



REPUBLIC OF KENYA



**Republic v Lepakiyo (Criminal Case 49 of 2016)  
[2025] KEHC 409 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 409 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 49 OF 2016  
EM MURIITHI, J  
JANUARY 23, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**CHRISTOPHER JOHN LEPAKIYO ..... ACCUSED**

**JUDGMENT**

1. The accused Christopher John Lepakiyo was charged with murder contrary to section 203 as read with 204 of the Penal Code under information dated 18/8/2016, with particulars that he “on the 13<sup>th</sup> day of August 2016 at Sordo Village, in Wamba Location, Samburu East County within Samburu County murdered Susan Lolmingan.”
2. The Prosecution called four witnesses to prove the charge. PW 1 Lowanye Lolmingani resident at Soloo, Wamba in Samburu County testified that on 23/8/2016 at about 3:12pm, the accused killed his sister and he had witnessed the postmortem examination on his younger sister Chepitoo Lolmingani at Isiolo and that he had identified his sister at the hospital. No questions were put to him on cross-examination.
3. PW2, Antonena Lonyingani, resident of Wamba testified that on 13/8/2016 at 1:00pm, we were at Manyatta in her house and she had left to fetch water from the forest. On returning home at 2:00pm, she heard screams coming from the house of the deceased, Susan Lolmingani who was her neighbor, whose house was just a short distance away [from the witness box to the court door at 10 metres]. She said the scream was shout-lived, only once, and when she went to see what was happening, she saw Christopher the accused coming from the Susan’s house running away and carrying a knife which had blood on it. [Samburu sword with yellow handle marked PMFI 1]” She knew Christopher used to live with Susan and was a child of Susan’s younger sister and Susan had stayed with Christopher since Christopher was a child. She said she saw Christopher ran away into the forest carrying the sword. She screamed and two people, Johana Lonying’ani and Susan Lototo, came in response to her scream. The



- three then went to the Chief Lambosita of Wamba location. She said that before going to the chief, she had looked into the house and saw the deceased was lying on the ground with her neck cut and there was blood coming from the neck. Later the police came and took the body to mortuary. On the following day at 2:00 am she heard the door to Susan's house being knocked and she saw a fire in house, which was constructed with paper and sacks. She screamed and called Wamba Police Station and the police came and arrested Christopher Lapakiyo, about 2:00 am in the night.
4. On cross-examination, she said it was 1:00pm when I saw Christopher get out of Susan's house after she went to fetch water and she was the one who saw he body first before Johana and Lototo came when she screamed. She said she had heard the scream and she went out to see what was happening, and when found the deceased, she screamed and other two people came and they went to the Chief who then called the Police. She later called the police then they came to arrest Christopher. She confirmed she did not see Christopher cut Susan and only saw him running away from the Susan's house.
  5. PW3 Dr. Mohammed Abdikadir from Isiolo General Hospital testified to produce the post mortem report dated 23/8/2016 (P.Exhibit 1.) on behalf of Dr. Robert Tabu and said that the postmortem was done 23/8/2016 on the body of Susan Lolmingan, aged 45 years, whose body had swollen and rigor mortis had set in after about 2-3 days. She had been cut on the neck with a knife and the injury was 14 cm length and 2 cm width and had got to the main artery which takes blood to the brain leading her to bleed profusely and it was the cause of death. The accused's counsel did not put any questions in cross-examination.
  6. PW4 No. 237384 C.I. Mohammed Lokicha the OCS Ndunyu Njeru Police Station Nyandarua North Sub-County testified that on 13/8/2016 while Police Sargent at Wamba Police station in Samburu County had been informed at 8:00pm by the head of the police station there was a killing at Soldol village a few kilometres from Wamba and taking five officers he had gone to the scene where he found the deceased Susan Lolmingan aged 59 years, with the body and its neck severed by a sharp object. We investigated around the village from the neighbors and we were informed she lived with a nephew, son of the deceased's sister and the deceased had breastfed the accused after the death of his mother. At this time, the accused was not here and hey were informed he had run away. We took the body to Wamba hospital mortuary on the night on 13/8/2016 and in the same night at 2:00am, the villagers called to inform that the suspect had come back to the home. The police went there and surrounded the home and arrested the suspect who was alone in the house and hey recovered a Samburu Knife. They also got his T. Shirt and other clothes (Red T-Shirt PEx.3(a) Grey sweater as 3 (b)) and reserved them as exhibits, which had bloodstains, and with doctor's assistance from Wamba hospital we extracted blood samples from the deceased and the accused. Upon presentation to the Government Chemist were confirmed that the clothes had human blood stains, on the knife and clothes and the blood belonged to the deceased. He said that Postmortem at Isiolo hospital by Dr. Oliver Tabu who filed a post mortem report Post-mortem [PEx. No 1] and the suspect was charged in court. He said that the body was found in a Samburu homestead with houses built in a circle and PW1 and PW2 were neighbours in the circles and they were neighbours. The deceased was childless and she had been given the accused to bring up and she lived with him. The body was at the centre of the house on his way to the sleeping area. The injury was only at the neck which had been cut off. She had big necklace and vest and skirt. The head was attached to the body by slight muscles that remained. The accused had been arrested in the said house and he was carrying the sword knife, which had had blood stains, PEx No. 2. The accused was wearing a T-shirt and a shuka they had blood stains. The Exhibit memo is produced [Ex No. 4] and the Government Analyst report the Government Chemist Report [Exh No. 5]. The Investigating Officer, said the accused is the one who committed the offence from the statements that he recorded at the village. There was a wedding at the village. The deceased was one of the villagers who attended and the Accused was not happy for the deceased to go there and the conflict started.



7. On cross-examination, he said the deceased lived with accused only and when they went there they only found the body and the accused was not there. He said that the dispute related to the deceased' attendance at the wedding. She had gone and came back early. The accused was annoyed. It was a Manyatta and the I.O. got the information from the members of the Manyatta. The deceased came home early alone. The incident happened at 2:00pm and was reported at 8:00pm. He said it was PW1 a relative who told the police about the dispute and that she had not gone to the wedding function but was at the home. At the time of the arrest, he was called by PW1 who they had asked to tell them when the suspect came back home. He said he had tried to interview the suspect on arrest but he was mute and only talked to them on 16/8/2016 he said he had been at Wamba, and he came back and found his mother missing [probably then at the wedding.]”
8. When placed on his defence, the accused gave sworn testimony through interpretation from Samburu language as follows;

“DW1 Christopher John Lepakiyo.

I come from Wamba. I used to work as a herder. I was taking care of cattle and goats, The animals are mine. I know I have been charged with murder of Susan Lolmingan. She was the one who brought me up. She had been left to bring me up by my parents. My mother is still alive but she gave me up to the care of Susan.

On 13/8/2016 I was at Wamba. The lady Susan started fighting with the elders. We were at Kanto, Wamba. We were 4 people including Susan. Susan started fighting with me. We stopped. On the 2<sup>nd</sup> day, [it is unclear whether witness meant on another occasion or another time on the same day], we fought again at Lowuyai where Susan lived. On the third day, we fought again at Lowuyai. Susan hit me with an axe and I also hit back with a knife and cut her on the neck. She hit me with an axe. The axe hit me on the blunt side. It did not cut me. Susan did not have strength. She only hit me with the axe. She died and she was taken by elders. I had not planned to kill her. They are the ones who started fighting. It was elders from the family of Susan Lolmingani. The fighting had been going on since I was a small boy. They have been used to fighting.”

9. The Prosecution did not cross-examine the accused on his defence evidence.
10. The Court put a couple of questions to the Accused and he responded as follows:

“ [What was the fighting about?]

The first time we fought was over milk from cows; we disagreed severally. I do not know why we always fought. It was not right to cut her on the neck. I had tried to calm the lady but she kept on beating me together with her family.

[What is the relationship you and Susan?]

There is no relationship. I did not act a long time ago. I am remorseful. Susan also wronged me.”

### **Submissions**

11. The DPP and the Defence did not wish to put in any submissions at the end of the trial and the matter was left to the Court in its reserved judgment.



## Analysis of the Evidence

12. The Prosecution proved the two elements of the offence of murder (see Republic vs. Nyambura & 4 Others [2001] KLR 355) of the death of the accused by the evidence of the sister PW1 and the doctor PW3 who conducted the postmortem; and that the death was caused by the unlawful cutting of the deceased on the neck by the accused, as shown by circumstantial evidence of the deceased's neighbour who saw the accused leaving the deceased's house with a bloodstained knife, and the Government Analyst Report dated 19/9/2019, presented by the Investigating Officer, with no objection by the defence Counsel, of DNA evidence of the accused knife which found the deceased's blood on it, with a report that "2. The DNA profile generated from the blood stains on the sweater and sword (Item M) matched the DNA profile generated from the blood sample (item B2 indicated as of deceased, with probability of a match 1 in  $2.4 \times 10^{19}$ )". The evidence of the accused leaving the deceased's house with blood on his sword and the DNA profiling report is on the test of validity of circumstantial evidence incapable of any other explanation other than the guilt of the accused and it is inconsistent with any innocent explanation.
13. See James Mwangi v Republic (1983) KLR 327, where the Court of Appeal (Madan, Potter JJA & Chesoni Ag JA) held that, in a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt and in order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other coexisting circumstances which would weaken or destroy the inference."
14. In his defence, the Accused set up the defence of extreme and prolonged provocation and was remorseful, as follows:

"We were 4 people including Susan. Susan started fighting with me. We stopped. On the 2<sup>nd</sup> day, [it is unclear whether witness meant on another occasion or another time on the same day], we fought again at Lowuyai where Susan lived. On the third day, we fought again at Lowuyai. Susan hit me with an axe and I also hit back with a knife and cut her on the neck. She hit me with an axe. The axe hit me on the blunt side. It did not cut me. Susan did not have strength. She only hit me with the axe. She died and she was taken by elders. I had not planned to kill her. They are the ones who started fighting. It was elders from the family of Susan Lolmingani. The fighting had been going on since I was a small boy. They have been used to fighting."....

[W]e disagreed severally. I do not know why we always fought. It was not right to cut her on the neck. I had tried to calm the lady but she kept on beating me together with her family."

The Prosecution did not cross-examine the accused, and must be taken to have accepted, as this court is bound to accept, that the accused was by long constant fights with the deceased provoked to act in the manner that he did. Even on the Prosecution's evidence, PW4 said the conflict arose from an incident where the deceased had attended a village wedding and when the accused came home he did not find her and a disagreement arose leading to a fight, which the accused in his defence, alleged was one of the many fights he had with his adoptive mother. The accused need not prove his innocence, and his allegation of provocation at the immediate incident or provocative previous fights with the deceased need only be established on a balance of probability. It is the Prosecution, who on its evidence, and with the aid of rebuttal process of section 309 of the Penal Code, were required on a standard of beyond reasonable doubt to demonstrate that the accused had malice aforethought. There was no



Prosecution evidence, contrary to what the defence testified, as to the circumstances leading to the fight or the killing and as to who the aggressor in the fight was, and the Court is compelled to accept the Accused's evidence that it was the deceased who hit the accused with an axe and he "hit back with a knife and cut her on the neck".

15. Of course, self-defence under section 17 of the Penal Code, is unavailable to the Accused as to excuse the accused for the killing, as in his own defence it is clear that he used excessive retaliatory force by cutting the neck of the deceased who had only feebly hit him with an axe in view of her lack of strength. Section 17 of the Penal Code is in the following terms:

" 17. Defence of person or property

Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law"

16. Excessive force dislodges the defence of self-defence as an absolute complete defence to a charge of murder, and it would amount to an offence of manslaughter. In, [\*Barisa v Republic \(Criminal Appeal 60 of 2022\)\*](#) [2024] KECA 219 (KLR) (1 March 2024) (Judgment) the Court of Appeal (Makhandia, Murgor & Odunga, JJA.) held as follows:

33. The appellant has asserted that this was a case of provocation by the adverse party hence the applicability of the defence of self-defence and or provocation. That there was imminent danger of being attacked by the deceased and other villagers hence their decision to react in that manner was therefore justified. The defence of self-defence is provided for in section 17 of the Penal Code which provides, inter alia:

"Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."

The said common law principles were spelt out in the case of *Palmer vs. Republic* [1971] AC 814 in which it was held:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury."



34. This Court in the case of *Mokwa vs. Republic* [1976–80] 1 KLR 1337, held that:

“Self-defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applied excessive force.”

In the case of *Mungai vs. Republic* [1984] KLR 85, the same Court held:

“1. It is a doctrine recognized in East Africa that the excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter – *R vs. Ngolaile s/o Lenjaro* (1951) 18 EACA 164; *R vs. Shaushi* (1951) 18 EACA 198.

2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered – *Palmer vs. Reginam* [1971] 1 ALL ER 1077.”

See also *Njoroge v Republic* (1988) KLR.

### Verdict

17. The prosecution did not, as it could have, seek to introduce evidence in rebuttal of lack of intention to kill and prolonged provocation presented by the accused. Section 309 of the Criminal Procedure Code provides for such rebuttal evidence in the following terms:

“309. Evidence in reply

If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

18. Under section 207 of the Penal Code a charge of murder is transformed into one of manslaughter as follows:

“207. Killing on provocation

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”

19. The prosecution evidence did not establish that the accused did the act causing the death of the deceased with malice aforethought in terms of section 206 of the Penal Code, in view of the obvious un rebutted provocation.

### Conclusion

20. On the evidence before the Court presented by the prosecution and the defence, the accused is only guilty of manslaughter contrary to section 202 as read with 205 of the Penal Code. The Court, therefore, acquits the accused for murder contrary to section 203 as read with 204 of the Penal Code and convicts him, pursuant to section 207 of the Penal Code, for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code.



## **Orders**

21. Accordingly, for the reasons set out above, this court finds that the Prosecution has on the evidence established an offence of manslaughter against the Accused and he is, consequently, convicted under section 207 of the Penal Code, for the offence of manslaughter c/s 202 as read with 205 of the Penal Code.
22. The date for mitigation and sentencing proceedings shall be taken in consultation with the Counsel for the Accused and for the DPP.

Orders accordingly.

**DATED AND DELIVERED THIS 23RD DAY OF JANUARY 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Omari for the Accused.

Mr. Masila for the DPP.

