



REPUBLIC OF KENYA



**Republic v Cheserek (Criminal Case 32 of 2023)
[2025] KEHC 281 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL CASE 32 OF 2023
JRA WANANDA, J
JANUARY 24, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

FREDRICK KIPKIROR CHESEREK ACCUSED

RULING

1. As indicated above, this case was initially registered as Eldoret High Court Criminal Case No. E002 of 2022 before it was transferred when a High Court sub-Registry was opened in Iten. The case has therefore been in Court for about 2 years so far.
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 8/12/2021 at Keu Village, Marich sub-Location, Kaben Location, within Elgeyo Marakwet County, he murdered one Alice.
3. The accused is represented by Mr. Amos Songok Advocate. From the record, the accused was first arraigned on 11/01/2022 before the Deputy Registrar at Eldoret and later took plea on 26/1/2022 before Hon. Ogola J. He denied the charge and a plea of not guilty was entered. He was then remanded in custody pending trial and has remained in custody ever since.
4. After pre-trial conference and other processes, the case was fixed for hearing for 22/02/2023 but could not proceed on that date as Hon. Ogola J had since been transferred to Nairobi. I then took over the case and it came up before me for Mention on 20/04/2023 on which date I transferred it to Iten as aforesaid. Although the Accused had applied to be released on bond/bail pending hearing of the case, on that date, his Counsel informed me that the Accused had abandoned the Application for bail/bond because “even if he is released, he has nowhere to go or no one to take care of him”. The Accused has therefore been in custody since arrest, presumably in December 2021.



5. As I was also the Judge handling Iten High Court matters, the case, after being Mentioned before the Deputy Registrar, again came up before me for further Mention on 30/11/2023 at Iten, on which date I fixed the hearing for 28/03/2024. On that date, I was not however sitting and the hearing was adjourned to 4/07/2023. On that date, Ms. Ayuma, the Prosecution Counsel appearing for the State prayed for adjournment stating that she did not have witnesses as the Security Personnel in Elgeyo Marakwet County had been transferred en masse. Despite strong opposition from Mr. Songok, I adjourned the hearing to 5/12/2024. On that date, Mr. Kirui, Prosecution Counsel who appeared for the State, again sought an adjournment on the ground of absence of witnesses. Again, Mr. Songok strongly opposed the Application. This time I declined the adjournment. There being no further application from the Prosecution Counsel, I duly marked the Prosecution case as closed and fixed the matter for Ruling on whether a case to answer had been established against the Accused.

etermination

6. What I now have to decide upon is whether the accused has a “case to answer”.
7. In this case, although the commission of crimes, particularly serious felonies such as murder, cannot be tolerated in our society and should not in any circumstances, be dealt with by way of “kid gloves”, and although a precious human life was lost in this case, more than 2 years have already lapsed since the deceased died. Either no witnesses are willing to testify or the Prosecution has not managed to trace them, either genuinely so, after applying all diligence, or perhaps just out of laxity or lethargy from the offices concerned. We may never know since the Prosecution did not offer any meaningful explanation, not even an Affidavit was sworn and filed by the Investigating Officer to give a sneak peek of the efforts made to trace witnesses and the outcome thereof. Meanwhile, the accused continues to languish in remand custody indefinitely. Without witnesses, no matter how long the file is kept open, the case will collapse
8. On the issue of “case to answer”, Section 306(1) and (2) of the *Criminal Procedure Code* requires the Court, after closure of the prosecution’s case, to make a considered determination on whether an accused person has a case to answer. The provisions are premised 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 on his own behalf or make unsworn statement and to call witnesses in his defence
9. At this stage therefore, the Court is only considering whether the accused has “a case to answer” and which was described by Dulu J in the case of *Republic vs Joseph Sbitandi & 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.”



10. 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 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.”

11. 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.” [Emphasis mine]

12. As regards Section 210 of the *Criminal Procedure Code*, it provides as follows:

“If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the Court that a case is not made out against the accused person sufficiently to require him to make a defence, the Court shall dismiss the case and shall forthwith acquit him.”

13. What amounts to a “prima facie” case under the equivalent of the provisions of Section 210 was considered by the Court of Appeal in *Ramanlal Bhatt Vs. R* (1957) EA 332 thus:

“It is true that the Court is not required at this stage to decide finally whether the evidence is worthy of credit, or whether if believed is weighty enough to prove conclusively, that final determination can only be properly made when the case for defence has been heard. It may not be easy to define what is meant by prima-facie case but it must mean one which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation was offered by the defence.”

14. Regarding ingredients of the charge of murder, Section 203 of the *Penal Code* provides that:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

15. It is therefore clear that for the charge of “murder” to be sustained, there are two ingredients that have to be proved. These are the “Actus Rea” and the “Mens Rea”. In this case, no witnesses testified. In



the absence of any witness testifying, there is obviously no evidence on record to disclose or sustain any prima facie foundation for establishment of the two ingredients. It is clear that in the event that the accused opts to keep quiet in his defence, no properly constituted tribunal directing its mind judiciously can, under the circumstances herein, convict him for the offence of murder.

16. Faced with a similar situation, Prof. J. Ngugi J (as he then was), in the case of *Republic v Muneh Wanjiku Ikigu* [2016] eKLR held as follows:
 19. In cases, such as the present one, where there is no reasonable likelihood of re-commencing proceedings or of tracing witnesses or where there is no reasonable likelihood of obtaining a conviction due to lack of available evidence (for example where a crucial piece of evidence the State hoped to rely on is ruled inadmissible in a motion in limine), then the correct procedure is the one to proceed with the case, call no witnesses and request an acquittal or let the Court reach a directed verdict of acquittal. This may also be the appropriate thing to do where there has been a significant adverse ruling against the State or the evidence available has been become so manifestly unreliable that there is no reasonable likelihood that the Accused could be convicted.
 20. In the present case, as catalogued above, the Prosecution requested no less than seven hearing dates spread over a four-year period. At each of those hearing dates, despite reasonable efforts reported by the Prosecution during those hearing dates and now detailed in the Affidavit of Cpl Esther Kombo, no witnesses were available. The circumstances are that the alleged murder happened at an informal settlement called Kiandutu in Thika where both the Accused Person and the deceased used to live. The family of the deceased, members of which were the key witnesses in the case, also lived in the same settlement. Soon after the case was recorded and plea taken, the Investigating Officer was unable to trace the witnesses any more. She tried to contact them through the mobile phone numbers they had recorded with her to no avail. She visited where they used to live in Kiandutu and even enlisted the help of the area Chief and elders in a bid to locate them. All these efforts were fruitless. The witnesses seem to have disappeared into thin area. The importance of the address of the intended witnesses is that many people tend to live in informal settlements only ephemerally. Many times, also, the neighbours would not have any contacts of each other beyond the physical contacts they have each day. As was the case here, therefore, once the deceased's family relocated, it became impossible to trace them.
 21. It has now been four years and ten months since the incident took place and since the Accused Person took plea. She has been in custody since then. Four years and ten months is a long time to be in custody awaiting trial. Four years and ten months is a long time to attempt to trace witnesses. Indeed, it would seem that the chances of locating the witnesses diminish with the passage of time. In the circumstances, the Prosecutor is right in not seeking to continue with the criminal trial. Four years and ten months is a long time set against the fair trial rights guaranteed in Article 50(2)(e) of *the Constitution*. Four years and ten months are an especially long time to spend in custody if there is no timeline for trial because there is no indication of if and when the witnesses might be located. Four years and ten months is enough time for the Prosecution – and the Court -- to conclude that there is no reasonable likelihood that the prosecution will ever be able to trace the witnesses or present any evidence in the case which could lead reasonably lead to a conviction.
17. The situation in the said case is similar to the one herein and I fully associate myself with the above sentiments. In the circumstances, I find and hold that no case has been made out against the accused person warranting this Court to put him on his defence. Consequently, I dismiss the murder charge and the entire case facing the accused and acquit him under the provisions of Section 210 of the



Criminal Procedure Code. Consequently, it is hereby directed that the accused person be released forthwith from custody unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF JANUARY 2025.

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Accused present physically in open Court

N/A for the Advocate for Accused

Ms. Mwangi for the State

Court Assistant: Mr. Kuto

