



**Republic v Etukutan (Criminal Case 2 of 2019)  
[2023] KEHC 2861 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2861 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL CASE 2 OF 2019**

**JK SERGON, J  
MARCH 30, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**LORO NABUKA ETUKUTAN ..... ACCUSED**

**JUDGMENT**

1. The Accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Particulars of the offence are that, the accused on September 19, 2018, at Lokichoggio Location in Turkana West Sub-County within Turkana County murdered Emuria Emase.
2. The Accused pleaded not guilty to the charge and the prosecution called Three (3) witnesses to prove its case.
3. PC Hassan Omar No xxxx (PW 1) stated that he was attached at Ngong Disposal Unit Mandera but before that he was at DCI Kakuma performing general investigation duties. He testified that on September 19, 2018 he was invited by DCIO Kakuma to go to Lokichoggio Nabriwan Area to investigate a murder case and when he reached Lokichoggio Police Station he told by the OCS that a spent cartridge (exhibit 1) was found at the scene of the murder. He further stated that later on they forwarded a G3 rifle (exhibit 2) belonging to Loro Nabuka Etukutan the accused person the serial number was 011xxxx, the rifle had been issued to the accused, the arms movement book (exhibit 3) indicates that the G3 rifle was issued on September 24, 2018. PW2 prepared an exhibit memo form (exhibit 4) in respect of the firearm, the spent cartridge, ammunition which was in the firearm on December 8, 2018 which was sent to ballistic expert at the DCIO Headquarters for further analysis which was done by Alex Chirchir who prepared a ballistic report (exhibit 5) which stated that spent cartridge had chamber markings consistent with G3 rifles. He reiterated that the firearm was in the possession of the accused who was a National Police Reserve officer ID Card No 02xxxx (exhibit 6) which was issued to the accused on June 29, 2018. On cross examination, PW 1 confirmed that he



was the investigating officer in the case, he had visited the crime scene on September 21, 2018. He also confirmed that he was the arresting officer. He stated that he did not know the circumstances surrounding the shooting as only the accused and the deceased were present during the shooting incident. On re-examination, he confirmed that following his investigations, he had summoned the accused and subsequently arrested him.

4. Alex Chirchir No 2xxxx (PW2) stated he is attached to the DCIO Headquarters as a firearms examiner his duties are examination and identification of firearms and ammunition, their component parts and related matter. He testified that on December 18, 2018 he received for PC Hassan Omar a number of exhibits follows; two rifles serial number KEKP 006xxxx A1 and KEKP 011xxxx A2; eighteen rounds of ammunition B1-B11, C1-C7, one cartridge case marked as E1. He further stated that there was an exhibit memo form dated December 18, 2018 inquiring as follows; whether A1 and A2 are classified under the *Firearms Act*, whether A1 and A2 are serviceable, which firearm fired exhibit E1, the caliber of E1 and whether B1-B11, C1-C7 are live bullets capable of being fired. He testified that he carried out examinations and his findings were as follows; A1 and A2 the two rifles were manufactured in Germany, each designed to caliber 7.62\*2 mm such as exhibits B1-B11 and C1-C7, each was in good mechanical condition with all parts intact. He further stated that on January 8, 2019 he prepared a report in which he stated that there were two rifles with one cartridge case and he was to establish which had fired the cartridge and having examined both found that the spent cartridge matched with exhibit A2 the rifle KEKP 011xxxx A2.
5. Dr Ekuru James (PW3) stated that he is a specialist in anesthesiology and critical care and has worked as a medical doctor for over 30 years. He stated that the postmortem report was prepared by Dr Soita who left for Mombasa County, he confirmed that the never worked with Dr Soita and that it was going to be difficult to have him back in Lodwar. He confirmed that the post mortem has a stamp from Lodwar Referral Hospital and that he was the Deputy -In -Charge of Lodwar Referral Hospital. The defence raised no objection to having PW 3 produce the post mortem report prepared by Dr Siota. PW 3 testified that the post mortem report was in respect of the body of Emuria Emase and further that the examining doctor had made various observations and findings on the body and that the cause of death was internal hemorrhage into the lung cavity secondary to the heart shattering with high velocity object and lung collapse resulting to respiratory arrest. PW3 produced the post mortem report as exhibit 5. On cross examination, he confirmed that he never worked with Dr Siota and that he was neither a signature or handwriting expert. He further confirmed that the post mortem report was brought to him by the police indicating that it was prepared by Dr Soita, he contacted Dr Siota and forwarded the report to him via whatsapp, Dr Soita confirmed that he prepared the report. On re-examination, he reiterated that he believes the post mortem report was prepared by Dr. Soita as he had personally contacted Dr Soita who indeed confirmed that he had prepared and signed the post mortem report.
6. When the accused was placed on his defence, he elected to give an unsworn testimony with no witnesses to call. In his defence, the Accused stated that he lives in Lokichoggio and he is a National Police Reserve (NPR) officer. He denied committing the offence. He stated that he was given a gun by the government to protect the citizens and himself and further that Lokichoggio is a dangerous place that is frequently invaded by Toposa raiders who cross the border from Sudan. He testified that the place where the deceased's body was found is where they had fought with the Toposa and that the spent cartridge found at the scene where the deceased body was found could not be traced to him and further that it was possible that he was killed by someone else or by the Toposa. He stated that on the material day when the deceased was killed, he was away herding cattle. He also stated that he did not know the deceased and he had never met him.



7. At the close of the case, neither the prosecution nor the defence counsel wished to put in any submissions.
8. The sole issue for consideration is whether the prosecution proved its case against the accused beyond reasonable doubt.
9. The offence of murder is provided for in section 203 of the [Penal Code](#) that provides as follows; “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
10. The offence of murder is provided for in section 203 of the [Penal Code](#) that provides as follows; “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” In [Republic v Andrew Omwenga](#) [2009] eKLR the court held: “It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) The death of the deceased and the cause of the death, (b) That the accused committed the unlawful act which caused the death of the deceased and (c) That the accused had the malice aforethought.”
11. The accused in this case was charged with the offence of murder contrary to section 203 of the [penal code](#) which defines murder as the unlawful killing of a person or persons with malice aforethought. In this case the death of the deceased is not disputed PW3 produced a post mortem report which indicated that the cause of the death was internal hemorrhage into the lung cavity secondary to the heart shattering with high velocity object and lung collapse resulting in respiratory arrest. However, it is not clear that the death of the deceased was as result of the unlawful actions of the accused or that the accused herein had malice aforethought, he had no motive to kill the deceased, there are no prosecution witnesses placing him at the scene save for a spent cartridge that was recovered next to the body of the deceased which according to a ballistic expert PW 2 was discharged by KEKP 011xxxx A2 which rifle had been issued to the accused person.
12. I have considered the prosecution’s case, the accused person’s defence and the evidence herein. I find that the prosecution has not discharged the evidentiary burden to the required standard and proven their case against the accused person beyond reasonable doubt. What therefore the prosecution must discharge by the phrase beyond reasonable doubt is evidence which satisfies the court on the truth of the facts in dispute to the exclusion of any reasonable suspicion. The doctrine is not measured with absolute mathematical precision rather it is the standard of proof as set out in section 107 (1) of the [Evidence Act](#) which states as follows; “that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of facts, which one asserts must prove those facts exist.”
13. In [Philip Nzaka Watu v Republic](#) [2006] eKLR, it was held that that to find conviction in a Criminal case, the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in [Stephen Nguli Mulili v Republic](#) [2014] eKLR the court stated as follows; “[I]t is not in doubt that the burden of proof lies with the prosecution. The *locus classicus* on this is the case of [DPP V Woolmington](#), (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases.”
14. The accused person has raised the defence of alibi, he stated that during the raid he was away herding cows, he therefore was not at the crime scene, the prosecution is mandated to dislodge the alibi defence and provide evidence rebutting the alibi, however, they failed to discharge their duty. It is trite law that



the onus is on the prosecution to displace the defence of alibi after the defence raises it at the trial since as was held by the Court of Appeal in *Victor Mwendwa Mulinge v Republic* [2014] eKLR; “It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution.”

15. I wish to point out that relying on circumstantial evidence in this instance is would render the conviction unsafe as there are no witnesses placing the accused at scene of crime and neither are there witness accounts that indicate that it is the accused person who shot the deceased, the only nexus between the accused person to the crime scene herein is a spent cartridge from his rifle that was found next to the body of the deceased. I concur with the sentiment of the court in *JOO vs Republic* [2015] eKLR, Mrima, J held that; “It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”
16. The Court of Appeal stated in *Pius Arap Maina v Republic* [2013] eKLR, the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution case raising material doubts, must be in favour of the accused.
17. Accordingly, I find that the prosecution has failed to prove that the accused person herein on September 19, 2018, at Lokichoggio Location in Turkana West Sub-County within Turkana County murdered Emuria Emase. In the premise, he is hereby acquitted and I direct that he be set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF MARCH, 2023.**

.....  
**J. K. SERGON**

**JUDGE**

In the presence of:

C/Assistant - Chepkoech

Maryanne Kariuki holding brief for Lele for the Accused

Kakoi for the State

Accused – Present in Prison

