

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 36 OF 2019

REPUBLIC.....PROSECUTION
VERSUS
KEVIN OPATI MIHESO.....
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 the night of 10th and 11th May, 2019 at Mwamba Trading Centre, Mwamba Sub-Location, Lumakanda Location, Lugari Sub-County, within Kakamega County, he murdered one **Philippine Gatweri**.
3. The accused is represented by **Ms. Kipnyekwei** as the *Pro bono* Advocate, and the Prosecution Counsel currently handling the case for the State is **Ms. C. Muriithi**, who took over from **Mr. Onjoro**, who had himself earlier taken over from **Ms. Okok**.
4. The accused took plea before **S.M. Githinji J.**, on 13/06/2019, denied the charge and a plea of not guilty was entered. The trial then commenced on 18/5/2022 before **Ogola J**, who took the evidence of **PW1** and **PW2** before being transferred. It is therefore **PW3 - PW7** who testified before me, after which the Prosecution closed its case on 2/12/2025.
5. **PW1** was **Douglas Momanyi**, who stated that he is a Clinical Officer at the Turbo Sub-County Hospital. He testified that on 11/5/2019, a Saturday morning, he was called by his night counterpart, one **Hellen Moraa**, between 6.00-7.00 am, and when he went where she was, he found a young woman lying dead on the bed, and they conducted tests which confirmed that she was not breathing. He testified that one of the people who had brought the deceased was her alleged husband, who told him that she appeared to have committed suicide, although PW1 did not find any evidence of suicide and noted the presence of bruises on the chest, neck and legs of the deceased, whom he also noted, was about 22 weeks pregnant. He testified further that the deceased had a cut wound on the lower hip which was bleeding, hematoma on the right clavicle, and had some hair removed from the head. He stated that he then called the police at Turbo Police Station, upon whose instructions, he asked the people who had brought the body to go to the station, and later the police came and

collected the body. He then identified the accused in Court as the alleged husband of the deceased whom he had referred to above, and whom he used to see around the town.

6. **PW2** was **Police Constable Elizabeth Chepkemoi**, who testified that he was previously attached at the Turbo Police Station between 2018 and 2021. She stated that on 11/5/2019, she was on duty when at around 0700 hours, 2 people came to the office, one was **Kevin Opati**, who reported that his wife had committed suicide in their rental house by using a *leso*. She testified that she informed the Officer Commanding the Station (**OCS**) who also interviewed the people and, together with other officers, they went to the scene of the alleged suicide, after which the said **Mr. Opati**, was booked in, together with one of his friends as murder suspects. He then identified **Mr. Opati** in Court as the accused person.

7. **PW3** was **Constable Dominic Ngetich** who stated that he previously attached at the Turbo Police Station between 2017-2022. He stated that on 11/5/2019, a Saturday morning, his OCS, called him to his office at around 8.00-9.00 am, and when he went there, he found him with 2 people, upon which his OCS informed him that the 2 had come to report a suicide attempt after being referred by a Clinical Officer (**PW1**) from the Turbo Sub-County Hospital. He stated that the one of the reportees, one **Kevin Opati** (the accused herein), told them that the previous evening, a Friday, he and a friend, who was also with him at the station, went to Turbo Township for a drink and left very late at around 4.00 am, and on returning home, a rented house, his wife opened the door for him, and the accused went straight to sleep in his bedroom, where the wife joined him but began quarrelling him about the late time he used to return home, and accused him of having an illicit affair. He stated that according to the accused, this nagging by his wife made him leave the room, and took long to return, but that he did not find her when he returned, and then noticed the wife having hanged herself on the beams that form the stairs into the upper room, upon which he rushed to the house and picked a knife, which he returned with and cut the *leso* used by the wife to hang herself. He testified that the accused told them further that he untied the piece from his wife's neck and called a *boda boda* (motor-cycle taxi) with whom he rushed her to hospital, where they were received by **PW1** who later sent the accused to the police to report the incident. **PW3** stated that they immediately noted that the narration given by the accused was inconsistent, they then proceed to the scene, where the accused took them from one spot to another repeating the account of what allegedly transpired. He stated that there were about 3 rental houses plus one room upstairs, that at the spot where the deceased was alleged to have committed suicide, they found the *leso* still tied on the beam, in another room which appeared to have acted as the kitchen, and where the couple's baby was sleeping, they recovered a piece from a *leso*, which piece the accused claimed was part of the *leso* the

deceased used to commit the suicide, and that they also recovered a kitchen knife in the first room, which knife the accused claimed he used to cut the *leso*. He testified that in the bedroom, items, including, beddings, and clothes were scattered as if there was a scuffle or struggle or a fight, which situation raised their curiosity, and they thus decided to carry out a thorough search upon which the OCS decided to perform a physical search on the accused, whom they observed had 4 scratches on his left cheek and neck, which prompted the OCS to ask the accused to remove his long-sleeved t-shirt. He testified that the scratches appeared to have been inflicted by finger-nails, and when the accused removed the t-shirt, they noticed a human bite on his left hand yet the accused had not told them about any fight with the wife, but at this point, he confessed that indeed he had a fight with her. **PW4** stated that they then also recovered a pulled-out hair braid in the bedroom, under the bed, within the scattered clothes. He testified that they went to the hospital together with the accused where they were shown the body of the deceased lying on a bed, they uncovered it and they noted a cut on the chin on the right side on the lower side, and also on the right leg, and when they compared the braid recovered from the house, with one the deceased had on her hair, it appeared similar, upon which they then became convinced that the death was not by suicide, but was caused by the accused, whom they then handcuffed and took into custody. He testified further that on 13/05/2019, the post-mortem exercise was conducted, during which he further observed that the deceased had a cut on the lip, and scratch behind the neck, which the Pathologist described as being too thin to cause the death, and also that the finger-nails had also turned blue, which the Pathologist explained as being due to lack of oxygen in the blood. He also testified that the Pathologist also removed a lifeless fetus of approximately 5-6 months from the deceased. He stated that he then recorded a statement from the 2 witnesses who identified the body and also the Pathologist. Under cross-examination by **Mr. Esikuri**, holding brief for **Mr. Kipnyekwei**, when shown the statement under inquiry recorded by the accused, he conceded that indeed, the accused had, in the Statement, disclosed that he had a fight/scuffle with the deceased.

8. **PW4** was **Dr. Kibet Keittany**, a Pathologist at the **Moi Teaching and Referral Hospital (MTRH)**, who stated that he performed the post-mortem on the body of the deceased on 13/05/2019, and that the deceased was alleged to have committed suicide by hanging. He testified that on external examination, he noted cyanosis (which he described as a sign of lack of oxygen), dislocations on the finger-tips, finger-nails and oral cavities, multiple injuries around the mouth and nose area, left side of the gums and lower lip, contusions on the left side of the nose and the upper lip, bruises on right side of the lower jaw mandibular area, and on the left side of the neck. He further stated that there was absence of a ligature

mark (a line that appears on the neck of somebody who had hanged himself), which was a negative finding since the absence was inconsistent with the allegation of suicide by hanging. He stated that internally, the lungs were deprived of oxygen, the deceased was pregnant in the 3rd trimester and the infant was female, and there was hematoma (accumulation of blood in the scalp) the left side of the head. He then described the cause of death as asphyxia due to smothering (suffocation) and he produced the post mortem report. In cross-examination, he explained that “*asphyxiation suicide*” is a group of conditions where a person deprives himself of oxygen such as in drowning or suicide by hanging. He reiterated that the cause of death, in his opinion, was asphyxia due to smothering. Under re-examination by **Prosecution Counsel Ms. Okok**, he stated that the death did not meet the criteria of “*asphyxiation suicide*” because of the lack of circumferential marks on the neck, the marks on the neck were horizontal, and also transverse, rather than diagonal, which should not be the case in suicide, and that there were also lack of injuries or contusions in the deeper parts of the neck. He also reiterated the lack of ligatures as inconsistent with the suicide theory.

9. **PW5 was Irene Chelangat**, a Clinical Officer previously working at the Turbo Sub-County Hospital. She testified that she examined the accused who was brought to the facility on 12/5/2019 under escort of a police officer, and that the accused was alleged to have been assaulted by his wife on 11/5/2019 at around 4:30 am, by way of biting and scratching. She stated that the clothing worn by the accused at the time of the alleged incident were not provided, and that on examination, she noted that the accused had scratches on the neck, and on the upper limbs (hands), and a bite mark on the left upper arm, which injuries were about 28 hours, and were caused by a blunt object. She stated that they gave the accused medicine and assessed the injury as “*harm*”. She then produced the P3 Form and treatment notes.
10. **PW6 was Joshua Arende (Retired Chief Inspector)**. He stated that on 11/5/2019 at around 6:45 am he received a call from OCS Turbo Police Station who informed him that she had received a call from a medic from the Turbo Sub-County Hospital reporting that a woman had been brought to the hospital that morning by a person who claimed to be the husband but the woman was already dead. He stated that the OCS told him to investigate the matter and he thus asked the OCS to tell the medic to ask the husband to go to the Station and make a formal report. He testified that he went to station and indeed found the husband waiting for him there, who introduced himself as **Kevin Opati** (accused) and who had come with another person who introduced himself as **Philip Manyasa**, and reported that his wife (the deceased herein), aged 24 years old, had committed suicide in their rental house using a lesa

on the stairs. He testified that he questioned them in his office in the company of other officers, but he was not convinced with the suicide theory and so he visited the scene of the incident together with the accused and other officers. He stated that upon reaching the scene, they found a small number of people and the accused then showed them the stairs where they found the *leso* remnant still there, and the accused told them that he cut off the *leso* to release the deceased. He testified further that the accused told them that he returned home at around 3.00 am from Turbo when the wife picked a quarrel with him about his coming late, that they went to bed and later the wife went outside but took too long to return, and when he went to check, he found her at the stairs with the *leso* around her neck, and that this is when he went to fetch the knife and cut off the *leso* piece to release the wife, and he then called the said **Philip Manyasa** to come and assist him. On whether he called neighbours, he stated that the accused stated that he did so but none responded. **PW5** then observed that the said **Philip Manyasa** did not even live in the plot and was a *boda boda* rider. He stated that he then took photographs of the scene using his phone, they retrieved the piece of *leso* that had remained on the staircase, and that the accused produced the other piece of the *leso* that he alleged to have cut off to release the deceased. He also stated that they did not find any suicide note in the house, that he had taken a photograph of the accused and when he enlarged the same by zooming the image, he noticed that the accused had a scratch on his face probably caused by a finger-nail, but the accused was not even aware of it because when he asked the accused whether he had any injuries, the accused responded that he did not have any. He stated that he then asked the accused to remove his jacket, and when he did so, he noticed a fresh wound on his left arm (a fresh teeth bite) just like the one on the face, that it is at this point that the accused owned up and confessed that indeed he had a fight with the deceased, and disclosed that it is the wife who had bitten and scratched him, and that he beat her up, which information **PW5** observed, the accused had not disclosed at the time when he reported the incident, or when they questioned him, and that they therefore changed the case from “*suicide*” to “*homicide*”. He testified that they took the *leso* and knife, and also went to the hospital with the accused and the said **Philip Manyasa**, that at the hospital they found the Clinical Officer (**PW1**) who was on duty when the body was received who narrated to them that the accused brought the lady at about 6:30 am with an explanation that was not clear, and that the body was brought already dead, and that it is because of the unclear explanation from the accused that **PW1** called the police. He stated that **PW1** showed them the body which was still lying on a stretcher in his room, **PW5** noted marks on the right cheek, and on the legs, the deceased had also excreted on herself, and it is at that point that the accused and the said **Philip Manyasa** were arrested and the body was transferred body to **MTRH**. He also recalled that in the course of investigations, the accused

had recorded a statement under inquiry on 12/5/2019. He testified further that he then instructed another officer to accompany the accused to hospital for treatment for the bites on his face and hands, and that to establish evidence of the violent confrontation, they procured a P3 Report. He testified that on 13/05/2019, the accused and the said **Philip Manyasa** were taken to Court which allowed their longer detention to allow for completion of investigations, on the same day, he revisited the scene with other officers, including **Corporal Odera (PW7)** from Lumakanda Police Station, who had now taken over the investigations, to whom he handed over the photographs he took at the scene, and which were later processed 3 photos. He denied any knowledge of any report made by the accused about his being assaulted by the deceased at any time, and he then took the Court through 11 photographs which he identified. When describing the photographs, he stated that photograph 1 shows the face of the accused with the injury mark on his face, photographs 5-8 show the staircase where the deceased was alleged to have hanged herself, which theory, according to **PW6**, was definitely false considering that from the height involved, she could not have remained suspended. He testified further that photographs 9-11 show the body of the deceased lying at the hospital with the fresh marks on the right cheek visible. In cross-examination, he stated that the couple had 2 children, one between 6-8 years and the other one still a baby, and they had about 6 neighbours in the plot. He stated that the time when the incident occurred was a dry season and there were no rains, and that he only interviewed one neighbour who however denied hearing any commotion at the time. He agreed that he did not take the measurement of the height of the staircase from the ground but estimated it to have been about 4 feet, yet the deceased was taller than 4 feet and, as such, could not have been suspended. He also asserted that the recovery of the hair braid was indication that the couple had a confrontation during which the braid came out, although he conceded that no DNA test was conducted to ascertain the owner of the braid.

11. PW7 was Corporal Allan Odera Ochieng, who stated that he was previously attached at the Lugari Directorate of Criminal Investigations (**DCI**) office. He stated that he was on 12/5/2019 assigned a case by his superior and instructed to investigate the case which had originated from the Turbo Police Station, which Station had already commenced investigations under **PW6**. He stated that upon an Application being filed, and the Court allowing it, they detained the 2 suspects, (the accused and **Philip Manyasa**) who had already been in custody. He testified that he revisited the scene on 13/05/2019 where the deceased and the accused were living together, with **PW6** and the father of the accused, and that he established that the initial report made by the accused was that the deceased had committed suicide, which report was not true. He testified that he later collected statements made at the

Turbo Police Station and exhibits and he found one witness, one **Vincent Marube**, who was a neighbour to the accused who stated he was never contacted by the accused or the deceased at the time of the incident, but noticed movements when he was called by the couple's child and asked to go and assist, and when the accused left with the wife on a **boda boda**, with the wife covered with a blanket. He stated that he established that the accused took the deceased to the Turbo Sub-County Hospital where however she was pronounced dead, and that the accused later made a report at the Turbo Police Station upon which the scene was visited by officers and the body was transferred to **MTRH**. He also testified that the accused, while in custody, claimed that he was sick and he was therefore taken to hospital where he was treated and issued with a P3 Form. **PW7** stated further that he also received 2 pieces of **leso**, a kitchen knife, a woman's hair piece all recovered earlier from the scene, and that the post-mortem exercise was later performed on the body of the deceased, and that when he took over the case, he realized that the second suspect, the said **Philip Manyasa** had not been implicated in the murder by any witness, that he tried to trace the **boda boda** rider who had assisted in taking the deceased to hospital but he did not succeed in locating him. He then stated that he forwarded the file to the office of the Director of Public Prosecutions (**DPP**) which office recommended that the accused be charged and the said **Philip Manyasa** be released, that the OCS later handed him the Compact Disk (CD) containing the photographs, in respect to which he prepared a Memorandum and forwarded the CD to the Scene of Crime Personnel from whom he later received a Report on the same. He then produced the larger and the smaller pieces of the **leso**, kitchen knife, hair piece, 11 photographs and the Certificate and Memorandum thereto. In cross-examination, he stated that the said **Vincent Marube**, the neighbour, stated that the child of the accused and deceased went to his house and told him that something had happened in their house, and it is when he (**Vincent Marube**) he went to check that he found the accused taking the deceased to hospital. He also conceded that the date in the photograph Certificate and the date in the Exhibit Memorandum were about 2 years apart.

12. Although this is simply a Ruling on "case to answer", I have deliberately chosen to reproduce the Prosecution's entire witnesses' testimony so as to give the matter a complete context.

13. At the close of the Prosecution case, I gave the parties leave to file written Submissions on the issue of "case to answer". **Prosecution Counsel Ms. Muriithi** then filed the Submissions dated 4/02/2026 while the defence Submissions is dated 9/02/2026.

14. In her Submissions, **Ms. Muriithi**, agreed that there is no single eye-witness who saw the accused person attack the deceased and cause her death, and that therefore the evidence against the accused is to a large extent, circumstantial evidence. She submitted that **PW4** opined that the deceased died due to *asphyxia* due to features consistent with smothering, and dispelled the theory that the death was caused by self-hanging, and that part of the Prosecution's evidence comprises of a situation that is only within the knowledge of the accused person as he was the one who was with the deceased before her demise. She cited **Section 111** of the **Evidence Act**, and also the Supreme Court case of **Republic v Ahmad Abolfathi Mohammed and another Petition No. 38 of 2018**. She submitted that in the absence of a reasonable explanation by the accused on how the deceased met her death, the only inference is that it is him (accused person) who committed the unlawful act that led to the death. On “malice aforethought”, she cited **Section 206** of the **Penal Code**, and urged that the action of the accused person was very deliberate and a clear indication that grievous harm upon the deceased was intended.

15. On his part, **Mr. Kipnyekwei** submitted that before the Court relies on the findings in the post mortem report, it has to satisfy itself that the report is in relation to the deceased herein, and that proper identification of the deceased must be proven, which identification is ascertained by way of DNA profiling, or by the deceased's family member(s) who is/are able to identify the body. He submitted that in this case, the post mortem Report does not give the relationship between the deceased and the two persons who allegedly identified the body, and who were also not availed to testify as witnesses, and as such, the Court cannot safely conclude that the body on which the post mortem report herein relates was that of the deceased. He cited the case of **Republic V Lokutan (2025)**, and also the case of **Roi v Republic (2025)**. According to him therefore, the Prosecution has failed the first test, which is to prove the death, in which case therefore, there is no sufficient basis to put the accused to his defence.

Determination

16. 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 Eldoret High Court Criminal Case No. 36 of 2019

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

17. 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 7 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.

18. 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."

19. 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** in which **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."

20. 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, 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."

21. In this case, although the defence has raised the issue that the Prosecution failed to establish that the body was satisfactorily identified before the post-mortem exercise was performed thereon, upon considering the evidence on record as a whole, and without delving deeply into the merits thereof, all I would state for now is that although there is no eye-witness to the incident, there is testimony allegedly establishing the death and cause thereof, and also testimony allegedly placing the accused at the scene of crime at the material time, testimony alleging that the accused and the deceased, who are said to have been living together, may have engaged in an altercation after the deceased was displeased by accused person's conduct of returning home late at night, which altercation is alleged to have led to a fight between them, and in respect to which physical injuries are said to have been observed on both the accused and the deceased. There is also testimony allegedly dispelling the truth of the claim made by the accused that the deceased had died by committing suicide by hanging herself. The evidence on record, if true, may therefore be deemed to implicate the accused person in the commission of the alleged assault said to have caused the death of the deceased. Although all these allegations may still be debunked during the trial of the defence case, they lay a foundation for the Prosecution case on a *prima facie* basis.

22. I therefore only state my finding to be that the Prosecution has established a *prima facie* case to the Court's satisfaction. Needless to state, this does not at all indicate that the accused has

been found guilty, far from it, all it means is that there is some evidence of his possible involvement in or with the circumstances in which the alleged death occurred, which circumstances call for him to be afforded an opportunity to give his side of the story, should he wish to do so. Regarding the issue of identification of the body before the post-mortem report was conducted, I choose to let that be determined after hearing the defence case.

23. The accused is therefore put on his defence.

24. 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 MARCH 2026

.....
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Accused (present physically in open Court in Eldoret)

Ms. Muriithi for the State

Ms. Kipnyekwei for the Accused

C/A: Brian Kimathi