



**Republic v Tioko (Criminal Case 4 of 2020)
[2023] KEHC 2800 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE 4 OF 2020
JK SERGON, J
MARCH 30, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ALETIA LOCHURO TIOKO 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 April 2, 2020, at Lobei village in Loima, Turkana County murdered Eyanae Galeba Engora.
2. The accused pleaded not guilty to the charge and the prosecution called eight (8) witnesses to prove its case.
3. Emuria Nawet Ekal (PW1) stated that on April 2, 2020 he was attending a wedding and while at the ceremony, the person who had eloped with his sister came to the ceremony in the company of six people whereby they chased them away but they refused. That the fight ensued and the deceased was trying to intervene when the accused who was holding a walking stick hit the deceased on the head and the deceased fell to the ground unconsciously. He stated that he took away the walking stick from the accused as he was running away. That the deceased was taken to Lobei dispensary and later transferred to Lodwar Referral Hospital where he died. That he later collected the walking stick and went to report the incidence to the police station where he found that the accused person had already been arrested and was at the police station. That he recorded his statement before he went back home. He identified the accused in court and the stick that was used to hit the deceased.

On cross-examination he stated that the fight began at about 4.00pm outside their home when they told the accused and his group to leave. He stated that the deceased was behind him when he was attacked. That he joined the fight but did not hit anybody.



4. Ekoropus Naweet Ekal (PW2) stated the deceased was his elder step-brother and that they had lived in the same area with the accused for many years. That on April 2, 2020 he was in Lobei in his house when at 3.00pm one Lolorum came to follow the witness's sister who had escaped from Lolorum's place. That Lolorum who was in the company of five people that is Eipa, Loine, Esekome, Ekeno and Aletia (accused) picked up a fight with Emuria over the said sister. That they also joined the fight to save Emuria. He testified that the deceased who was far away came to separate those who were fighting, that is when the accused hit the deceased with a club on the head and the deceased fell down and died. The accused fled the scene and the deceased was taken to Lobei hospital and later transferred to Lodwar Referral Hospital where he was pronounced dead on arrival. On cross examination he clarified that his sister was aged below 12 years and that the wedding they were attending was for his elder sister called Nakale. He confirmed that Ekoropus and Emuria were present. He testified further that there were no traditional drinks at the ceremony and that he was in possession of a club but did not fight anyone.
5. Ilem Ekal Etoke (PW3) stated that the deceased was his step-son. That on April 2, 2020 he was at home and there was a wedding of his daughter called Nakale. That he was resting after the ceremony when at 3.00pm he was woken up that some people were fighting in his compound and when he went to check he found out that his children were fighting with the accused. That by then the accused was standing aside from people and when he reached where the deceased was, he saw blood oozing from his head and that he suspected that Ekoropus was the one who hit the deceased. That he was also hit by another person and he lost conscience. He testified that the deceased was taken to Lobei hospital and later transferred to Lodwar Referral Hospital. That Emuria later informed him that the deceased had succumbed to his injuries. He testified that he saw PW2 fighting with the accused.
6. Etaba Ilim Ekal (PW4) testified that she attended a wedding ceremony of her sister called Nakale in April 2020. That she found that the deceased who was his brother had died and had already been taken to the hospital but the blood was still on the ground. That she was told that the accused had used a stick to assault the deceased and that she saw the accused in their compound. She identified the accused and stated that she had known him since childhood as a neighbour. That the deceased was her step-brother and she did not know whether the deceased had a dispute with the accused. On cross-examination she stated that she saw the accused come to their home but she shortly left to go and water the animals and but she did not see him with any weapon. That she could not tell what caused the fight between the deceased and the accused. She testified that the stick she identified in court is commonly in possession of many Turkana men and that she could not tell whether the said stick belonged to the accused. She confirmed that she did not witness the fight.
7. Dr Wayaa Jonathan (PW5) 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 April 3, 2020. That the deceased body was stiff and he had a thermal burn on the legs. That the deceased had an abrasion on the scalp and a linear skull fracture on the head. He testified that the deceased had a massive bilateral subdural haematoma. He formed the opinion that the cause of death was severe head injury secondary to bilateral subdural haematoma secondary to blunt force trauma to the head. He produced the Post-mortem report as PExht-1. On cross examination he stated that there was injury to the head caused by a blunt force although he did not examine the blunt object.
8. PC Simon Kamau Kinyanjui No 117384 (PW6) stated that he was a police officer based at Lorugum Police Station. He testified that he was at the said station on April 10, 2020 at 10.00 am when a young man reported that his brother was killed on April 2, 2020. That shortly the suspect was arrested at the shopping centre and brought to the station. He stated that the stick which was recovered was brought to the station and that he could see the stick in court marked MFI-1. On cross-examination he stated



that the accused was the one who first reported and that he just received the report. He testified further that the deceased was brought by the deceased's brother and that the said stick was broken.

9. PC Lawrence Odongo No 106436 (PW7). He stated that he was currently attached to Bungoma County but the incident happened when he was in Loima Sub-County police station. He testified that on April 4, 2020, Lomuria, the deceased's brother reported that someone had committed an act that led to the deceased's death using a walking stick. That he came with a walking stick broken into two pieces claiming that it was used by the accused to assault the deceased. He stated that when PC Emmanuel Korir took over as the Investigating Officer he handed over the walking stick to him. He produced the said walking stick as PExht-2 and stated that the same was initially handed to him. On cross-examination he stated that the Investigating Officer compiled the file and that he only recorded two statements.
10. PC Emmanuel Korir No 80439 stated that he was from DCI Nairobi but used to be the DCI Loima. That on April 4, 2020 while he was working at the DCI Loima, he was called by EP Ondimu about a murder incidence within their jurisdiction. That he proceeded to Lobei locality and visited Lorugum police station where the suspect was being held and later proceeded to the scene and the homestead of the deceased's father. That after interviewing other witnesses about the incidence of April 2, 2020, he took the suspect to Lodwar. He noted that on April 2, 2020 there was a wedding ceremony of PW3's daughter and the guest had departed peacefully when at about 3:00pm a group of six (6) men were sighted nearby the homestead and were suspected to have bad intentions. That the said men had come to forcefully take one of PW3's daughter who had eloped with one of the men earlier but their action was met with resistance. That a fight ensued and the deceased joined two of PW3's sons seeking to resist the attackers when the accused walked across while holding a walking stick and hit the deceased with the said walking stick with such force that the deceased fell down and became unconscious. That the six men ran away while the deceased was taken to Lobei Dispensary and was later transferred to Lodwar Referral Hospital. He stated that the deceased succumbed to his injuries on April 4, 2023. That he attended the post-mortem on the body of the deceased and that the deceased had a fractured skull. That he took possession of the walking stick from Lorugum police station where it had been taken by family members. He produced the said stick as Pexh-2. He identified the accused and stated that he was among the six young men who caused commotion and that the other young men escaped and were still at large. He testified that the deceased was injured when he tried to stop the fight and that the said deceased was not armed at the time.

On cross examination he stated that the evidence he had given was what he gathered from the witnesses. He stated that there were several broken sticks at the scene of crime but he produced the one that was surrendered at Logurum police station. He stated that he was the investigating officer in the case and that the wedding had ended when the fight broke out.

11. 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 was herding his goats after which he proceeded to attend a wedding alone at around 6.00pm. That a fight ensued between the families of those who were wedding and they tried to separate them but when they were prevented from intervening, they left the wedding ceremony. That on April 4, 2020 four people came to summon him to go to Lorugum but he refused to accompany them. He stated that he was forcefully arrested and taken to Lorugum where he was placed in police cell. He denied committing the offence of murder.
12. 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.

13. 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.”

14. 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

15. On this issue PW1 testified that he saw the accused hit the deceased on the head with a walking stick and even took the said walking stick from the accused while the accused was running away. PW2 also testified that he was in the fight and saw the accused hit the deceased on the head with a club. PW5 testified that the deceased died from severe head injury caused by a blunt force. To that end, the Prosecution has proved beyond reasonable doubt that the deceased died due to an unlawful act of assault.
16. Assault is an offence provided for in the Penal Code and is therefore an unlawful act that is punishable in law. Indeed, the cause of death of a person is an unlawful act except in circumstance authorized in law as was held in [Republic v Boniface Isawa Makiod](#) [2016] eKLR that referred to the case of [Gusambizi Wesonga v Republic](#) [1948] 15 EACA 65 where it was held: “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self-defence of property.”

b. Whether the accused caused the death of the deceased

17. PW1 testified that he saw the accused hit the deceased on the head with a walking stick, and identified the accused in court as the person who hit the deceased. PW2 also testified that he saw the accused hit the deceased on the head with a club.

c. Whether the accused person had malice aforethought.

18. 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) ...

19. 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 *N M W 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.”

20. PW1 testified that he saw the accused hit the deceased on the head with a walking stick that he (the accused) was holding after which the deceased fell to the ground and became unconscious. PW1 further testified that he took away the said walking stick from the accused as he (the accused) was running away. PW2 testified that he saw the accused hit the deceased on the head with a club whereby the deceased fell down and died. PW2 testified further that the accused fled the scene after hitting the deceased.
21. It is apparent from the evidence presented that the Accused hit the deceased once with a walking stick. It would appear the fight between the Accused and the deceased was spontaneous. It is difficult in the circumstances to conclude that the Accused had malice. The element of malice aforethought was not established. Therefore the offence of Murder was not proved against the Accused. However, the evidence establishes the offence of Manslaughter. Consequently, the Accused namely:- Aletia Lochuro Tioko is convicted for the offence of Manslaughter Contrary to Section 202 as read with Section 205 of the *Penal Code*

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF MARCH, 2023.

.....

J.K. SERGON

JUDGE

In the presence of:

C/Assistant – Chepkoech

Maryanne Kariuki holding brief for Ondambu for the Accused

Kakoi for the State

Accused – Present in Prison

