

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ITEN
CRIMINAL CASE NO. E040 OF 2023

(FORMERLY ELDORET HIGH COURT CRIMINAL APPEAL NO. 11 OF 2015)

REPUBLICPROSECUTOR

VERSUS

CORNELIUS KIPKOECH KIBET.....1ST ACCUSED
ALFRED KIPKOECH.....2ND ACCUSED
KENNETH KIPCHUMBA KIPROP.....3RD ACCUSED

RULING ON CASE TO ANSWER

1. The accused persons are 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 the night of 27th and 28th December 2014 at Mutei location in Keiyo North sub-County, within Elgeyo Marakwet County, they jointly murdered one **Kenneth Kiptoo Kipchumba**.
2. **Mr. Oburu Advocate** represents the 1st and 2nd accused, while **Mr. Omboto** represents the 3rd accused. The accused persons were initially charged separately but the 3 cases were subsequently consolidated, and the accused all pleaded not guilty. The case then proceeded to trial wherein the Prosecution called 9 witnesses. **PW1** and **PW2** testified before **H. Omondi J**, upon whose elevation to the Court of Appeal, the matter was taken over by **E. Ogola J** who then took the evidence of **PW3** and **PW4**. Upon **Ogola J's** transfer, I took over the case and **PW 5-PW9** therefore testified before me. The Prosecution then closed its case on 16/10/2025.
3. I may just mention that in both instances of taking over the case 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 trial from where it stopped.
4. **PW1** was one **Senior Chief John Kiptoo**. He stated that he received a phone call on 28/12/2015, at around 2.00 am, from one **Susan Kiprop** who informed him that there was a fight in her neighbourhood and people were shouting "**mwizi! mwizi!**" (**thief! thief!**). **PW1** stated that his home is only about ½ kilometres from the scene and so he rushed there where he found 5 people, and also the deceased who had been placed on a pick-up motor vehicle registration number KAZ 467F, and smeared with used engine oil all over his body. He

testified that he interrogated the owner of the vehicle and the homestead (3rd accused), who told him that he had been experiencing theft from his maize store, and that that on that night, his dogs barked and upon checking around, he caught the deceased carrying a bag of maize, and when he raised the alarm, residents came and administered “mob justice” on the deceased. He stated that he did not find a mob when he arrived at the home, but only 5 people, and testified further that the 3rd accused, as owner of the home, showed him the bag of maize, which was about 10 yards away in the pick-up vehicle, and when he observed the deceased, he noted that he had been thoroughly beaten, and was not speaking but he did bear any visible injuries. **PW1** stated that before leaving, he found it proper to inform the grandfather of the deceased about the incident, which he did, and the grandfather came and saw the deceased. He stated that later, with the people present, they took the deceased to hospital at Iten where he was treated and admitted, and he then accompanied the 5 people he found at the scene to the Police Station where they filed a Report and recorded statements.

5. He stated that he knew the 3rd accused, and that on the next day, an uncle of the deceased phoned and informed him that the deceased had died. He then stated that he also knew the deceased as he was his neighbour, and he also named the said 5 people he found at the home of the 3rd accused as **Kenneth Kipchumba Kiprop** (3rd accused), **Kipkoech Chelel**, **Kipkoech Bure**, **Shadrack Kimitei** and **Walter**. Under cross-examination by **Mr Oburu**, he stated that all 5 were known to him as they were all fellow villagers, but he did not know whether the 4 were employees or relatives of the 3rd accused. He also stated that one of the 5 alighted before they reached the police station, and that when the grandfather of the deceased arrived at the scene, he stated that “*this grandson of mine has been stealing and today he has been caught*”, and that the grandfather then returned to his home, and did not accompany them to hospital. He described the 3 accused persons as people of good character, but regarding the deceased, he stated that he had received several cases of petty theft by him (deceased), who was not of good character. Under cross-examination by **Mr Omboto**, he stated that he believed there were more people at the home before he arrived, but he only found 6 people.

6. **PW2** was **Walter Kiprop Korir**, who testified that he was at his house on 28/12/2014 when at about 3.00 am, he heard a knock on the door, and upon opening, he found **Kipkoech Bure**, whom he described as one of the accused persons herein, who then told him that he had a task for him, namely, to arrange timber at the home of 3rd accused, which **PW2** agreed to as the said person was known to him. He stated that when he came out, he found the 3rd accused waiting in his motor vehicle, which they all boarded and the 3rd accused drove them to his home, where however, when they reached, the people he found there descended on

him and started beating him with sticks, rungs and fists, telling him to admit what he had done, when he enquired further, they continued beating him and told him that **“today we have caught your friend who is a thief”**. He testified that one of the people who were beating him was **Kipkech arap Chelel**, whom he also described as one of the accused persons herein, that he saw the deceased but did not recognise him immediately because his body and face were smeared with black oil, and he only recognised him when he spoke, that the deceased had been tied to a tree using chains and they continued beating both of them for a long time asking them to disclose what else they had stolen, that by this time, the deceased was unable to speak, and he (deceased) was then placed on a motor vehicle and he (**PW2**) also boarded the same vehicle. He stated that the Chief (**PW1**) then arrived and the people who had been beating them narrated to the Chief what had transpired, they then drove away but the 3rd accused released him along the way with the warning that **“you go, you are lucky, you would have seen fire”**, and that he alighted and went to hospital for treatment, and was issued with a P3 form. He testified that the 3 accused persons were among those who assaulted him, that the people who beat him were about 10, and that he knew all the accused persons as they all come from the same area, and he had never had any problems with them. Under cross-examination by **Mr. Oburu**, he stated that he had no knowledge on whether the accused persons have any employer-employee relationship as he resides some distance away, and that he also knew the deceased who was his acquaintance, with whom they used to carry out work at the market. He defended the deceased as a person of good character against whom he had never heard of any accusations of criminal conduct, and confirmed that he saw a bag of maize being loaded into the motor vehicle when the Chief arrived.

7. **PW3** was **Grace Kibet**. She stated that she was a neighbour of the deceased, that she was sick at home on 27/12/2014 when another neighbour, **Susan Cherono (PW4)**, went to her home around 1.00 am while making noise, and told her that she had heard noise from the neighbours' compound. **PW3** stated that **PW4** then asked her for her phone which **PW4** then used to call the Chief, and she went back to sleep. She testified that she did not herself hear any noises, and that among the accused persons, she only knew the 3rd accused as he was also a neighbour.

8. **PW4** was **Susana Cherono**, who stated that she, too, knew the deceased. She then testified that she had gone to sleep on 27/12/2014, after midnight, when she heard wailing from her neighbour, **John Kirui's** home, about 100 metres away, and shouts of **“mwizi!, mwizi!”**. She stated that upon hearing the noises, she went to **PW3's** house, whom she asked for a phone, which she then used to inform the Chief of the happenings, after which she returned to her home. Under cross-examination by **Mr. Oburu**, in what sounded like a contradiction to her

earlier testimony, she stated that she did not know the deceased. She confirmed that she did not go to the scene, and she, too, stated that among the accused persons, she only knew the 3rd accused. Under cross-examination by **Mr. Omboto**, she stated that the said **John Kirui** was the 3rd accused's father.

9. **PW5** was **Dr. Isaac Kipyego**, a Medical Officer at the **Moi Teaching and Referral Hospital (MTRH)**. He stated that he performed a post-mortem on the deceased on 31/12/2014. He reported that the body was soaked in used engine oil, and externally, there was evidence of chain marks on the wrists, elbows and waist, bruises all over the back and a penetrating injury, and both feet had bruises and the respiratory system had soot from the trachea to the corona. He testified further that the oesophagus was covered with an oily substance, the stomach had undigested food floating in a black oily substance, there was evidence of bleeding below the skull, a subdural haematoma, and a fracture at the base of the skull. He reported further that there was global brain swelling with engorged vessels, and the brain matter had a haematoma, and that his conclusion was that the cause of death was cardio-respiratory collapse secondary to head injury, evidenced by the fracture at the base of the skull.

10. **PW6** was **Vincent Kimutai**, the Assistant Chief Kaptere sub-location, who stated that he received a call from one **Barnabas Kibet Kipkoskei** on 13/09/15 at around 4.30 pm, informing him (**PW6**) that he had arrested his own son (1st accused) who had been on the run. He testified that he left to go to the home but met them on the way, that **Barnabas** had tied the 1st accused with ropes, and handed him to **PW6**. He stated that he then phoned the police who came and collected the 1st accused, they all went to the Police Station where they wrote Statements, and that **Barnabas** told him that the 1st accused had been involved in a murder in a different sub-location. He stated further that the 1st accused was his cousin. Under cross-examination by **Mr. Omboto**, he stated that he was the Assistant Chief for Chelingwa sub-location.

11. **PW7** was **Abraham Kiptoo Maiyo**, who stated that the deceased was his nephew. His evidence was simply that he and one other relative attended the post mortem exercise for the deceased on 13/12/2014, and they identified the body. He further stated that he knew all the 3 accused persons as they were their neighbours. Under cross-examination by **Mr. Omboto**, he stated that the distance between the home of the deceased and the home where the killing took place is about 1 kilometre.

12. **PW8** was **Shadrack Kimutai** who testified that he attended a party on 28/12/2014, about 500 meters from his house, which ended at about 2.00 am., that on his way home, he ran into a group of people, about 30, chanting that they had found a thief who stole maize from the home of the 3rd accused, and they were all running away from the scene. He testified that his home was about 300 metres from the home of the 3rd accused, that, as it was dark, he could not identify the people he found at the accused persons' house, that he found the 3rd accused standing next to his white pick-up motor vehicle, and the maize said to have been stolen was also there, and that there were about 15 people in the home but seated some distance away from where the 3rd accused and the motor vehicle were. He stated further that when he asked for the name of the thief, someone told him that it was "**Kiptoo**" (deceased), who was at that time lying down on the ground in the homestead. He stated that he could not tell the condition of the deceased but he was rolling over on the ground, and **PW8** managed to see him because the 3rd accused's motor vehicle had its lights on, although he did not see his injuries, and also the lights did not illuminate the side where the group of people was. He also testified that he did not know the deceased but he had heard the name before.

13. He stated after some time, the Chief arrived and asked the 3rd accused that they go to the Police Station, which the 3rd accused agreed, and they, including **PW8**, boarded the 3rd accused's said vehicle, the deceased was also loaded thereto, and they drove away, that along the way, the Chief alighted and went to inform the deceased's grandfather about the incident, upon which the grandfather came out, took a look at the deceased, and simply stated that the deceased's "**40th day**" had reached, and returned to his house. He testified further that they then continued with the journey and when they reached the Police Station, the police asked them to take the deceased to hospital, which they did and left the deceased there, and they later recorded statements. He stated that he knew the 3rd accused well, that the home where the incident took place was the 3rd accused's father's home, but he did not know the 1st and 2nd accused, and he did not also see them at the said home on that night. Under cross-examination by **Mr. Oburu**, he stated that they were 5 people who went to the Police Station, including the 3rd accused and the Chief, and that the deceased's grandfather mentioned that the deceased's "**thieving days were now over**". Under cross-examination by **Mr. Omboto**, he stated that when the vehicle stopped for the Chief to go and inform the deceased's grandfather about the incident, one of the people jumped out and fled.

14. **PW9** was **Senior Sergeant Peter Kosgey** from the **Directorate of Criminal Investigations, (DCI)**, Marakwet. He stated that he took over as the Investigating Officer in 2019 from one **Corporal Robert Ndambuki** who was transferred and is now retired.

Having been allowed by the trial Court to testify on behalf of the said **Corporal Ndambuki**, he stated that **Corporal Ndambuki** conducted investigations on the matter, then apprehended and charged the accused persons in Court. He testified that from the file, the report is that the deceased was beaten to death in the compound of one of the accused persons, **Kenneth Kipchumba** (3rd accused) as he was accused of stealing maize, that the body of the deceased was smeared with oil, and after the beating, they took the deceased to the Iten Police Station together with a sack of 90 kilograms maize, using the 3rd accused motor vehicle, where they were told to take him to hospital, and where he was however pronounced dead on arrival. He stated that he had never met the accused persons before and only saw them in Court for the first time. Under cross-examination by **Mr. Oburu**, he stated that from the file, the incident occurred on the night of 27/09/2014 and 28/09/2014. He also stated that he was not given any exhibit since the bag of maize was said to have all beaten eaten up by rats at the Police Station. He stated further that he did not establish whether the 1st and 2nd accused were employees of the 3rd accused, or whether the 2nd accused was the 3rd accused's driver. He also stated that from the file, the 1st and 3rd accused were among the people who took the deceased to hospital, but the two went missing after the incident although they later presented themselves at the Police Station with their Lawyers. In re-examination, he stated that the 3rd accused presented himself at the Police Station on 27/01/2015, about one month after the incident, with two Lawyers, and the 1st accused was arrested on 13/09/2015 in Chelingwa sub-location, while the 2nd accused presented himself at the Police Station on 21/09/2015.

15. At the close of the Prosecution case, I gave the parties liberty to file written Submissions on "case to answer" but Counsels for both sides informed the Court that they would not be filing any Submissions.

Determination

16. This Court is now called upon to determine whether, at this stage, based on the evidence adduced by the 9 witnesses, the Prosecution has established a *prima facie* case to warrant the accused person to be placed on their defence to answer to the charge of murder. It should however not be forgotten that at this stage, the Court is only considering whether the accused have "a case to answer", and which was 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."

17. The manner in which a determination on whether an accused has a case to answer is to be made, 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 in 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.”

18. Further, in the case of **May vs. O’Sullivan [1955] 92 CLR 654**, it was held that:

“When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence, as it stands, the defendant ought to be convicted, but whether on the evidence, as it stands, he could lawfully be convicted. This is a really question of law.”

19. The trial Court is 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.”

20. The picture painted by the Prosecution is that this was a case of mob justice administered on a thief who was “caught in the act” at the home of the 3rd accused in the middle of the night stealing maize. The doctor (**PW5**) told the Court that the cause of death of the deceased was cardio-respiratory collapse secondary to head injury evidenced by a fracture to the base of the skull which severed the connection to the brain, and which affected the heart and other

organs. Several witnesses, including the area Chief (**PW1**), testified that they went to the home of the 3rd accused upon being called, or after hearing noises, wailing or screams from the home of the 3rd accused, and found the deceased lying down on the ground in a bad condition, obviously thoroughly beaten up, and his entire body smeared with black engine oil. **PW2** testified that he was picked up from his home through trickery by the 3rd accused and another person, and driven to the home of the 3rd accused where he found the deceased, whom he recognized after sometime as somebody he knew, already in a bad condition, tied to a tree using chains, clearly severely assaulted, and that the 3rd accused, together with the group of people he found at the home, and which included the 1st and 2nd accused persons, lumped **PW2** together with the deceased and gave him severe beatings, and also unleashed more beatings on the already injured deceased. He claimed that they were beaten using sticks, rungs and fists and that the beatings lasted for a long time. He also stated that he knew all the accused persons well as they were all neighbours. The testimony of **PW2** was therefore that of an alleged eye-witness, and which allegedly placed the accused persons at the scene of crime. Testimony of the other witnesses also alluded to the above facts. An alleged motive for the killing, namely, stealing of a bag of maize by the deceased from the home of the 3rd accused, was also advanced. Although all these matters may still be debunked in the course of the defence case, they lay a basis for the Prosecution case.

21. With the principles set out earlier, and the facts recounted above in mind, having considered the evidence on record so far, the testimonies of the witnesses, and without delving into the merits thereof, I only state my finding to be that the Prosecution has established a *prima facie* case to the Court's satisfaction. Accordingly, I find that each of the 3 accused persons has a case to answer. They are all therefore placed on their defence.

22. Pursuant to the finding above, the accused persons are now informed of their 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, they are informed, and it is explained to them, that they have a right to address the Court either personally or by their Advocates, and to give evidence on their own behalf or to give unsworn statements, and to call witnesses in their defence.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 13TH DAY OF FEBRUARY 2026

.....
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Accused persons (all present physically in open Court)

Ms. Muriithi h/b for the State

Ms. Oburu for the 1st and 2nd Accused

Ms. Omboto for the 3rd Accused

C/A: Brian Kimathi