



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Ekaale (Criminal Case E004 of 2023)  
[2025] KEHC 5237 (KLR) (12 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 5237 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL CASE E004 OF 2023  
RN NYAKUNDI, J  
MARCH 12, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**NICHOLAS EKIRU EKAALÉ ..... ACCUSED**

**JUDGMENT**

1. The Accused person was charged with the offence of murder contrary to section 203 as punishable with section 204 of the *Penal Code*. The particulars are that the accused on 30<sup>th</sup> December 2022 at Kibiti village, within Turkana West sub county, he murdered Andrew Kokiro Lopuya with malice aforethought. He pleaded not guilty to the offence. The prosecution called upon 4 witnesses.

**Prosecution case summary**

2. At the hearing, the 1<sup>st</sup> prosecution witness was PW1-Paul Ebenyo who told the court that on 30<sup>th</sup> December 2022 at about 8 o'clock he was at his residence when he witnessed 2 young men fighting within the neighborhood. The 2 were staying together in the same house. According to PW1, he saw the accused with a club and using it against the deceased and any attempts made to separate them was resisted as the fight escalated between the two within that same homestead. It was also the evidence of PW1 that during the efforts of trying to separate the two he was also attacked by the accused and did sustain physical injuries. He was later to learn that the fight and the assault of inflicting injuries resulted into the death of the deceased.
3. PW2 was Elani Kuchai whose evidence was to the effect that on 30<sup>th</sup> December 2022, he received a telephone call which informed him that the accused had killed another human being which was also confirmed by PW1. As he walked on the same road, PW2 made the victim who was lying on the ground and at the same time he had a conversation with the accused at the same scene who remarked that he has killed the person who stole his identity card. According to PW2, in company of PW1 and the accused



they proceeded to the police station passing through the area chief and made a report concerning the events which occurred on the 30<sup>th</sup> December 2022 with regard to the fight in which the deceased suffered fatal injuries.

4. PW3 Abdullahi Longech testified as the area assistant chief with regard to the incident of murder which occurred on 30<sup>th</sup> December 2022. In his evidence, he received information from PW2 that the accused had killed the deceased. With that information, the witness made a follow up on the issue by going to the police station to secure support in investigating the incident of murder. He accompanied the police to the scene of murder and one of the issues which was resolved was to collect the body from the scene and have it taken to the mortuary for post mortem examination. The witness further told the court while at the scene with the police officers, the alleged murder weapon identified as a wooden clap was recovered to be produced as an exhibit to support the inflictions of physical injuries suffered by the deceased during the attack by the accused.
5. PW4 Police Detective Elias Njeiha who at the time was based at Turkana West as the Investigator. He recalled to have been instructed by then DCIO to proceed to the murder scene for the purposes of gathering evidence as the cause of death of the deceased. On the day in question, PW4 moved to the scene where he observed blood streams from the body of the deceased and the things around the house were scattered all over the house. He also observed that next to the body but near the fence was a wooden clap which was confirmed to be a murder weapon used to inflict the fatal injuries. He produced the wooden clap as a murder weapon and as an exhibit. That the exhibit recovered being a long stick with wire and nails at the end, a red pair of shorts, fingernails and cartilage of the deceased were all forwarded to the Government Laboratory for forensic examination. The aforesaid exhibits were subjected to forensic examination in which the Government Analyst in his report dated 16<sup>th</sup> January 2024, produced as exhibit 5b opined as follows:

“That based in the findings of the DNA profile generated from blood stains on the sticks marked exhibits a1 and a2 and the pair of shorts marked b are identical and matched the DNA profile of the deceased.”

6. At the close of the prosecution case, the accused was placed on his defence on which he elected to give a sworn statement with the following highlights;
7. That on 30/12/2022 he woke up early and went about with his daily chores. He later went back to his house and encountered many people with torches around the homestead. He was confronted by the people in connection with the murder of the deceased which he stated that he had no knowledge of as claimed by the members of the public. He therefore denied any involvement with the death of the deceased.

### **Analysis and Determination**

8. This a criminal offence and the duty rests squarely on the prosecution to prove the following essential elements constituting the offence beyond reasonable doubt.
  - i. The fact of death
  - ii. The fact that the deceased's death was caused by an unlawful act or omission.
  - iii. That the accused committed the unlawful act which caused the death of the deceased; and
  - iv. That the accused had malice aforethought.
9. The provisions of section 107(1) of the [Evidence Act](#) provides as follows:



107. Burden of proof (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
10. Likewise, Article 50(2)(a) of *the Constitution* of Kenya 2010 provides that every person accused of the commission of the offence has the right to be presumed innocent until the contrary is proved beyond reasonable doubt. Actually the standard and burden of proof provided for under the *evidence Act* is that of proof beyond reasonable doubt. The dictum of Denning J, as he then was in *Miller v Ministry of Pensions* [1947] 2 All ER 372
- “that degree is well settled. It need not reach certainly, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible but not in the least probable’ then the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
11. An analysis of the facts of the case reveal that is purely a direct evidence case. The Black’s law dictionary defines direct evidence as piece of evidence often in the form of the testimony of witnesses or eyewitness accounts. Examples of direct evidence are when a person testifies that he/she: - saw an accused commit a crime, heard another person say a certain word or words, or observed a certain act take place.
12. It was PW1 testimony that on 30<sup>th</sup> December 2022 at about 8 o’clock he was at his residence when he witnessed 2 young men fighting within the neighborhood. The 2 were staying together in the same house. According to PW1, he saw the accused with a clap and using it against the deceased and any attempts made to separate them was resisted as the fight escalated between the two within that same homestead. It was also the evidence of PW1 that during the efforts of trying to separate the two he was also attacked by the accused and did sustain physical injuries. He was later to learn that the fight and the assault of inflicting injuries resulted into the death of the deceased.
13. It is trite that any crime in our legal system must comprise mens rea and actus reus. The trial court is under duty to ensure that before any conviction is entered both actus reus and mens rea have been proved to the required standard of beyond reasonable doubt. See *Joseph Kimani v R* 2014 eKLR. In this case, the following ingredients of the offence of murder must be proved beyond reasonable doubt without any conjecture or suspicion.
- a. The death of the deceased one.
  - b. The death was unlawfully caused
  - c. The death was caused with malice aforethought
  - d. The accused persons participated in or caused the death of the deceased.
14. Section 203 of the *Penal Code* defines the offence of murder and requires proof of the following elements beyond reasonable doubt, to establish the offence of murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.



15. The first issue for consideration is proof of death. In the instant case, there is no dispute of the deceased's death. This was confirmed by all the prosecution witnesses, more so by the evidence of PW3 and PW4. PW3 Abdullahi Longech testified as the area assistant chief with regard to the incident of murder which occurred on 30<sup>th</sup> December 2022. In his evidence, he received information from PW2 that the accused had killed the deceased. With that information, the witness made a follow up on the issue by going to the police station to secure support in investigating the incident of murder. He accompanied the police to the scene of murder and one of the issues which was resolved was to collect the body from the scene and have it taken to the mortuary for post mortem examination.
16. PW4 Police Detective Elias Njeiha who at the time was based at Turkana West as the Investigator also testified in this ingridient. He recalled to have been instructed by then DCIO to proceed to the murder scene for the purposes of gathering evidence as the cause of death of the deceased. On the day in question, PW4 moved to the scene where he observed blood streams from the body of the deceased and the things around the house were scattered all over the house. He also observed that next to the body but near the fence was a wooden clap which was confirmed to be a murder weapon used to inflict the fatal injuries.
17. Accordingly, from the above, it is my opinion that the prosecution has satisfied this element beyond reasonable doubt.
18. The next ingredient is to determine whether the death of Andrew Kokiropuyawas unlawful act or omission. Put differently, it must be presented in evidence that the victim of the murder suffered either physical or bodily harm as a result of the unlawful act of omission or commission. That the evidence demonstrates beyond reasonable doubt that the injuries inflicted leading to the loss of survival of a human being as known in law were unlawfully executed. It is therefore necessary to appreciate the scale of evidence on this ingredient as submitted before this court by the prosecution. In the present case, directly, the flow of evidence by the prosecution witnesses point out to the Accused person as the perpetrator.
19. In murder cases, or manslaughter for that matter, causation is a central issue. The prosecution must adduce evidence connecting the acts or omissions which contributed or caused the death of the deceased. The Prosecution establishing the cause of death is non-negotiable in so far as section 203 of the Penal Code is concerned.
20. The allegedly causative acts or omissions need not to be the sole cause of death but must be a substantial or significant cause of death or have substantially contributed to the death (The maxim here is that of acts or omission which occasion the acceleration of death)
21. The provisions of section 213 of the Penal Code which defines causing death to include acts which are not the immediate or sole causes of the death. The accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances;
  - a. He inflicts bodily injury on another person and as a consequence of the injury the injured person undergoes a surgery or treatment which causes his death;
  - b. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or/and proper precautions as to his mode of living;
  - c. He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding



such violence which in the circumstances appear natural to the person whose death is so caused;

- d. He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death; and
  - e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.
22. In the case of *R v Gusambisi s/o Wesonga* [1948]15 EACA 65, every homicide is unlawful unless rebutted by evidence that it was either justifiable or excusable. These principles bring into play the provisions under section 17 on self-defence and section 207 as read with 208 of the *Penal Code* on provocation.
23. In this respect any potential defences to the unlawful acts which causes death have been excluded in respect of all of that range of acts which caused the fatal injuries leading to the victim succumbing to death. That those acts or omissions done by the offender were in the prosecution of an unlawful purpose to endanger human life. As a matter of emphasis, the element of unlawfulness to cause death in exceptional circumstances is excusable by law in the event of an accident, natural causes, insanity self-defence and also provocation.
24. Article 26 (1) of *the Constitution* guarantees every person the right to life. Therefore, no person is permitted to kill or cause the death of another person unless otherwise as provided for in our constitution or any other enabling statute. The law in Kenya presumes every homicide to be unlawful unless it is accidental or excusable or authorised by law. On this ground the court has to take into account the guidelines in *Juma Lubanga v R* [1972] HCD in which the court made the following observations:
- “Grievous harm as defined in the *Penal Code* involves a consideration whether the harm is such as seriously to interfere with the health or comfort, and the answer to the question may depend on the nature of the injury and the circumstances of the case.”
25. The post-mortem report brought by PW4 revealed that the deceased’s cause of death was severe head injury with skull fracture and cerebral Haemorrhage/Haemotoma. This was not opposed by the Defence. In the circumstances, I am persuaded beyond reasonable doubt that the deceased, Andrew Kokiropuyadied of an unlawful act.
26. The other question is whether it was the Accused who unlawfully caused the deceased’s death. From the comparative law this element of prosecuting an unlawful purpose was discussed in the case of *Macartney v R* [2006] 31 WAR 416, in which Steytler P observed of the meaning of unlawful purpose:
- “The words “unlawful purpose” are very wide, even wider than the old common law requirement that the act of violence occur in the course of or in furtherance of a felony involving violence. As was pointed out in *R V. Georgiou* [2002] 131 A Crim R 150 at 160, the framers of the section have chosen the words “Unlawful purpose” rather than the word “offence” and the unlawful purpose is not limited to the strict elements of an offence, with the consequence, for example, that an act done in the cause of attempting to get away after the commission of an offence would be an act done for an unlawful purpose.

It appears to follow that an act is done in the prosecution of an unlawful purpose if it is done in order to carry out or try to carry out an unlawful purpose, which includes trying to deter or avoid resistance to doing so and apprehension for doing so”



27. It was PW1 testimony that on 30<sup>th</sup> December 2022 at about 8 o'clock he was at his residence when he witnessed 2 young men fighting within the neighborhood. The 2 were staying together in the same house. According to PW1, he saw the accused with a clap and using it against the deceased and any attempts made to separate them was resisted as the fight escalated between the two within that same homestead. It was also the evidence of PW1 that during the efforts of trying to separate the two he was also attacked by the accused and did sustain physical injuries. He was later to learn that the fight and the assault of inflicting injuries resulted into the death of the deceased.
28. In my judgment, I think there is convincing evidence that Andrew Kokiro Lopuyais dead and the accused person caused his death by the alleged acts of assault as depicted in the post mortem report. This element stands proved beyond reasonable doubt by the prosecution
29. Finally, on the question of whether there was malice aforethought on the part of the Accused, Section 206 of the [Penal Code](#) defines Malice aforethought as follows:
- “ 206. 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.”
30. These provisions contain various characteristics of malice aforethought which can be individualised to specific circumstances and facts of each case. It is implicit to bear in mind though not defined under section 206 of the [Penal Code](#), Malice aforethought is either direct or implied or inferred from the consequences of each case. Sometimes facts can speak to premeditation by the perpetrator to commit the offence of murder. Whereas on the other hand, malice aforethought may be a continuum of events manifested before, during or after the commission of the homicide itself by the offender. The extract from one of the landmark cases ever litigated in South Africa in *S v Pistorius* 2016 (1) SACR 431 (SCA), tends to articulate this concept of intention for purposes of clarity as follows:
- “In the case of murder, there are principally two forms of dolus which arise: dolus directus and dolus eventualis. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased. Dolus eventualis, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to dolus directus, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person’s intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore ‘gambling’ as it were with the life of the person against whom the act is



directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act ‘reckless as to consequences’ (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have ‘reconciled’ with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions, It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.”

31. The Court of Appeal in the case of Joseph Kimani Njau v R (2014) eKLR, the Court of Appeal held as follows:

“ Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the

following intentions, the test of which is always subjective to the actual subject;

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

32. In the instant case, PW4 witnessed the Post Mortem of the Deceased where it was ascertained that the cause of death of the Deceased was severe head injury with skull fracture and cerebral Haemorrhage/ Haematoma. Moreover, PW4 moved to the scene where he observed blood streams from the body of the deceased and the things around the house were scattered all over the house. He also observed that next to the body but near the fence was a wooden clap which was confirmed to be a murder weapon used to inflict the fatal injuries. He produced the wooden clap as a murder weapon and as an exhibit. That the exhibit recovered being a long stick with wire and nails at the end, a red pair of shorts, fingernails and cartilage of the deceased were all forwarded to the Government Laboratory for forensic examination. The aforesaid exhibits were subjected to forensic examination in which the Government Analyst in his report dated 16<sup>th</sup> January 2024, produced as exhibit 5b opined as follows:

That based in the findings of the DNA profile generated from blood stains on the sticks marked exhibits a1 and a2 and the pair of shorts marked b are identical and matched the DNA profile of the deceased.

33. In the circumstances I am persuaded beyond reasonable doubt that the prosecution also proved this limb of the presence of malice aforethought on the part of the Accused beyond reasonable doubt.

34. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the offence of murder against the Accused person beyond reasonable doubt. I record and enter a finding of guilty against the Accused as charged.



## Ruling On Sentence

35. Having found the accused person Nicholas Ekiru Ekaaleguilty of the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#), I now proceed to determine the appropriate sentence.
36. The Supreme Court of Kenya in the landmark decision of Francis Muruatetu & Another V Republic[2017] eKLR held that the mandatory nature of the death sentence prescribed under section 204 of the [Penal Code](#) was unconstitutional. The Court emphasized that a person facing the death sentence is entitled to be heard in mitigation, as mitigation is an essential element of a fair trial process.
37. In mitigation, counsel for the accused submitted that the accused is a young person which makes him a great candidate for a non-custodial sentence. It was emphasized that he has the capacity and advantage of time to rebuild his life and make better decisions for his future. The court was informed that the accused desires to go back to school and pursue further education.
38. Counsel further submitted that the accused has expressed remorse for his actions and is regretful for the life lost. He has apologized to the family of the deceased for their loss and is described as now being a reformed and responsible citizen ready to reintegrate back to his community in Kakuma - Turkana West Sub-County.
39. It was brought to the court's attention that the accused person has been in custody for more than two years, during which time he has demonstrated good behavior in relating with his fellow remandees at Lodwar Prison. Counsel prayed that this time in custody be considered as sufficient sentence served, or if needed, that the court consider a non-custodial sentence.
40. Lastly, counsel submitted that the family of the accused is fully dependent on him, and during his incarceration at Lodwar Prisons, they have been exposed to untold suffering. The court was urged to commit the accused to a non-custodial sentence to allow him to reintegrate back to his community and serve his family.
41. In R v Engert [1995] 84 A Crim R 67 at 68, Gleeson CJ observed:

“Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application of this facts and circumstances to the principles laid down by statute or established by the common law. The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment .....

In a given case, facts which point in one direction to one of the consideration to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance .....

It is therefore erroneous in principle to approach the law of sentencing as thought automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.”
42. In determining an appropriate sentence, I am guided by the Judiciary Sentencing Policy Guidelines and the principles established in the Muruatetu case. I must consider the following factors:



- a. The gravity of the offence
  - b. The circumstances of the offence
  - c. The age of the offender
  - d. Whether the offender is a first-time offender
  - e. The character and record of the offender
  - f. The possibility of reform and social re-adaptation
  - g. The interests of society and the victim's family
43. Murder is undoubtedly one of the most serious offences under our legal system. The sanctity of human life is protected under Article 26 of *the Constitution*. In this case, the deceased lost his life through violent means that demonstrated the accused's intention to cause death or, at minimum, grievous harm.
44. The Constitutional Court of South Africa in *State v Makwanyane* [1995] CCT/3/94 remarked as follows on mitigation and aggravating factors in sentencing:
- “mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighed with the main objectives of punishment, which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence.”
45. I have carefully considered the evidence adduced during the trial, particularly the nature of the attack. The court cannot overlook the brutality of the attack, which involved the use of a wooden club with wire and nails at the end. The post-mortem report revealed that the cause of death was severe head injury with skull fracture and cerebral haemorrhage/hematoma. The violence employed in this attack demonstrates a shocking disregard for human life.
46. I have also considered the forensic evidence presented, including the DNA analysis which confirmed that the blood stains on the murder weapon and the accused's clothing matched the DNA profile of the deceased, establishing a direct connection between the accused and the brutal murder.
47. I have given due consideration to the mitigating factors presented by the defence, including the accused's young age, expressed remorse, and family circumstances. However, I must balance these against several aggravating factors:
- a. The heinous and brutal nature of the murder
  - b. The use of a dangerous weapon modified to cause maximum harm
  - c. The accused's refusal to stop the attack even when others attempted to intervene
  - d. The fact that the accused attacked PW1 when he tried to separate the fighting parties



48. The sentencing objectives of retribution, deterrence, and community protection are paramount in cases of such extreme violence. While rehabilitation is important, it cannot overshadow the need to impose a sentence that reflects society's abhorrence of the taking of human life in such a violent manner.
49. Having carefully weighed all factors, I find that a substantial custodial sentence is necessary to meet the objectives of justice in this case. The plea for a non-custodial sentence is not tenable given the gravity of the offence and the circumstances of its commission.
50. Consequently, I sentence the accused person Nicholas Ekiru Ekaaleto twenty-five (25) years imprisonment with effect from 31<sup>st</sup> December 2022, being the date of arrest.
51. The accused person has the right of appeal against both conviction and sentence within fourteen (14) days from today. The State has a right of appeal against the sentence.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 12<sup>TH</sup> DAY OF MARCH 2025**

.....

**R. NYAKUNDI**

**JUDGE**

