Republic v Lotyang (Criminal Case E016 of 2023)
[2024] KEHC 10120 (KLR) (14 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10120 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL CASE E016 OF 2023

RN NYAKUNDI, J

AUGUST 14, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

JOSEPH ARIONG LOTYANG ..... ACCUSED

JUDGMENT

1. Joseph Ariong Lotyang was 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 27th day of August 2023 at Kakuma Refugee camp in Turkana West Sub-County within Turkana County murdered (a minor) Peter Lotiang Joseph.

2. The accused person pleaded not guilty to the offence as stipulated under Section 203 of the Penal code. He was represented at the trial by learned counsel Mr. Karanja pursuant to Art. 50 2(g) of the *constitution* whereas the lead prosecution Counsel was Mr. Mark Mugun who appeared on behalf of the estate.

3. The brief summary of the case as deduced from the prosecution witnesses as tabulated herein highlighted as follows:

4. PW1 Pendo Chebahenyo, a resident of Kakuma of Congolese origin testified that on 27th August, 2023 she was at home cooking when she was disturbed by screams from the neighbours. As a responder, she rushed to the scene where she witnessed a child being cut with a Panga simultaneously with his mother. As an action to save the victims, PW1 told the court that he took a stone which he used to hit the accused person but on fearing for her life, she took flight from the scene. Further PW1 testified that the victims were taken to the hospital but the child passed on in the night while undergoing treatment. She was able to identify the accused person and the victims at the scene by the source of light from the fire which was illuminating the scene.

5. Next was PW2 Ibrahim Geloka who acts as a community peace member within the refugee camp taking care of security matters in the area. In his evidence, PW2 testified that on 27th August, 2023 while at block 13 he received an assault report involving the accused, his wife and child. This incident culminated into the two victims of the assault being taken to the hospital for examination and treatment, however the child passed on flowing from the injuries sustained during the assault by the accused person. The accused surrendered to PW1 as one of the security managers of the camp an interrogation on the circumstances of the offence was commenced in earnest culminating into the police indicting the accused person.

6. The next witness in support of the Prosecution case was PW3 Police detective Senah Cherop. In her testimony she told the court that a murder incident was reported to the police station at Kakuma involving the accused person and his family, being the child and his mother. The victim minor was aged 3 months. According to PW3, the mother and the minor were taken to hospital where it was established that she suffered wounds to the head, while the fatal injuries to the minor occasioned him to succumb to death. In support of the level of investigation carried out, PW3 in concurrence with the defence produced the murder weapon as Exhibit 1, medical evidence in the form of a post mortem report as Exhibit no. 2 and the P3 from as Exhibit No. 3. This was all to correlate the events of 27th August 2023, which happened at Kakuma refugee camp leading to the death of the deceased minor Peter Lotyang Joseph.

7. At the close of the prosecution case, this court rendered its decision on 4th April, 2024 pursuant to the provisions of Section 306 of the *Criminal Procedure code* to place the accused on his defence. The accused elected to give a sworn statement in which he acknowledged being a Ugandan citizen with a refugee status in Kakuma camp. It was also the case for the accused that indeed he fought with his wife because she had breached the domestic obligations. The accused further told the court that the wife was under instructions to go and fetch firewood for use at home but she disobeyed the order, which became a trigger of the conflict. It was also his evidence that on arrival at home, the house was locked from outside and he had to open it up with a spare key. It is also clear from his evidence the accused and his children served a meal together and on finishing he asked, he should go and look out for the mother. That is when they found the mother inside a bar taking alcoholic drinks with the small child. That the quarrel which started between them was the foundation which escalated the fight between them where she picked a stone threw it at him aimed at his eye, in retaliation, he also punched the wife and as a consequence of it, she armed herself with a panga, which in the course of disarming her, she threw down the baby at him and that is how he suffered the fatal injuries.

8. The accused believes that the deceased was accidentally fatally injured when there was a serious conflict with his wife. The accused essentially denied the offence.

Determination.

9. It is trite law that the burden of proof lies with the prosecution in criminal cases as illuminated in the following cases: *Mwaula and another v The Republic* (1980) KLR 127(1976-80) 1 KLR, *Mbugua Kariuki v The Republic* (1976-80) 1KLR 1085 and *Longinus Komba v Republic* (1973) LRT 127. An accused person is therefore convicted on the strength of the prosecution's case and not the weakness of the accused's defence as the burden is on the prosecution to establish its case beyond reasonable doubt.

10. On a charge of murder, the prosecution has to prove the following essential ingredients:

    i. The death of the deceased one Peter Lotiang Joseph

    ii. The death was unlawfully caused

iii. The death was caused with malice aforethought

iv. The accused person participated in or caused the death of the deceased.

11. On the first ingredient, it is without doubt that it is proved by medical evidence especially by the post mortem report or on the other hand by pure circumstantial evidence. (See *Republic v Cheya* (1973) EA 500 *Ambari Gandani Konde v Republic* Mombasa CARCRA No. 103 of 1999 and *Kimweri v Republic* (1948) EA 452).

12. In this crime, there is sufficient evidence to show that Peter Lotyang Joseph is dead as a result of the fatal injuries sustained on the 27th August, 2023. The deceased initially was taken to IRC clinic for treatment but succumbed to death while undergoing treatment. He was later taken to the same hospital for a post mortem examination which was conducted on 28th August, 2023. The pathologist confirmed that the deceased's cause of death was severe brain injury. The medical evidence was further corroborated by the prosecution evidence adduced by PW1, PW2 and PW3 respectively This element has been proved beyond reasonable doubt by the prosecution as required by the law. This medical evidence on proof of death is also corroborated by the testimony of PW1, PW2 and PW3. This ingredient therefore is proven beyond reasonable doubt.

13. The next ingredient is that of the prosecution establishing the cause of death. This is what the law refers to as an act or omission by an accused person whose consequence is death. In Art 26(1) of the *Constitution*, the right to life is protected and guaranteed with the exception in Sub-section 3 which provides for elements of justification or excusable by this same constitution or any written law. It is trite law that the cause of death is usually proved by medical evidence. The tapestry on causation issues are as defined in Section 213 of the *Penal Code* which provides as follows:

> " The accused would be held responsible for another person's death although this act is not the immediate or sole cause under the following circumstances:
>
> a. He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death;
>
> b. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of living.
>
> c. He by actual or threatened violence cause such other person to perform an act which causes the death of such, an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused:
>
> d. He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death; and
>
> e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons."

14. The legal position on the legality of death is that every presumed to be unlawful unless circumstances make it excusable. It is trite that an accused person can only be punished for what he had done as opposed to what he merely thinks. It is therefore a manifestation beyond the state of mind which is the fact of acts or omissions which are prima facie regarded as unlawful. The accused can only raise a ground of justification or excuse to exclude a conclusion that his conduct was unlawful if it meets the

criteria, set out in Section 17, 207 and 208 of the *Penal Code*. See the position laid down in the case of *R v. Gusambiza S/o Wesonga* (1948) 15 EACA 65.

15. In the present case, it is the prosecution's case that the assault injuries sustained by the deceased were the direct cause of his death. On the other hand, the accused in his defence testified to hitting the mother in self-defence and in that confusion, she threw the baby to the ground and that is how he sustained the fatal injuries. It is pertinent therefore, to establish the cause of the deceased's death and if indeed the assault was the direct cause of death. The court also has to assess the circumstances surrounding the death were such that will make death excusable or justifiable or accidental.

16. It is true from the evidence that the deceased's death was attested to by the prosecution to arise of conflict between the accused and his wife. PW3 identified and produced the post mortem report which contains the findings of the pathologists as to proof and cause death of the deceased. Referring to the post mortem report, in respect to the deceased inflicted injury, it is clear he suffered head injury. From the post mortem, examination report, the deceased was not found to have any pre-existing condition or health issues that could have led to his death. I do find from the foregoing that the medical evidence directly linked the injuries suffered by the deceased to his subsequent death. The fault by the accused person in his defence can only be said to take the form of either intention or negligence. These are not grounds within the exceptions of Art. 26(3) of the *Constitution*. Hence in answer to this question of unlawful causation of death, the prosecution has discharged the burden of proof beyond reasonable doubt as one of the key ingredients of murder contrary to section 203.

17. The other ingredient is whether the death was caused by malice aforethought. In Section 206 of the *Penal Code*, Malice aforethought may be proved or manifested by direct or circumstantial evidence as defined in Section 206 of the *Penal Code* in the following terms:

    (a). An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.

    (b). Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused.

    (c). An intent to commit a felony.

    (d). An intention to facilitate the escape from custody of a person who has committed a felony.

18. The Court of Appeal in the case of *Joseph Kimani Njau v R* (2014) eKLR the Court of Appeal held as follows:

> " Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test which is always subjective to the actual subject;
>
> i. The intention to cause death;
>
> ii. The intention to cause grievous bodily harm;
>
> iii. Where the accused knows that there is a risk that death or grievous bodily harm will ensue from his act, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter

that the act and intention were aimed at a potential victim other than the one succumbed.... "

19. Similarly, in *Rex v Tubere S/o Ochen* (1945) 12 EACA 63, the court gave the following guide of circumstances from which an inference of malicious intent can be deduced:

a. The weapon used i.e. whether it was a lethal weapon or not;

b. The part of the body that was targeted i.e. whether it is a vulnerable part or not;

c. The manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted, and

d. The conduct of the accused before, during and after the incident i.e whether there was impunity.

20. The onus is on the prosecution to prove that the accused did assault the deceased with malice aforethought. In this charge against the accused, there is some consistency in the prosecution evidence with regard to the weapon used during the assault as stated in the testimony of PW1. She testified as having witnessed the accused hit the deceased and also his mother with a Panga. PW1 also testified that she took a stone targeting the accused as a device and an attempt to scare him away from continuing the act of assault. I therefore accept the evidence of PW1 as an eye witness to the assault with regard to the weapon used in this case, and reject the defence narrative on the surrounding circumstances of the offence. The panga in question was recovered and presented to court as an exhibit by PW3. The post mortem report is conclusive that the deceased was hit on the head and that was eventually the cause of death. This evidence corroborates PW1 testimony that the deceased's death was caused by unlawful acts or omission by the accused person. It is also instructive to mention the accused's conduct before, during and after the commission of the assault. It is clear from the prosecution evidence that both the minor and the mother were assaulted by the accused person and thereafter went for medical examination at IRC clinic but unfortunately the minor passed on while undergoing treatment. This was excessive force used from the father of the minor, innocent and defenceless as he was, his life was terminated prematurely. I find no evidence that the death so occasioned can be excusable or justifiable as stipulated in Art 26(3) of the *Constitution* or Section 17 as read with Section 207 and 208 of the *Penal Code*.

21. For the foregoing reasons I find that the vulnerable part of the body targeted by the accused person did manifest malicious intent to occasion death as defined in Section 206 of the *Penal Code*. I am satisfied that beyond reasonable doubt that the accused intentionally caused the death of the deceased.

22. The last ingredient is on identification of the accused person. The guidelines are as postulated in the case of *Abdullah Bin Wendo v. Republic* (1953) EACA 166, *Roria v. Republic* (1967) EA 583 and finally in *Maitanyi v. Republic* (1986) 1 KAR 75. The principle set out in those cases is trite law but it can bear repetition: -

" Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing out to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although

based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

23. Following the close of the prosecution case and analysing the evidence of PW1, I find her evidence to be of sufficient quality in consonant with the factors in the case of Abdullah Bin Wendo and Roria (Supra). I accept that there was no identification parade to test the evidence however this is a witness who knew this family prior to this incident. In the circumstances, there is good reason for not holding the ID parade for the witness. There is no dispute from the accused person that he was not at the scene of the crime to challenge PW1's testimony on her ability to identify him as the only perpetrator to the aforesaid offence. For those reasons, the prosecution has established the ingredient of identification beyond reasonable doubt.

24. My conclusion is that the evidence by the state establishes the offence of murder contrary with Section 203 as read with Section 204 of the *penal Code* to find him guilty of the offence, followed with a conviction as per the law established. As a consequence of these orders, the legal counsels for the state and the accused person shall be at liberty to file their submissions on mitigation and aggravating factors for purposes of this court exercising its discretion on an appropriate verdict on sentence.

Verdict on Sentence

25. The accused in this case has been convicted of murder contrary to section 203 and as punishable under Section 204 of the *Penal Code*. This court conducted a mini trial to take submissions from the accused person for purposes of imposing an appropriate sentence. It is instructive in this case to recollect the footsteps for the accused person on 27th August, 2023 at Kakuma Refugee Camp when he inflicted a deep cut wound at the frontal palatal region against his own child of 10 years. It apparently emerged that the deceased was just a victim of circumstances whose source being the differences his father may have had with the mother of the victim. To this court that is really beside the point as the victim in this homicide was a minor but within the bloodline of the accused person. There would be no mistaken identity and if then the accused was in rage against the conduct of his wife and the mother to the deceased, he should have directed that very hunger to the right person than bringing her own child into the conflict. I consider this to be a case confined within the doctrine of transferred malice aforethought. However, I have always held the strong view that trying a case is as easy as falling off of a log. The practical difficulty comes in reviewing the facts and evidence of the case and invoking the sentencing methodology to pass a sentence for society to conclude that justice has been done and served to this individual case. Therefore, the most solemn moment for every trial judge is when an accused person has been found guilty after a full trial or when he unequivocally enters a plea of guilty to the offence. The instinctive synthesis takes shape in view of the specific facts of a particular case and to structure a sentence, which means the criterion of sentencing objectives and principles. Fixing the bounds of a range within which a sentence in a particular face should follow is not a mathematical exercise but one which a trial judge has to balance the many different and conflicting features to break them down into some set of component to arrive at a just and proportionate sentence of the offence. It also follows that the trial judge in sentencing an offender without necessarily knowing he/she draws from his professional experience, intuition and both subjective and objective judgment to arrive at a fixed term of custodial or non-custodial sentence. I think that is the reason the Supreme Court rules that a trial judge must be afforded a significant margin of sentencing in discretion.

26. The provisions of Section 204 of the *Penal Code* provide for a death sentence for the offence of murder. However, in the case of *Francis Muruatetu v Republic* (2017) eKLR, certain factors were identified on sentencing an offender found culpable under Section 203 of the *Penal Code*. The applicable factors include:

a. Age of the offender

b. Being a first offender

c. Whether the offender pleaded guilty

d. Character and record of the offender

e. Commission of the offence in response to gender-based violence

f. Remorsefulness of the offender

g. The possibility of reform and social re-adaptation of the offender

h. Any other factor that the court considers relevant.

27. In *Veen v The Queen* (No. 2) (1987-88) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson & Toohey JJ – High Court of Australia stated that:

> " However, sentencing is not a purely logical exercise and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of a criminal punishment are various: Protection of Society, deterrence of the offender an of others who might be tempted to offend, retribution and reform. The purposes overlap and none of the can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. they are guideposts to the appropriate sentence but sometimes they point in different directions."

28. Having assessed the mitigation and aggravating factors in this case there is no doubt given the seriousness of the offence, the filial relationship between the perpetrator and the victim, offenders culpability. I have no doubt that this was an offence committed negligently, recklessly and or intentionally with one ultimate outcome to cause death or grievous harm to the victim.

29. It is also well at this stage to state the sentencing policy guidelines which comprises of the objectives and principles to concretize sentencing in the criminal courts has a great influence in the decision making of a trial judge. Thus in the accused's case, the balance of mitigating factors with the aggravating factors the scale does tilt towards aggravating factors for lack of compelling and exceptional circumstances to punish the accused with a lesser sentence.

30. It will be a mistake to conclude that the accused is remorseful and regrets the offence even though this is a homicide against his own child of fragile years. In *S v Matyityi* 2011 (1) SWACR 40 (SCA) Ponnan JA differentiated between regret and remorse when he said

> " There is moreover, a chasm between regret and remorse, Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contribution can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take genuineness of the contrition alleged to exist cannot be determined. After all before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia:

what motivated the accused to commit the deed, what has since provoked his or her change of hear, whether of the he or she does indeed have a true appreciation of the consequences of those actions."

31. The court has carefully weighed the aggravating factors with the mitigation offered by the accused person. In overall the nature and seriousness of this crime of homicide the interests of society and the personal circumstances of the accused, points not to a measure of mercy the scale on sentencing calls for a deterrence sentence based on the facts of the case.

32. Following this staged approach to sentencing guidelines, the dicta in *Muruatetu* and rightly so the outraged conduct of the accused no substantial or exceptional circumstances exist to pass a lenient sentence for this heinous crime. it is in my judgment that the accused person be imprisoned for 30 years with a residual enhanced credit under Section 333(2) of the *Penal Code* with effect from 13th September, 2023.

33. 14 days right of appeal.

DATED AND SIGNED AND DELIVERED AT LODWAR THIS 14TH DAY OF AUGUST, 2024

In the Presence of:-

Mr. Kakoi for the State

Accused Person

.....

R. NYAKUNDI

JUDGE