



**Republic v Lukulu (Criminal Case 16 of 2014)
[2023] KEHC 3776 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 16 OF 2014
WM MUSYOKA, J
APRIL 28, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

GEOFFREY MANDELA LUKULU ACCUSED

JUDGMENT

1. Geoffrey Mandela Lukulu is charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya. Particulars of the offence allege that on the 23rd day of March 2014, at Sichelechele village in Makhokho Sub-Location, Iguhu Location, Kakamega South District, within Kakamega County, he murdered Benedict Lukulu Litoro, hereinafter referred to as the deceased. He pleaded not guilty to the charge, on 27th March 2014. The hearing of the case for the prosecution commenced on 10th May 2017. 6 witnesses testified.
2. The first on the stand was Angeline Keya Lukulu, who testified as PW1. She was the mother of the accused and the widow of the deceased. She was at home on 22nd March 2014, with the deceased. She prepared supper, and served him, and as she was feeling unwell, she went and sat outside the house, leaving the deceased inside. He was drunk. The accused then came into the compound. PW1 directed him to where his food was, and instructed him to warm it for himself. When he entered the house, the deceased asked him who had given him permission to get in. He did not respond, instead he went about warming his food. The deceased then told him that if he, the deceased, had power he would tell people to kill the accused, or to have him overrun by a motor vehicle. The accused did not respond immediately, but he later told the deceased, that if he had wronged him, then he should forgive him. The deceased then asked him if he had left his wife to him. PW1 did not intervene, as both the deceased and the accused were drunk. She heard the deceased shout, "Oh," followed by commotion of falling boxes. She wondered what had happened. She walked into the house, which was dark, lit a match, and saw the deceased lying on the floor on his belly, while the accused was seated at the hearth, eating.



PW1 touched the legs and hands of the deceased, and found them limb. He was not talking. She sat him down, and he started to bleed from the mouth after sometime. When she asked him what had happened, he only opened his mouth. She called his brother, Benard, who organised for his transport to Kakamega County General Hospital, where he was admitted. He died the following day, at 3.00 PM. On her way home, from hospital, to report the death to family members, she met a young man carrying a stick, which he said he had been asked by the police to take to them. It had been recovered from her home, the young man said.

3. During cross-examination, she said that the deceased was in the habit of insulting people. He had entered the bedroom to rest, before the accused came. She said that she did not know whose voice had said "Oh." As she passed through the sitting room to the bedroom, she met with the accused, who was coming out of the kitchen. He was not holding anything in his hands. She did not know what caused the deceased to fall to the ground. She stated that the accused was generally polite, and she had never witnessed him try to beat the deceased. She said the deceased was talking to the accused while he was in the bedroom, while the accused was in the kitchen. She said that the first time she saw the stick was with the young man called Majonnie, who told her that he had retrieved the stick from her home. He said that he had been sent to pick the stick, although he did not say who it was who sent him. He said that he was headed for Ikolomani, and PW1 thought he was going to the police. She said that there were 4 metal boxes, piled on top of each other on a stool, beside the bed. She found one of them lying on the back of the deceased, and another was beside him. All the boxes had fallen off the stool. She said that they had clothes, and were heavy. She saw blood coming from the scalp of the deceased, and also oozing out of his mouth and nostrils. When she washed his mouth, she noted that the blood was not coming from the tongue, but from deep inside. She said that when she came back from the hospital, she found that the accused had been arrested.
4. Benard Andalo Lidoro testified as PW2. He was a brother to the deceased, and the nephew of the accused. He said that he got a call from a son of the deceased, called Musa, at 4.00 AM, on 23rd March 2014, telling him that the deceased had been beaten by the accused, and was in a bad state. When he went to the home of the deceased, he found him seated on the bed, but he was not talking. PW1 was holding him. PW2 made a report to the village elder, who also visited the scene, to see the deceased, after which they began to look for a vehicle to ferry him to hospital. They found one, and brought him to Kakamega County Referral Hospital. He said that he did not see the accused on the night that he was said to have beaten the deceased, but a day later. He was among those who identified the body of the deceased for post-mortem purposes.
5. Herman Shikanga testified as PW3. He was the village elder for the area where the accused and the deceased came from. He stated that PW2 came to his home on 23rd March 2014, at 5.00 AM, and reported to him that the accused had beaten the deceased to death. He did not see the deceased before he was removed to hospital, but he arranged with PW2 for a vehicle to take him to hospital. He later heard that he had died in hospital. He arrested the accused after 3 days, and took him to the AP camp. While at the AP camp he heard one of the uncles of the accused say that the murder weapon was at the home of the accused, and Majonnie was sent to collect it. Majonnie brought it, a stick. They later escorted the accused to Malaika Police Station. During cross-examination, he conceded that he arrested the accused on 24th March 2014, which was the day after the death. He said that Majonnie went alone, and came back alone, and the police did not go with him. PW3 could not say where Majonnie got the stick from. He said that he did not know the cause of the death of the deceased.
6. No. 59000 Police Constable Dennis Maingi followed as PW4. He was stationed at Malaika Police Station. He testified that he received a report, on 23rd March 2014, at 7.20 PM, from a Carolyne, that the deceased had been assaulted by the accused, on 22nd March 2014, at 9.30 PM, after disagreement.



She reported that he had been rushed to hospital, but died there on 23rd March 2014, while under treatment. He booked the report, and visited the scene. He recorded statements from witnesses. The assailant had fled, but was arrested by members of the public, taken to Ikolomani AP camp, before being handed over to Malaika Police Station. He attended post-mortem on the body of the deceased, on 25th March 2014. The cause of death was said to be a broken skull. A club was then brought to PW4 by an AP officer from Ikolomani AP camp. Then again he said that the accused was brought to the police station together with the club. During cross-examination, he stated that he was the investigating officer, even though he did not hold the rank of an inspector, and that it was him who made the recommendation to prosecute to the Director of Public Prosecutions. He said that the AP officers told him that the weapon was recovered from the home of the accused, although they were not specific on who exactly did the recovery. He did not record a statement from the person who allegedly recovered the weapon. He stated that PW1 identified the club as the weapon used to clobber the deceased. He said that the weapon was entered in the OB when it was presented to him, but he did not prepare a recovery inventory. He said that in the course of his investigations he did not hear the name of Majonnie being mentioned. He said that PW1 witnessed the accused assaulting the deceased with the club produced in court.

7. Josephat Kipngetch Kemboi, service number 217736, testified as PW5. He was a police corporal based at the Ikolomani AP camp. He re-arrested the accused from members of the public, on 24th March 2014, at 5.00 PM. He said that the accused was said to have had hit the deceased with a piece of wood. It was also said that the accused had gone into hiding after the incident on 22nd March 2014. He escorted him to Malaika Police Station, and recorded a statement. During cross-examination, he stated that PW3 handed over to him a piece of wood, which he subsequently handed over to the police at Malaika Police Station. He said that he did not know where the piece of wood was recovered from.
8. Dr. Amos Kibisu testified as PW6, on behalf of his colleague, Dr. Malangachi, who was unavailable. He stated that post-mortem was done on 25th March 2014, at Kakamega County Referral Hospital. The body of the deceased had a stitched cut on the left orbital region, covered with a bandage. There were no fractures. There was evidence of medical intervention. Most of the body systems were normal, save for the head, where there was bleeding, and multiple skull bone fractures, which were depressed. It was opined that cause of death was severe head injury as a result of assault.
9. Njagi J ruled, on 29th April 2019, that the accused person had a case to answer, and put him on his defence. The defence hearing happened on 27th June 2022. The accused gave a sworn statement. He said that on 23rd March 2014, he had been drinking and watching football at Sigalagala. He then went home. He found, PW1, seated outside, who directed him to the kitchen, to warm his food. He warmed the food and ate it. He said that he found the deceased inside the house, who asked him where he had spent the day, saying that he had come to eat, yet he had not worked. The deceased was also drunk. The accused told him that PW1 had asked him to get food and eat. The deceased then pulled a piece of wood, wanting to hit him with it. He, the deceased, slipped and fell. The accused retrieved the piece of firewood, and threw it. He then left the kitchen, took a bath, and slept. When he woke up the next morning, he did not find anyone at home. A neighbour told him that they had taken the deceased to hospital. He later got information that the deceased had died. PW1 came home, after which he was taken to the Ikolomani AP camp, and later to Malaika Police Station. He said that he had not fled, and that he was arrested at home. During cross-examination, he stated that he threw the piece of firewood at the deceased.
10. At the close of the oral hearings, the accused, through his Advocate, Mr. Ondieki, made oral submissions. He said that there was no malice aforethought, and the offence of murder was not established. He invited the court to find the defence formidable. Ms. Kagai submitted that the deceased



and the accused had an altercation, where the accused threw a piece of wood at the deceased. She argued that he had the option of walking away. She submitted that the attack was heavy, as the deceased died in hospital.

11. The elements of the offence of murder, as set out in section 203 of the Penal Code, are the fact of the death, the cause of it, the role of the accused person in the causation, and the fact that the death is caused by the accused with malice aforethought.
12. From the material before me there is proof that the deceased died. All the prosecution witnesses testified to the fact of his death. Post-mortem was conducted on his body, after it was identified by relatives. The cause of the death is also not in dispute, it was said to be due to head injury, secondary to assault. The role of the accused in the causation is equally not contested. What is in contest is whether the causation was with malice aforethought.
13. Malice aforethought is defined in section 206 of the Penal Code. Section 206(b) states:

“Malice aforethought

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

 - (a) an intention to cause the 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 caused;
 - (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”
14. Under section 206, malice aforethought is to be inferred where there is an intent to cause death or to cause grievous harm, or the knowledge that the act causing death could cause death or grievous harm, or an intent to commit a felony, or an intention to facilitate escape from lawful custody of a person and in the process a death is caused.
15. The circumstances were that both the deceased and the accused were drunk. The accused found the deceased at home, and it would appear, from PW1 and the accused, that the deceased was the aggressor. I found the accused to be a very candid witness, who did not attempt to run away, by way of testimony, from what happened, by perhaps suggesting that he was nowhere near the scene. The accused came home, found his mother seated outside the house, and she directed him where to get food. It is when he got into the kitchen, to warm his food, that the deceased began to be verbally aggressive, from what PW1 and the accused told the court. They were the only other persons present. According to PW1, she was outside, the other 2 were inside, and she did not see what happened. She was only able to hear them talk, before she eventually heard the deceased say, “Oh.” According to the accused, the deceased took a piece of wood and wanted to attack him with it, then he slipped and fell. At cross-examination, he said something intriguing, that he threw the piece of wood at the deceased.
16. What I deduce from the accused is that the deceased was verbally aggressive towards him, after he started to eat, as the deceased felt that he did not deserve to eat, as he had not worked. The deceased



then sought to attack him with a piece of wood, and then fell. The accused conceded that he did get hold of that piece of wood at some point, and that he threw it at the deceased. The deceased died by the hand of the accused. Did he have malice aforethought? Both of them were drunk, and acted under drunken influence. Not much evidence was led on how drunk the accused was, but given that the 2 did not appear to have had any prior differences, it would appear that their actions were influenced by their drunkenness. PW1 said that she did not attempt to intervene into their drunken exchange, as she thought that the exchanges were harmless. I do not, in the circumstances, believe that the accused person had any intention to kill the deceased, or to cause him life-threatening injuries, or had knowledge that whatever he did to him could cause his death. Consequently, whatever happened points to lack of malice aforethought, and, therefore, the offence of murder was not established.

17. However, the conduct of the accused was not altogether totally excusable. He might have been drunk, but he was still in fair control of his senses. PW1 had presence of mind to let him warm his own food, which meant that he could still make rational decisions. That being the case, he ought to have known throwing a stick at the deceased could cause serious injury, or even death, depending on the part of the body struck by the same. The act of throwing the stick or piece of firewood at the deceased was unlawful. He was reckless and careless about it. Consequently, I find that the accused did not murder the deceased, but he committed the lesser offence of manslaughter, through either recklessness or carelessness.
18. In view of everything stated above, I do hereby, in exercise of the discretion under section 179 of the [Criminal Procedure Code](#), Cap 75, Laws of Kenya, find the accused herein guilty of the offence of manslaughter, of Benedict Lukulu Litoro, contrary to section 202 of the Penal Code, as read with section 205 thereof, and I convict him accordingly, under section 322 of the Criminal Procedure Code. For the purpose of sentencing, I hereby direct the Kakamega County Director of Probation and Aftercare Services to assess the antecedents of the accused person, and to get the views of the family of the deceased, and the community, and to file a report thereon within 30 days.

**JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
28TH DAY OF APRIL 2023**

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Ondieki, Advocate for the accused person.

