



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Lomuria (Criminal Case E011 of 2019)
[2023] KEHC 2798 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E011 OF 2019
JK SERGON, J
MARCH 30, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

JOEL ENGOMO LOMURIA 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 July 17, 2019, at Narewa area, Milimani 'A' Kanamkemer location, Turkana Central sub-county in Turkana County murdered Tony Lorogoi Aupe.
2. The accused pleaded not guilty to the charge and the prosecution called six (6) witnesses to prove its case.
3. Lucy Lochaan (PW1) stated that on July 17, 2019 she was at her place with the deceased who was her husband when the accused came and asked the deceased to play a game of cards with him. The accused then asked the deceased why he didn't want to play cards after which he grabbed money from the deceased hand. That the deceased asked him why he had taken his money and followed him to his home whereby the accused took a knife and stabbed the deceased. She identified the accused in court and stated that the accused ran to the police station after stabbing the deceased while the deceased was taken to Lodwar Hospital. That she was with the deceased and a friend called James. That she followed the deceased to the hospital where he died while undergoing treatment.

On cross examination she stated that the accused was her husband and was not playing cards. He confirmed that the accused grabbed money from the deceased hands and that the deceased was stabbed near the accused's home. She testified further on cross examination that the accused had a knife when he came to their home and that the deceased was stabbed on the road between her home and the accused home. She reiterated that the deceased did not have a knife. On re-examination she confirmed that



the deceased was not playing cards and that the accused came to their home with cards and asked the deceased to play with him but the deceased declined. She reiterated that the deceased did not have any weapon and that the deceased only followed the accused for his money whereby the accused ran to his home and grabbed a knife. She stated that she was able to see the accused stab the deceased from where she was.

4. James Ekamais Eyanae (PW2) stated that on July 17, 2019 at around 1840hours he was at the deceased's home when the accused came and asked to play cards with the deceased but the deceased declined. That after the accused asked why the deceased was not playing, the said accused grabbed Kshs 500/= that the deceased was holding in his hands. That the deceased followed the accused to his home and the accused said he was going to finish the deceased. He testified that the accused went to his home and came back with a knife that he used to stab the deceased. That the accused then ran to the police station and he followed him to a place called Rexona whereby the accused took a moto bike to the police station. He stated that at the Police station the accused reported that he stabbed the deceased in self-defense. That the deceased was then taken to Lodwar Referral Hospital.

On cross examination he stated that the accused came to the deceased home alone and found the three of them whereby he took the deceased money and ran to his home. That the accused did not have any weapon when he came to the deceased home. He stated that they followed the accused and the deceased was outside the accused's fence. That the deceased who was not armed but just following his money was stabbed by the accused at the fence.

5. Dr Wayaa Jonathan (PW3) stated that he was a general practitioner attached to Lodwar County Referral Hospital with 8 years' experience as a medical officer. He testified that he did the post-mortem on the body of the deceased on July 19, 2019. That the body was preserved using formalin. He stated that the body had two stab wounds and there was injury to the left pleura. That the deceased suffered massive haemothorax, severed left artery and severed muscle. The opinion formed from the post-mortem was that the deceased died due to exsanguination secondary to severed left carotid artery and internal jugular vein (left) secondary to penetrating injury by sharp object to the neck. He produced the post-mortem report as PExh.1. He also stated that he had two photographs MFA-2(a) Injury on the neck and MFI-2(b) injury on the back. On cross-examination he testified that there were no defence injuries noted and that the sharp object was inflicted from behind the deceased.
6. PC David Ochieng Oloo No 95491 (PW4) stated that he is an investigator at DCI Headquarters, Land Fraud Investigation Unit but before that he was an investigator at Turkana Central DCI office. That on July 17, 2019 at around 7.00pm he was called by PC Leteipa to rush to Lodwar Referral Hospital where the deceased body was. He stated that when he arrived, he found the deceased body being examined by the doctors. That corporal Leteipa was at the hospital with a small crowd which surrounded the body. He stated that he managed to see the body and noticed two stab wounds, one at the back and the other at the throat. That he took over the investigation where together with PC Obute and other police officers they visited the scene at the junction of Lodwar Narewa road. That on arrival, the scene had been tampered with, there was a large crowd at the scene but they were able to see blood spots. He stated that there was nothing they could take from the scene because the scene had been damaged. That they later learnt that the accused had surrendered himself to Lodwar Police Station with a knife and was received by PC Abdulrahman Shee. That the said accused had gone to the police station to seek refuge as members of the public baying for his blood having seen him stab the deceased. That the knife he had carried was recovered from him and the same was marked as PMFI-2. He testified that he recorded a statement from PC Abdulraham who confirmed having received the knife and the accused. That he later recorded a statement from Lucy Lochaan, the deceased's wife. That he also recorded a statement



from James Ekamai and Susan Tukai. He testified that together with PC Leteipa they witnessed the doctor perform post-mortem on the deceased body.

On cross-examination he stated that he personally interrogated the accused in the presence of CPL Leteipa but the accused statement was recorded by IP Oyasi. He confirmed that the accused person surrendered a blood-stained knife to PC Abdulraham Shee in the presence of PC Rono. That the accused signed the inventory that was before the court. It was his testimony that when he was transferred, he left the file to another Investigating Officer to conduct further investigations.

7. Pc Isaac Leteipa No 86722 (PW5). He stated that he was currently attached to the DCI Emuhaya sub-county. That on July 17, 2019, he was based at DCI Turkana County and he was with the Turkana Central Sub-county DCI head CIPBill Wago. That they met several officers at Lodwar Police Station and that is when he learnt that the deceased had died. That CIP Wago was made the Investigating Officer. He stated that together with CPI Kurgat, PC Ogute and PC Rono, they left for Lodwar County Referral Hospital where they met the clinical officer on duty. That the said clinical officer told them that that the deceased had passed on after which they proceeded to the scene and found that the scene had been tampered with by the onlooking members of the public. He stated that they found the deceased body and dried blood at the scene. That they also found the deceased wife at the scene. That they collected the deceased sandals and left for the station. He stated that at the station they found that the accused had surrendered to the police and was followed by members of the public. That the accused had a knife that was handed over to this witness by PC Rono. He testified that on July 19, 2019, they attended the post-mortem at Lodwar County Referral Hospital. He identified the accused in court and stated that he learnt that the accused and the deceased were playing cards before a quarrel ensued prompting the accused to stab the deceased.

On cross examination he stated that he did not arrest the accused at the scene and that since the scene had been tampered with, they did not carry out any DNA investigation. He confirmed that the deceased and the accused were playing cards as friends.

8. Pcl Leten Saidimu No 800016 stated that he is attached to DCI Turkana Central performing Investigation duties. That he was the Investigating Officer in the case the duty which was handed over to him by PC David Ochieng Oloo. He stated that the Investigating Officer handed over to him a knife without a handle which he produced before the court as Pexht-2 as the murder weapon that was used by the accused person.
9. 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 that on July 17, 2019 at 7pm they were playing cards about 20 people. That he was surprised to see someone lifting him whereby they both fell down. That he tried lifting the said person but he instead hit this witness using his head and when he attempted to hit him for the second time, he avoided him whereby he saw him remove a knife while the witness left for his home. He testified that the said person followed him and they fought outside his gate. That they were both drunk, he snatched the knife from the deceased but he could not remember what happened as they continued fighting. That the knife cut him on the shoulder. he stated that he surrendered to the police where he was arrested and placed in custody. He sought for forgiveness from the deceased family and the court.

On cross examination he stated that they were playing cards while the deceased wife was present. That the deceased knife is the weapon which may have been used.

10. 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.

11. 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.”
12. 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

13. PW1 testified that the accused stabbed the deceased with a knife. PW2 testified that the accused went to his home and came back with a knife which he used to stab the deceased. PW3 testified that the deceased body had two stab wounds and there was injury to the left pleura. 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

14. PW1 testified that she saw the accused stab the deceased. PW2 also testified that the accused stabbed the deceased then ran away whereby he followed him until the said accused boarded a moto-bike to the police station.

c. Whether the Accused Person had Malice Aforethought.

15. 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) ...”

16. 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.”

17. PW1 testified that the accused grabbed money from the deceased hand and ran towards his home whereby the deceased followed him, that is when the accused stabbed the deceased with a knife. PW2 testified that the accused grabbed Kshs. 500 from the deceased hand and when the deceased followed him, the accused said that he was going to finish the deceased, that is when the accused entered his house and came back with the knife which he used to stab the deceased. PW3 testified that the sharp object was inflicted from behind the deceased and that there were no defence injuries noted. PW4 testified that he managed to see the deceased body and noticed two stab wounds, one at the back and the other at the throat.
18. 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*.
19. In his defence, the accused testified that they were playing cards around 20 people in the presence of the accused wife when they started fighting with the deceased. That they were both drunk and when he tried to avoid the fight by moving towards his home, the deceased removed his knife. That he snatched the knife from the deceased but he could not remember what happened as they continued fighting. However, the accused did not call any witness to corroborate his testimony that he stabbed the accused in self-defence. PW1 and PW2 testified that the accused entered his house and came back with the knife that he used to stab the deceased. PW3 testified that the deceased was stabbed from the back and that there were no defence wounds noted in the body of the deceased.
20. I find the defence put forward by the accused person namely: Joel Engomo Lomuria does not displace the prosecution’s case. The prosecution has proved its case against the accused beyond reasonable doubt and in the premises, I find the Accused the 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 THIS 30TH DAY OF MARCH, 2023.

J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Chepkoech

Maryann Kariuki for the Accused

Kakoi for the State



Accused – Present in Prison.

