
4. **PW 1** was **Joel Chepsergon**. Led by **Prosecution Counsel Ms. Limo**, he stated that he and the deceased were both security guards at separate premises near each other, and the accused was also a security officer in premises located about 200 metres away. He testified that he was at his place of work on 22/09/2023 having reported at around 6.00 pm, when at around midnight, the deceased came with a lady by the name **Sussy**, whom he (**PW1**) used to see in the area, who told him (**PW1**) that the deceased was experiencing pains in the head as he had been assaulted by some people, although the deceased himself did not talk to him (**PW1**). He stated that he then went to buy some medicine for the deceased but on returning, he found the deceased had deteriorated to the extent that he was not even able to take the medicine. He testified that he then went and called the caretaker of the premises, **PW2**, who then took the deceased to hospital, and that **Sussy** told him (**PW1**) that the deceased had been assaulted by another security officer. He stated that after 1 day, he heard that the deceased had died, and **PW2** told him that the deceased had been assaulted by “*huyo soilder wa hiyo upande ingine*” (*the security guard for the other side*). He then confirmed that he had, in his statement, stated that when the deceased and **Sussy** came over, and **Sussy** told him that the deceased had been assaulted by the other security officer, he and the deceased (without **Sussy**) went to where the accused was, and asked him why he had assaulted the deceased, and that the accused did not say anything relevant, and they thus went back, and it is after **Eldoret High Court Criminal Case No. E022 of 2023**

this that he (**PW1**) went to buy medicine for the deceased. He reiterated and confirmed this account as correct. He also clarified that when he went and asked the accused why he had assaulted the deceased, the accused told him that the deceased had insulted him. Under cross-examination by **Ms. Ruto**, he stated that the place they were guarding was near the stage to Kapsoya. Regarding **Sussy**, he stated that she was a resident around there, and she had pointed out to him the spot where the accused was guarding when she referred to the security officer who had assaulted the deceased.

5. **PW2** was **Joel Kiprono Kongekuk**, who stated that he was a caretaker in the building where the deceased used to guard, and that **PW1** and the accused were also security guards at respective nearby premises. He testified that the accused used to be referred to as “**Turkana**”, and that on 23/09/2023, **PW1** woke him up at around 2.30 am and told him that the deceased had been assaulted by the security officer known by the name “**Turkana**”. He testified that he then woke up and went to where the deceased was lying down about 10 metres, the deceased was not speaking and was vomiting, and that he (**PW2**) procured a motorcycle with which he took the deceased to hospital where the deceased was admitted. He stated that he left the hospital at around 3.00 pm after relatives of the deceased had arrived, and that on the next day, he was informed by one of the relatives that the deceased had died. In cross-examination, he stated that he went to the police station and reported the matter, the police told him to go and check whether the accused was at his place of work, which he did, but he did not find the accused. He testified that one **Robert** then took him to where the accused resided, where they found the accused sleeping, and they called the police, who came and arrested the accused. In cross-examination, he stated that the deceased had a swelling on the head. In re-examination, he stated that when he was told that it is the security officer by the name “**Turkana**” who had assaulted the deceased, he immediately understood that it was the accused who was being referred to as he was the only security officer in the area from the Turkana community.

6. **PW3** was **Dr. Kibet Keittany**, a Pathologist at the **Moi Teaching and Referral Hospital (MTRH)**. Led by **Mr. Okaka**, he stated he performed a post-mortem on the body of the deceased, aged 48 years, on 2/10/2023. He testified that, externally, the deceased had a contusion on his left forearm, a sign of a defence injury, and he bore evidence of having undergone a neuro-surgical procedure on the left side of the head where he had a 30 cm surgical incision. He stated that on opening the skull, he noted 5 drilled holes within the skull bone, and a fracture of the skull on the left side, and on examining the brain, he noted the presence of intracerebral hematoma on the left side. He then described the cause of death

as “*severe head injuries caused by a blunt trauma as a result of assault*”, and produced the post mortem. In cross-examination, he stated that he arrived at the opinion of assault because of the defence injury on the forearm, and also because of concentration of the injuries on only one side of the head, and the extent thereof.

7. **PW4** was **Erick Onsongo**. He testified that the deceased was his father and he lives in Nakuru, that he received a phone call on 23/09/2023 informing him that the deceased was admitted at the **MTRH**, he travelled to Eldoret on the same day and rushed to **MTRH** hospital where he found the deceased in the emergency room, in critical condition, and that he died on the same night. He stated that he attended the post mortem exercise conducted on 2/10/2023.

8. **PW5** was **Chief Inspector Michael Lemayan**, attached at the Ainabkoi sub-County Police office. He testified that while in the office on 24/09/2023, one **Jackson Ololtelel** and another person came to the office and reported that their security guard, **Joseph Nyariki**, who was working around Barnatai area had been killed. He stated that **Mr. Omultelel** told him that he worked with **Lexus Security Limited** and that the guard was assaulted on 22/09/2023 while on duty at night and was taken to the **MTRH** where he died on 24/09/2023. He stated that he also learnt from the reports that the assailant was also a security guard working for **Joycord Security** within the same Barnatai area and his name was **Peter Ebongon**. He testified that he visited the scene on the same date and established that the incident had indeed occurred. He stated that, together with other officers, he returned to the scene in the evening after receiving information that the accused had reported to work and was in full uniform, but upon reaching there, they learnt that the accused had fled after learning that the deceased had died. He testified that upon inquiry, they learnt of the location of the accused person’s residence where they went on the same night, found him and arrested him. He stated that the accused had already removed his uniform and changed clothes and they learnt that he was contemplating fleeing to Turkana. He testified that when they interviewed the accused, he admitted that he had a fight with the deceased after the deceased attacked him, and claimed that he had even reported at the Eldoret Police Station the allegation of his being assaulted. **PW5** stated that the accused told them that he had hit the deceased on the head with a stick, and he (accused) then took **PW5** and other officers to their office and showed them the stick, which was broken. **PW4** stated that he then handed over the stick and the uniform to the Investigating Officer, **Corporal Chelimo**, and testified that he did not find any blood stains on the stick which was broken on the upper part. He also confirmed that he established that the accused had indeed reported to the Police Station, the allegation of his being assaulted,

which report he made on 24/09/2023, the same date he was arrested, and that in the report the accused had stated that he had been assaulted on 22/09/2023 at his place of work around midnight. In cross-examination, regarding his testimony that the deceased had planned to flee at the time when they arrested him, he stated that his sources of the information was from police intelligence, and was thus privileged, and he reiterated that the accused fled from his place of work to his house. He agreed that Mr. **Omutel** did not refer to the accused by name but simply referred to him as the “**Turkana**” guard. He also reiterated that the accused himself told him that the stick broke when he hit the deceased on the head.

9. **PW6** was **Corporal Joshua Chelimo**, the Investigating Officer in this case, and previously attached to the Directorate of Criminal Investigations (**DCI**), Keiyo. He testified that he received a phone call on 24/09/2023 from his superior at around 10.am informing him that there was an incident of murder near Bandaptai in Eldoret town, and that his superior, who had already arrested the accused, briefed him in the morning about the incident. He then stated that he obtained an order from the Court allowing him to detain the accused in custody for 10 days, during which time he recorded statements from witnesses. He testified that he learnt that the accused and the deceased were both watchmen in the same area but working for different companies, and that they had an altercation during which the accused hit the deceased with a stick. He testified further that a lady by the name **Susan**, who was passing by told him that she found the deceased sitting down touching the part of his head which had been hit, and that another watchman, **PW1**, and **Susan** assisted the deceased, through a caretaker, to take the deceased to hospital but the deceased died on 24/09/2023. He stated that the accused, on the same date, reported at the Central Police Station that somebody had gone to his place of work armed with a stick and after an altercation, he dispossessed the person of the stick and hit him on the head. **PW6** stated that he attended the post mortem exercise conducted on 2/10/2023 during which he noted that the deceased had an injury on the head. He also stated that the arresting officer handed over to him a walking stick recovered from the residence of the accused when he was arrested, and he agreed that the walking stick did not have any blood stains. He then produced it. In cross-examination, he agreed that he did not produce the police Occurrence Book (OB), that no forensic investigations was conducted on the walking stick, and that the stick was not recovered at the scene of crime but from the residence of the accused. He also stated that the accused stated that the deceased attacked him first before he dispossessed him of the stick. He however agreed that there were no eye-witnesses.

10. At the close of the Prosecution case, I gave the parties leave to file written Submissions on the issue of “case to answer” but **Prosecution Counsel Ms. Muriithi** chose not to file any. On her part, **Ms. Ruto** filed the Submissions dated 12/11/2025.

11. In her Submissions, **Ms. Ruto**, after recounting the testimony of the Prosecution witnesses, urged that no direct, clear and sure link has been made between the accused and the alleged crime, as all that is before the Court is weak circumstantial evidence, uncorroborated and conflicting testimonies and mere hearsay evidence. She urged that the two police officers say very different things regarding recovery of the walking stick alleged to be the murder weapon, and pointed out that that no forensic examination was conducted thereon. She termed it bizarre that the arresting officer decided to open a case and arrest the accused on account of two people who were only reporting what they were told by others, one of whom was not even called to testify, as was the alleged **Suzzy** referred to by some witnesses. She further submitted that no *mens rea* or *actus reus* has been established as there is nothing to show that the accused intended to harm the deceased, nor as any act been proven to have been committed by the accused that directly caused the death of the deceased. She termed the circumstantial evidence in the case as insufficient, and pointed out that while one officer testified that the stick was recovered from the home of the deceased, the other stated that it was found in in an office.

Determination

12. Under **Section 306** of the **Criminal Procedure Code**, this Court is obligated, upon close of the prosecution’s case, to rule on whether a case to answer has been established against the accused. **Section 306(1)** and **(2)** provide 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 recording 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 on his own behalf or make unsworn statement and to call witnesses in his defence”

13. In view thereof, at this juncture, what the Court is called upon to do is simply to determine whether, at this stage, based on the evidence adduced by the 6 witnesses, the Prosecution has established a *prima facie* case to warrant the accused to be placed on his defence to answer to the charge of murder. Needless to state, the burden of proof to establish the case against the accused lies on the Prosecution throughout the trial. At no point does that burden shift to the accused reason being that an accused person's constitutionally guaranteed rights include the right to remain silent, the right to adduce and challenge evidence, and the right not to give any incriminating evidence. However, at this stage, the prosecution is not expected to have proved the case beyond reasonable doubt. The measure is for a *prima facie* case to be established.

14. At this stage therefore, the Court is only considering whether the accused person has “*a case to answer*”, which term was aptly 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.”

15. 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.”

16. 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**, **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, and 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.”

17. Upon considering the evidence on record and testimonies of the witnesses as set out above, and without delving deeply into the merits thereof, all I would state for now is that there is testimony believably establishing the death and cause thereof. There is also testimony allegedly placing the accused at the scene of crime at the material time, and also alleged witness’ accounts of the chain of events before and after the alleged assault committed against the deceased, including the possible altercation between the deceased and the accused, although there is no eye-witness to the assault itself. There is also testimony alleging that the either the walking stick used to hit the deceased was recovered from the home of the deceased, or that the accused led the police to where it was, and that the accused admitted to hitting the deceased on the head with the stick. The evidence on record may therefore be deemed to implicate the accused person in the commission of the assault. I will therefore only state my finding to be that the Prosecution has established that the accused has a case to answer. Needless to state, this does not at all indicate that he has been found guilty, it merely means that there is some evidence of his possible connection with the circumstances in which the death occurred, which calls upon him to be afforded an opportunity to give his side of the story, should he wish to do so.

18. The accused is therefore put on his defence.

19. 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, 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 30TH DAY OF JANUARY 2026

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WANANDA JOHN R. ANURO

Eldoret High Court Criminal Case No. E022 of 2023

JUDGE

Delivered in the presence of:

Accused (present physically in open Court)

Ms. Muriithi for the State

Ms. Kemboi h/b for Ms. Wanjiku Karuga for the Accused

C/A: Brian Kimathi