



**Republic v Lokwasinyen (Criminal Case E001 of 2021)  
[2023] KEHC 2799 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2799 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL CASE E001 OF 2021  
JK SERGON, J  
MARCH 30, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MICHAEL EKWAM LOKWASINYEN ..... 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 December 21, 2020, at Kataboi village in Turkana North Sub-county within Turkana County murdered Rebecca Ipiyo Losinyolo.
2. The accused pleaded not guilty to the charge and the prosecution called five (5) witnesses to prove its case.
3. EL (PW1) a child of unknown age. The Court conducted a *voire dire* and determine that it could take this witnesses' unsworn evidence. PW1 testified that on December 21, 2020, together with the victim who is his mother, they were sleeping in the home of PW3 when the accused who is his father forcefully gained entranced to the said home while drank. That, the Accused took a rod and hit the deceased on the stomach after which he heard the deceased requesting for water. After witnessing, that act this witness saw the accused take the deceased to the hospital where she died. PW1 identified the Accused and the road MFI-1 that the accused used to assault the deceased. On cross examination, PW1 stated that he was told what to say but maintained that he was present at the scene on the fateful day and that though he was sleeping, he woke up and he was shaken.
4. Dr. E. Kidalio (PW2) stated that he works at Lodwar County Referral Hospital and that he performed the Post-mortem on the body of the deceased on January 1, 2021. He testified that there were no external injuries on the body of the deceased and that there was blood on the left chest, the breast and the left lung was ruptured. The opinion formed from the post mortem was that the deceased died due



to ruptured left lung with hemothorax. The Post mortem report was produced as Pexht-1. On cross examination, PW2 confirmed that there were no external physical marks in the body of the deceased and that the cause of death was due to ruptured left lung with hemothorax as a result of a trauma and that there can be many causes of ruptured lung. That it was false that there was no possibility of physical assault as it is possible to be assaulted without leaving physical mark. He also stated that injury can be caused by a sharp or blunt object. On re-examination, this witness confirmed that the post-mortem report was in the file and on the record and was accessible.

5. John Ekaran Embenyo (PW3) stated that the deceased was his brother's daughter and that the accused used to live at his place with his wife. That on December 21, 2021 the deceased went to the lake and came back without fish, she got only one fish, she was sick. She left the accused at the lake. PW3 testified that on the fateful day at 10.00pm, he heard his door being knocked and when he opened the door, the accused came in and asked for his children. The accused and the deceased started fighting when the accused hit the deceased thrice with a stick and left the house. The deceased then asked for water. He testified that when the accused came back, he asked him to take the deceased to the hospital using a wheelbarrow whereby the deceased was pronounced dead on arrival. That a report was made to the chief and the police who went to look for the accused. He testified further that the deceased had lived at his place for about two months and that before that fateful night, there had never been any fights between the accused and the deceased. He identified the stick which was used to hit the deceased and which he gave to the police.

On cross examination he stated that the deceased was his uncle's daughter and that the deceased and the accused were husband and wife. He further confirmed that the accused had stayed at his place for two months and that while at his place the deceased would go to the lake and come back in the afternoon. He stated that he does not take alcohol and that it was not true that the deceased used to brew alcohol at his place. He confirmed that the deceased and the accused had never had any fights before that fateful night and that the deceased was sick. He further testified on cross examination that it was his wife who called the accused at 10pm to come and see how sick the deceased was and that it was a dark night and that he had not seen when the accused came to his compound nor seen what accused was wearing as he was sleeping in his house. He stated that MFI-1 was found on the scene but he didn't know whether it was brought by the accused or whether it was the one used to hit the deceased. On re-examination he confirmed that when the accused came at 10pm, himself, his wife, the deceased and PW1 were in the house. That the accused forced his way into his house. He stated that he saw the deceased being assaulted by the accused with a stick and that when the deceased was taken to the hospital, she was not talking but alive.

6. Emanikor Lotianga (PW4) testified that he positively identified the body of the deceased at the morgue for post mortem.
7. No. 91328 Pc Shadrack Muinde (PW5) stated that on December 22, 2020 at 0900hours he received a call from the Officer Commanding Station Lokitaung' Police Station to take up a murder case. That the accused had already been arrested and booked in for murder of his wife. That he took the body to the mortuary at Lokitaung' and received a walking stick that was used to hit the deceased. He stated that he visited the crime scene where he met PW1 a minor of between 6-8 years old who informed him that the accused who is his father entered the house at 10pm and assaulted the deceased who was his mother in the stomach thrice using a stick. That PW3 who was an eye witnessed informed him that he saw the accused assault the deceased using a stick while he was in his couch and could not assist in any way but just observed as the accused assaulted the deceased. That later the accused took the deceased to the hospital using a wheelbarrow whereby the deceased was pronounced dead on arrival



and later on took the body to the mortuary. He identified the accused and produced the walking stick as prosecution Pexht- 2.

On cross examination he confirmed that he visited the scene and did not tell the court what he observed but what he was told. That it is believed that the accused used Pexht-2 to assault the deceased and that he was present when the post-mortem was conducted.

8. When the accused was put to his defence, the accused person gave a sworn testimony and called one other witness; his biological sister who also gave a sworn testimony. The accused testified that he met the deceased in the year 2016 and they had a cordial relationship with her. That the deceased had 3 children from her previous relationship which the accused took as his and later sired one child with the deceased. He testified that the plan to conclude the marriage ceremony according to the Turkana customs was underway but were shuttered by the deceased death. He testified that the deceased was a heavy drinker of illicit brew. That he is a fisherman and the deceased used to collect fish from him to feed the children but she did not turn up on December 19, 2020. That when he visited her on December 20, 2020 at PW3 place he was told that the deceased was unwell after which he gave instructions that she be taken to the nearest hospital and that he was to pay the hospital bill in the evening. He stated that when he came back from fishing, he met the deceased in a different location from the usual meeting place whereby the deceased refused to take the fish that he gave her and when he questioned her about the refusal, the deceased asked him for a panga to cut firewood. That the deceased left and later on the accused was informed by PW3's wife that the deceased had collapsed and died. That he rushed and found the deceased crying down after which he took her to the hospital in a wheelbarrow but was pronounced dead upon reaching the hospital. That he had no quarrel with the deceased on December 20, 2022. It was his further testimony that PW3's wife was not called to testify despite being present where the deceased died and that a member of nyumba kumi who consoled him and told him to take the deceased to the hospital was also not called to testify. That the stick that he allegedly assaulted the deceased with was fetched from PW3's house and did not belong to the accused. He stated that he did not touch or assault the deceased and urged the court to set him free.

On cross-examination he stated that the deceased was his only wife and was staying with PW3 at the time of her death. That the deceased had lived with PW3 for two months and the accused had not done the traditional Turkana wedding with the deceased. That he did not have a problem with the deceased staying at PW3's place neither did he mind having the deceased as his wife despite her being a drunkard. That he did not report about the illicit alcohol his wife was taking together with others. He stated that PW3 came to court on a wheelchair. He testified further on cross examination that it was not true that the deceased ran away from him and that he used to tell the deceased his opinion. He clarified that he did not summon PW3's wife nor the nyumba kumi member and that he did not know where the police recovered the stick from. He maintained that he had no dispute with the deceased except for the drinking problem. On re-examination he stated that he saw the alleged stick for the first time at the police station and that he was a fisherman who does not use a stick.

9. Agnes Lotome Lokwasinyen (DW2) stated that the accused is her brother who has done fishing since he was young. That the deceased was the accused's second wife and together they were living at the shores of the lake and that she used to get fish from the deceased. She testified that she had a cordial relationship with the deceased and considered her as a family and that the accused had intended to marry the deceased even though the deceased had three children from previous relationship and only had one child with the accused. She stated that she didn't know what happened on December 20, 2020 as the accused visited her and asked for food but she had no food to serve the accused. She stated that the accused had no walking stick and had not taken alcohol. That PW3's wife came to her house and told the accused to go to her place and take the deceased for treatment in the hospital. She stated that PW3's wife told her that she gave malarial drugs to the deceased and that the deceased was not taken



to the hospital. That the accused took the deceased body to her homestead though she was not aware that the accused and the deceased had a fight. On cross-examination she confirmed that the deceased and the accused were living together at the shores of lake Turkana while she was living in the village. She testified that she couldn't tell how the deceased met her death. On re-examination she stated that the deceased lived with PW3 after she fell ill.

10. At the close of the case the Defence put in their written submissions while the prosecution chose not to file any written submissions.
11. The Defence submitted that no case had been demonstrated by the prosecution to warrant a conviction of the accused person as the prosecution witnesses testified that there was no quarrel between the accused and the deceased. PW1 and PW3 testified and produced a stick that the accused allegedly assaulted the deceased with on the dark night of 20<sup>th</sup> December, 2020, coupled with PW3's testimony that the deceased had been sick for about a month and had not been taken to the hospital but instead given PW3's wife medication without any evidence from a medical practitioner that the said drugs would cure the deceased. The defence continued that PW2 who conducted the post-mortem testified that the deceased had no physical marks as a characteristic of assault by the accused. It was the defence's submissions that the prosecution failed to prove that there was any intention to kill or intention to cause grievous bodily harm by the accused and there is also no proof of the Actus Reus.
12. The Defence submitted that the defence's evidence dispels the allegations in the charge sheet in that the accused testimony demonstrated that at the time of the alleged assault of the deceased happened, he was at his sister's house and the sister (DW2) corroborated the defence of alibi that the accused was at her home during the period hoping to get some meal for the night. That the accused disowned the stick produced as Pexht-2 and testified that he was a fisherman who did not engage in the business of holding sticks for whatever purposes and that he had never seen that stick other than in court.
13. It was the defence's submissions that the prosecution's case was marked with poor investigation, material inconsistencies, vagueness, discrepancies and contradictions. The defence reiterated that PW5, the investigating officer, did not say who the owner of the stick produced as Pexht-2 was, who handed it to him and where he recovered it and did not link the said stick to the accused person.
14. The defence contended that it is a puzzle that no one intervened or even heard what was happening on that fateful night despite PW3's homestead being proximal to the area chief's residence and the nyumba kumi chairperson who were mentioned by the prosecution witnesses but were never called to testify. That PW1, PW3, PW4 and PW2 position on the assault of the deceased was contradicting given that the Pathologist testified that there was not a single mark on the deceased body and that this delinked the accused from the alleged actus reus of the charge of murder.
15. It was the defence's submissions that the above were material inconsistencies that create doubt whether the offence was actually committed and that the settled principle in such circumstances is that the court should wire its mind in favour of the accused. The defence cited the case of *Richard Munene v Republic* [2018] eKLR where the Court of Appeal held that:

“Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused person.



16. It was defence's further submissions that the prosecution had miserably failed to discharge the burden of proving the case beyond reasonable doubt. He cited the case of *John Munyoki v Republic* [2017] eKLR where the Court of Appeal held that:

“The prosecution has the task of proving its case against the accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged.”

The defence also cited the case of *Pius Arap Maina v Republic* [2013] eKLR where the court of appeal observed that:

“the prosecution must prove a criminal charge beyond reasonable doubt and as a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused.”

17. The defence submitted that the evidence submitted by the prosecution was insufficient and did not point to the accused person's guilt. That the prosecution did not prove malice aforethought or the Actus Reus in the charge of murder to the required standard of proof as reasonable doubt had been cast on the prosecution case. The defence prayed that the accused be acquitted and set at Liberty.

The only issue for consideration is whether the prosecution proved its' case against the accused beyond reasonable doubt.

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

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

19. 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**

20. On this issue PW1 testified that the accused assaulted the deceased with a stick three times in the stomach. PW3 also testified that he saw the accused assault the deceased with a stick three times in the stomach. PW2 testified that the cause of death was due to ruptured left lung with hemothorax as a result of a trauma and that the deceased body had no physical marks. PW5 produced Pexht-2 and testified that it is believed that it is the stick that the accused used to assault the deceased. On cross examination PW1 stated that he said what he was told and that he was asleep at the time of alleged



assault but was woken up and he was shaken. PW3 testified on cross-examination that it was a dark night and that he had not seen when the accused came to his compound nor seen what accused was wearing as he was sleeping in his house. He stated that MFI-1 was found on the scene but he didn't know whether it was brought by the accused or whether it was the one used to hit the deceased. PW3 also testified that it was his wife who called the accused person at 10pm to take the deceased to the hospital. The said PW3's wife was not called to testify. The accused testified that PW3's wife called him to take the deceased to the hospital, that the deceased had collapsed and that on the accused reaching the hospital, the deceased was pronounced dead. The accused also testified that the stick produced as Pexht-2 did not belong to him and he saw it for the very first time in court. DW2 testified that the accused was at her house when PW3's wife called him to go and take the deceased to the hospital. The accused and DW2 testified that PW3's wife administered her malarial medication to the deceased and there was no expert testimony that such medicine could cure the deceased. The accused also testified that PW3's place where the alleged assault took place was proximal to the area chief's residence and the nyumba kumi chairperson yet they did not hear or intervene and were never called to testify.

To my mind, PW3's wife was a more credible witness to credit or discredit the accused testimony that he found the deceased collapsed since she is the one who called the deceased on that fateful night. PW1, PW3 and PW5 have not linked the assault stick to the accused and none of them is certain whose stick it was. To that end, the Prosecution has not 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**

21. PW1 testified that he saw the accused assault the deceased with a stick but on cross examination he stated that he said what he was told to say. PW3 also testified that he saw the accused assault the deceased with a stick but on cross examination he stated that the said stick was found on the scene but he didn't know whether it was brought by the accused or whether it was the one used to hit the deceased. To this end, there has not been sufficient evidence to link the accused to the deceased death.

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

22. For the charge of murder to succeed, it must be proved that accused 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 cause 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) ...
23. 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 vs. 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.”

24. PW3 testified that there was no bad blood between the accused and the deceased and that on December 20, 2020, the accused had not quarreled with the deceased. The accused and DW2 also testified that the accused and the deceased lived peacefully. PW3 who was an eye witness on cross-examination testified that the night was dark and he could not certainly link the accused with the assault or the assault stick. PW5 also could not link the assault stick to the accused. PW3's wife who is the one who called the accused to take the deceased to the hospital on that fateful night and who was present at the scene during the alleged assault was not called to testify.
25. It cannot be inferred from the nature of the injuries suffered by the deceased that there was assault as PW5 testified that there was no any physical mark on the deceased body. The cause of death was ruptured left lungs with hemothorax to which PW5 testified that there can be many causes of ruptured lungs and did not directly link the alleged assault to the ruptured lungs. The upshot is that the alleged assault if any was not intended to cause death or grievous harm and therefore malice aforethought cannot be inferred under Section 206(b) of the Penal Code.
26. I have forward the opinion that the defence put forward by the Accused Namely: Michael Ekwan Lokwasinyen, has created reasonable doubt and displaced the prosecution's case. The prosecution has therefore not proved the case against the accused beyond reasonable doubt. The Prosecution failed to establish that the death of the deceased was caused by an unlawful act on the part of the accused person. I accordingly find the Accused Person not guilty of Murder. He is hereby acquitted of the aforesaid offence.
27. The accused person namely: Michael Ekwan Lokwasinyen is hereby set free forthwith unless 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

Ekusi for the Accused

Kakoi for the State

