



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Ilima (Criminal Case 5 of 2018)  
[2023] KEHC 2860 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2860 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL CASE 5 OF 2018**

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

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**LOKITOE CHAPU ILEMA ..... 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, on September 15, 2018, at Oluguse Village in Loima Sub-county in Turkana County murdered Amoit Esuban
2. The accused pleaded not guilty to the charge and the prosecution called eight (8) witnesses to prove its case.
3. David Nayialomala (PW1) stated that on the morning of September 15, 2018 he was at Naipa when he received a report from Lokitor Jabu and his friend who told him that his daughter called Amoit Esuban had committed suicide. That together with his wife and Lokitor's brother they took a motor bike to the place where the said deceased had committed suicide. That when he turned the deceased body, the side was swollen with injury, the chick had bruises and the blood was oozing from the nose and mouth. He concluded that it was not suicide. That he called Ekoko who was there with him to come and witness what he was seeing and the said Ekoko decided to call the police who came and took the deceased body to the mortuary at Lodwar. He stated that he went to the accused's home but the said accused who was the deceased husband was not there. That he went to the mortuary and witnessed the post-mortem examination on the deceased body. That she also had injuries on her forehead. He testified that the deceased was pregnant at the time of death and the infant removed from her uterus was also dead. That he saw the doctor file a post-mortem report and he had a copy of the said report MF1-1. He reiterated that the deceased who was his niece was the accused wife and he had not received a report of any quarrel between them as they were waiting for the accused to pay the dowry. He stated



- that he didn't know when the accused was arrested and that the accused had lived with the deceased for seven months.
4. On cross-examination he testified that he found the accused at the police station, the said accused having been arrested in respect of murder. That the accused told him that the deceased had committed suicide but from the information that he saw in the post-mortem report, he concluded that it was not a case of suicide. He testified that he was the first in their family to confirm the deceased's death and that the women that he found at the accused's home showed him the lining of the vest which the deceased used to hang herself. He confirmed that the accused was not at home and he only saw him at the police station. That the incident happened on September 15, 2018 but he saw the accused at the police station on September 16, 2018. He stated that the body was removed from the scene to a shade by the women they found there while they went to inform the police. That after the accused informed him of the incidence, the said accused then proceeded to the deceased father's home to inform them of the same and he did not meet him again until he met him at the police station.
  5. On re-examination he confirmed that it was the accused who went to inform him that the deceased had died. He stated that the accused brother remained with him while the accused proceeded to the deceased father's home with another person. That together with the accused brother and his wife, they went to the accused home and did not find the said accused there.
  6. James Emankor (PW2) stated that on September 15, 2018 his father and mother informed him about the deceased death. He stated that together with his wife and his brother they went to the accused's home and a neighbor and a KPR officer informed them that the deceased had committed suicide. That he told them not to bury the deceased before the post-mortem examination. He stated that together with the accused brother, they turned the deceased body and noticed that there was bleeding from the nose and the mouth and there was injury on the chest (rib area). He testified that he told the accused brother that the deceased had been killed and should therefore be taken to the hospital. That they left the body at the scene and went to notify the chief. That the police who arrived at 4.00pm took photographs of the scene and statements from the witnesses who were at the scene. The the body was taken for post-mortem examination whereby together with PW1 they witnessed the post-mortem examination and identified the deceased body. He identified the accused in court and stated that the deceased was married to the accused in March 2018 and that he had not heard of any dispute between the accused and the deceased. That he knew the accused and there was no grudge between them.
  7. On cross -examination he confirmed that he was informed about the deceased's death by his father and his mother. That he did not see the accused at the scene and that the deceased body was in the shade under a tree. That the women who were at the accused home are the ones who moved the body. He testified further that they were shown a piece of cloth that the deceased allegedly struggled herself with.
  8. Albert Naker(PW3) stated that he was called on phone on September 17, 2018 and informed that his cousin had been killed. That on September 18, 2018, she left Kakuma for Lodwar and met his uncle at the mortuary. That when the post-mortem examination was being done, he identified the body and noticed that there was blood in the ribs and the head also had injury. That the doctor confirmed that there was injury to the rib and the forehead and went ahead to file the post-mortem report while giving them a copy of the said report. He stated that the deceased had been married to the accused for 3 months and there was no grudge between them and the accused.
  9. On cross examination, he stated that the accused was in court because of the deceased's death. That as they were struggling with the deceased issue, the accused feared for his security and went to the police.
  10. DR. Wayaa Jonathan (PW4) stated that he was a general practitioner attached to Lodwar County Referral Hospital and that he performed post-mortem examination on the deceased body, the said



body having been identified by two witnesses. He testified that the deceased body had bruised neck and bruised left lateral thoracic cage. That there was a lot of blood on the right side of the chest between the lungs and the rib cage. That there was also blood on the left side of the chest cavity. He stated that the heart was normal and there were no perforations in the intestines. That there was a pre-mature baby in the uterus of 18-22 weeks. He testified that there was blood under the sculp on the head but there were no blood clots or free blood on the scalp. The opinion formed from the post-mortem was that the deceased died due to massive right sided haemothorax secondary to blunt thoracic injury. The post-mortem report was produced as Pexht-1. On cross examination he stated that there were no fractures on the skull though there was skull haematoma. He testified that the uterus was intact so the foetus could not have caused the death. He explained that there was no injury to the foetus, that it had died before the deceased and that there was no specimen taken for chemical analysis.

11. Alice Akai Kerio (PW5) stated that on September 15, 2018am at 7.00am she was at home when the accused went home and told her that the deceased had committed suicide at night. That she knew the accused as their in -law. That together with her husband, they went to the accused's place where they found the deceased body under a tree covered with a net and bleeding from the nose. That there was nothing near the deceased body and on checking the cheek they noticed that it had some marks. That her husband then called the Police from Lorugum Police station and three police led by the OCS came at 4.00pm. That the police interviewed witnesses and then took the body to the mortuary. She stated that she went to Lorugum police station and recorded her statement.
12. On cross-examination she confirmed that she found the deceased body in the shed under a tree but she was not there when the said body was moved to the shade. That there was no any weapon in the shed, the body had some marks on the shoulder and the face was swollen. She confirmed that the accused was not at the shade.
13. Asekon Akimat (PW6) stated that on September 15, 2018they woke up at around 6.00am in the morning and saw the deceased lying down. That when she got to the scene, they found a piece of cloth around her neck. That her traditional beads had been pushed down and the rope tied. The beads are marked MF1 2. That she also saw a lesa that the deceased was wearing marked as MFI3 and that she had a skirt marked MFI4. She stated that they were living with the deceased in the same manyatta, that though the deceased had a man called Losura, her parents referred her to the accused who accepted to marry her. That the accused is her husband and therefore the deceased was her co-wife. That on that fateful night, the accused slept near the goat shed while the deceased slept with the accused's mother. She stated that together with her sister-in-law they tried to turn the deceased around and that is when they saw the piece of cloth. That the accused went to inform the deceased's parents. That the deceased body was picked by the police. That she was not happy when the deceased was brought to her husband (the accused) but they did not kill the deceased nor quarrel with the deceased before her death.
14. On cross-examination she stated that the police came and recorded her statement and that she was not forced to testify. That after the accused went to inform the deceased parents of the deceased death, she did not see him again. That the deceased was sleeping inside the accused's manyatta but was found dead outside. On re-examination she stated that when they found the deceased body lying down, the only thing they did was to turn the said body. That the deceased body was lying outside the accused's mother's house.
15. Lokichar Kodikodi (PW7) stated that on September 15, 2018, she was woken up from her hut by the accused's mother and that is when she found the deceased with a vest rope on her neck. That she saw the skirt that the deceased wearing. That the deceased had beads around her neck and also had a lesa. That the accused was his brother-in -law and the said accused came to the scene later on with other people from different manyattas. She stated that she thought the deceased had hanged herself having



been separated from her lover. She stated that she had seen the deceased earlier that morning and did not hear any commotion that night. That the deceased was given to the accused for marriage. She stated that she recorded her statement with the police.

16. On cross examination she confirmed that she found a piece of vest rope around the deceased neck. That she was woken up at 1.00am but did not go to the scene immediately until one hour later. That she saw the items marked for identification at the scene but there was no light at the scene. That the accused was forced to marry the accused and that is why she killed herself. That she found the accused at the scene and she had known the deceased for a week. On re-examination she stated that there was moonlight.
17. PC Benard Ng'ang'a No. 113473 (PW8) stated that he is stationed at Logurum Police station and is the investigating officer. That he was informed about the deceased's death by the OCS on 15<sup>th</sup> September, 2018, at 1524hours. That together with the OCS, they proceeded to the scene where they found several members of the public and the deceased's body under a shade. That he noted that there was blood in the nose and bruise on the cheek. That he took photographs of the deceased body which he produced as Pexht-2a being photograph of the scene before the body was uncovered, Pexht-2b being photograph of closed up view of the body, Pexht-2c (i) and (ii) being photographs of blood stains in the nose and the mouth respectively, Pexht-2d being photograph of bruise in the left cheek and Pexbt-3 being an item that the deceased allegedly used to commit suicide. He also stated that they collected the beads that the accused was wearing which he produced as Pexht-4. He stated that he recorded statement from witnesses and that it was alleged that the deceased had committed suicide. He stated that the post mortem on the body of the deceased was done on 18<sup>th</sup> September, 2018.

It was his testimony that on September 16, 2018, the accused went to the police station by himself and alleged that the deceased had committed suicide. That they investigated and charged him with the offence of murder. He stated that there were marks on the deceased neck showing that she had struggled, the left cheek had marks and blood stains in the mouth. That the deceased was accused's second wife and they were staying together in the same manyatta. He testified that if it was a suicide case, the accused would have seen it since he was sleeping outside the manyatta. He stated that the deceased was pregnant at the time of her death and the pregnancy was not the accused's as the said accused said that he had not had sex with the deceased since they got married and therefore the accused had the intention to kill the deceased. He testified that he didn't know how the accused prepared himself to commit the offence. That he was not present during the post-mortem and had not known the accused before the incidence. He identified the accused in court.

18. On cross examination he confirmed that the accused told him that the pregnancy was not his and that no DNA was carried out to ascertain that. That when he visited the scene the accused had vanished to unknown area. That the accused told him that he was sleeping outside the manyatta when his wife came outside and committed suicide. That most of the members of the public and the family members who were in the compound at the time of the incidence had already left when he visited the scene. He stated that he was concerned that the accused stood trial for murder. That the deceased co-wife (PW6) informed him that it was the accused that informed the relatives about the incidence and therefore he knew what had happened. That the accused had not been intimate with the deceased but there was no any domestic violence. On re-examination, he stated that though there was no domestic violence, there was some quarrel between the accused and the deceased about the pregnancy. That the deceased's relatives said that the deceased had ran away and gotten married to another man at Kakuma who impregnated her. That when the deceased went back to her father's home, her father called the accused to come and pick his wife (the deceased). That he was able to recall those who were at the scene as witnesses. On further cross-examination he stated that he confirmed from the father of the



deceased and the accused that the pregnancy was not the deceased's but of a man from Kakuma. That the deceased had run away from her parents' home to Kakuma.

19. When the accused was placed on his defence, he elected to give a sworn testimony with no witnesses to call. In his defence, the accused stated at the time of deceased death he was away herding his cattle and was therefore not near the scene of crime. He stated that he was asleep when PW6 told him to go and see what had happened. That he went to the scene and was surprised to see the lifeless body of the deceased after which he reported to the deceased parents. That the deceased had hanged herself using a rope. That he later went to report to the police station where he found the deceased's parents and he was arrested and placed in custody. He stated that he had no grudge against the deceased and that he concluded that he hanged herself because there was a rope around her neck. That he took himself to the police station to report on what he saw.
20. On cross examination he stated that the deceased had been given to him but she did not agree to be his wife and that though they lived together, he had not performed any conjugal rights. That the deceased was pregnant with a child he did not sire and that he suspect she hanged herself because she had not quarreled with anyone. He testified that he was aware the doctor said that she had chest injuries, that he had never been intimate with the deceased, had no cordial relationship with the deceased and they always quarreled. On re-examination he stated that he found the deceased already dead and that he did not know that the deceased was married to someone else.
21. At the close of the case, neither the prosecution nor the defence counsel wished to put in any submissions.

The Only Issue for Consideration Is Whether the Prosecution Proved Its' Case Against the Accused Beyond Reasonable Doubt.

22. The offence of murder is provided for in section 203 of the *Penal Code* that provides:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
23. The Court of Appeal in *Joseph Gitbua Njuguna v Republic* [2016] eKLR outlined the ingredients of the offence of murder and stated that:

“ Under section 203 of the *Penal Code*, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See *Milton Kabulit & 4 others v Republic* [2015] eKLR.”

#### **a. Death and Cause of Death**

24. PW1 testified that when he turned the deceased body, the side was swollen with injury, the cheek had bruises and the blood was oozing from the nose and mouth. PW2 stated that there was bleeding from the nose and the mouth. That there was injury on the chest (rib area). PW3 testified that during the post-mortem exam he noticed the blood in the left rib and an injury on the forehead. PW4 opined that the deceased died due to massive right sided haemothorax secondary to blunt thoracic injury. To that end, the Prosecution has proved beyond reasonable doubt that the deceased died due to an unlawful act of assault.



## **b. Whether the Accused Caused the Death of the Deceased**

25. None of the prosecution witnesses actually saw the accused kill the deceased. In essence, the prosecution case was based on circumstantial evidence.

The Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction in the case of *Abamad Abolfathi Mohammed and another v Republic* [2018] e KLR where it stated as follows:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr App No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

26. PW1 testified that the accused told him that the deceased committed suicide but from the information contained in the post-mortem report, he concluded that it was not a case of suicide. PW2 testified that after he noticed the blood in the nose and mouth as well as injury on the head and ribs, he concluded that the deceased was killed. PW4 opined that the deceased died due to massive right sided haemothorax secondary to blunt thoracic injury.
27. All the prosecution witnesses testified that the accused was not at the scene of crime, in fact PW3 stated that as they were struggling with the deceased's issue, the accused feared for his security and went to the police. PW8 also testified that when he visited the scene, the accused had vanished to unknown location.
28. PW1, PW5 and PW8 testified that it was the accused that informed them that the deceased had committed suicide. PW1 and PW6 also testified that it was the accused who went to tell the deceased's parents about the deceased death. The same accused took himself to the police station to report that the deceased had committed suicide.
29. PW1 testified that they found the deceased body outside accused Manyatta. PW6 testified on cross examination that the deceased was sleeping inside the accused's manyatta but was found dead outside. PW8 testified that the accused told him that he was sleeping outside the manyatta when his wife came outside and committed suicide.
30. From the evidence adduced by the prosecution, it is clear that the accused was the last person who was seen with the deceased prior to her death. PW1's testimony that the accused was the one who informed him of the deceased death was corroborated by both PW5 and PW8. In his defense, the accused himself testified that indeed he reported the incidence to the deceased's parents and the police but the deceased committed suicide.
31. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is therefore expected to provide any explanation as to what happened. Having been placed at the scene



of the incident as the person who was last seen with the deceased before she died, the accused herein has a duty to give an explanation of how the deceased met her death.

32. In the circumstances of this case, the accused's defence failed to offer any explanation as to how the deceased might have met her death. His defense amounted to a mere denial. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused who unlawfully caused the deceased's death.

### **Whether the Accused Person had Malice Aforethought.**

33. For the charge of murder to succeed, it must be proved that they acted with malice aforethought. Section 206 of the [Penal Code](#) provides circumstances from which malice aforethought may be inferred. They are:

- a. An intention to caused death of or to do grievous harm to any person, whether that person is the person actually killed or not; (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually 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 not be cause; (c) An intention to commit a felony; (d) ...

34. In determining whether the accused persons had malice aforethought, the court must take the surrounding evidence into account as was held by the Court of Appeal in [NMW v Republic](#) [2018] eKLR when it relied on the case of [Bonaya Tutu Ipu & another v Republic](#) [2015] eKLR:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v Uganda*, Cr App No 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

35. PW8 testified that the accused told him that they had never been intimate with the deceased and that the deceased was pregnant with a child that he did not sire. He further stated that he confirmed from the father of the deceased and the accused that the pregnancy was not the deceased's but of a man from Kakuma. That the deceased had run away from her parents' home to Kakuma. That though there was no domestic violence, the accused and the deceased quarreled over the pregnancy issue. PW6 and PW7 testified that the deceased had her lover but was forced to marry the accused. The accused in his testimony confirmed that the deceased did not agree to be his wife hence they had no cordial relationship. The accused stated that though he lived with the deceased he had never performed any conjugal rights yet the deceased was pregnant with a child that he did not sire and they always quarreled.
36. PW8 testified that there were marks on the deceased neck showing that she had struggled, the left cheek had marks and blood stains in the mouth. PW4 testified that the deceased body had bruised neck and bruised left lateral thoracic cage. That there was a lot of blood on the right side of the chest between the lungs and the rib cage. That there was also blood on the left side of the chest cavity. He formed an opinion that the deceased died due to massive right sided haemothorax secondary to blunt thoracic injury.



37. It can be inferred from the nature of the injuries suffered by the deceased that the assault was intended to cause death or grievous harm and therefore malice aforethought can be inferred under Section 206(b) of the Penal Code.
38. The defence put forward by the Accused namely: Lokitoe Chapu Ilema, prima facie is a mere denial. The defence did not displace the prosecution's case. The prosecution has proved its case against the accused beyond reasonable doubt. I find the accused guilty for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He is hereby convicted.

**DATED, SIGNED AND DELIVERED VIRTUALLY 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 Prosecution.**

**Accused – Present in Prison**

