Republic v Maler (Criminal Case E001 of 2020)
[2025] KEHC 5007 (KLR) (9 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5007 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL CASE E001 OF 2020

RN NYAKUNDI, J

APRIL 9, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

LOKORIO MALER ..... ACCUSED

JUDGMENT

1. Lokorio Maler is indicted with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that the accused on the 26th day of August, 2018 at Ikalale Akamar area in Turkana South Sub-County within Turkana County murdered Nicholas Elar Eloiloi.

2. The information was read to the accused person who pleaded not guilty to the charge. The prosecution in discharging their burden of proof called three witnesses whose evidence has been captured as hereunder:

3. PW1 – Ekitela Amaler Mzee told the court that she is unemployed and that the deceased was the son of her brother in-law. That on 26th August, 2018 she while together with her son and the deceased, they left Lokichar centre and proceeded to Loperot area. She testified that the deceased was a motorcycle rider. That were being ridden by the deceased and upon reaching a certain bush, she heard her children exclaim "waaa!". Shortly, she heard a gunshot, their motorcycle lost control and they all fell down. She told the court that the deceased was hit on the head by the bullet. She said on oath that she saw the person who hit the deceased. That he came and checked the motorcycle. She fell down and she was on her knees. The person who shot the deceased also wanted to take position to shoot her. She went near that person so that he doesn't shoot her.

4. It was further her testimony that when the assailant realized that Augustine had not died, he went next to Augustine to shoot but Augustine who was still bleeding pleaded with him not to kill. That shortly

after, the assailant went back to the bush from where he had ambushed them. She stated that they ran away since it was getting late. She called Augustine's father and they agreed to meet next to the road. Later on, the police vehicle arrived and took the body of Nicholas.

5. Next to take the stand was Lobwin Benson who testified as PW2. He stated that the deceased was his step brother. He stated that on the material date he had been summoned by the step mother and while on his way, he was called by his sister while she was crying. She told him that her brother had died. He went back home where he met people mourning. He told the court that he borrowed a motorcycle and left for the scene of the shootout which was about 5 kilometers. He found members of the public and police surrounding the deceased's body. The witness was able to identify the accused person in court and stated that he knew him well since he used to attend the cattle market.

6. PW3 was Dr. Wayaa Jonathan who testified that he is attached to Lodwar Referral Hospital as a general practitioner. That he has been in Lodwar since 2014. He produced the post mortem report and indicated that the post mortem was done on 29th August, 2018 at Lodwar Refferal Mortuary. He stated that the deceased had a sweater soiled in sand. He also had a blood stained T-shirt and a red boxer and a long check trouser. He further stated that the deceased was aged 29 years with a gunshot injury. That the lungs appeared normal, the heart appeared normal, there was a skull fracture and there was perforation in the stomach. He indicated that the cause of death was traumatic brain injury secondary to gunshot (bullet injury).

7. The accused did not tender a defense to this case, opting to remain silent as is his right under Article 50(2) of *the Constitution*.

Determination

8. It is the law that the burden of proof in a criminal case lies on the prosecution. It has a duty to discharge the burden of proving its case against the accused beyond reasonable doubt. In Miller –v- Ministry of pensions (1947) 2 ALL ER 372 at 373 the court stated:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the 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' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

9. Similarly, in Woolmington –v- DPP (1935) AC 462 where the court stated as follows:

> " But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.
>
> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception ..... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained ..... It is not the Law of England to say as was said in the summing up in the present case: 'if the Crown satisfy you that this woman died at the prisoner's hands then

he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident...."

10. It is trite law as stated elsewhere that the burden of proof is on the prosecution to prove beyond reasonable doubt that the crime as charged against the accused person was committed by none other than the accused as stipulated in section 203 of the *Penal Code*. The doctrine of beyond reasonable doubt is underpinned on the right of every accused person to be presumed innocent unless the contrary is proved under Art. 50(2)(a) of *the Constitution*. It is also the law in Kenya that unless the accused person avails himself or herself the defence of insanity, the specifics of provocation as defined in section 207 as read with section 208 of the *Penal Code* and further the defence of self under section 17 of the said code. The standard and burden of proof of beyond reasonable doubt is stated to have been discharged by the prosecution.

11. In this case, the accused is charged with the offence of murder contrary to section 203 of the *Penal Code*. The prosecution has the burden of proving, beyond reasonable doubt, that the accused, 'with malice aforethought', caused the death of the deceased. Section 206 of the *Penal Code* sets out what the prosecution needs to place before the court for 'malice aforethought' to be established:

> " 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."

12. In order for the prosecution to sustain a charge of murder, they must prove beyond reasonable doubt that:

    a. The deceased died.

    b. The death was caused by an unlawful act or omission.

    c. The act or omission was committed with malice aforethought, and

    d. It was the accused who committed the act or omission that caused the death.

13. Culpable homicide as envisaged in our *Penal Code* is where a person causes the death of another human being while armed with a dangerous weapon or other devices which can be manipulated to inflict grievous bodily harm with an intention to also cause death. The manifestation and inference of what was intended by the accused person is to be inferred from the surrounding circumstances in which the offence was committed. One of the key principles which will be discussed elsewhere in this judgment is the minimum mental state of the accused person that in committing the offence, he intended the consequences in that particular nature of the crime. It is clear that under Art. 26(1) of *the Constitution*,

the right to life is protected and guaranteed to every citizen and other residents within our borders. That therefore deters the use of any dangerous weapons like firearms to be used in targeting to inflict bodily harm because of its high risk of causing death of another human being. In this case, the court will be testing the threshold of the evidence adduced by the prosecution to satisfy itself whether the criterion set in the law on every element of the offence has been met beyond reasonable doubt.

14. In the first instance, the question is whether the death of Nicholas Elar Eloiloi has been established. It is not in dispute that the deceased is dead. The testimony of PW3, Dr. Wayaa Jonathan, who conducted the post-mortem examination determined that the cause of death was traumatic brain injury secondary to gunshot (bullet injury). The doctor's testimony confirmed that the deceased had a gunshot injury that resulted in a skull fracture and perforation in the stomach. This evidence establishes beyond reasonable doubt that Nicholas Elar Eloiloi is deceased.

15. The next question is whether the death was caused by an unlawful act. From the evidence tendered, it is clear that the deceased was shot while riding a motorcycle with PW1 and another passenger. The unlawful nature of this act is evident as there was no suggestion that the shooting was accidental or done in self-defense or under any other legally justifiable circumstances. In the case of Gusambizi Wesonga v Republic [1948] 15 EACA 65 the court spoke as follows:

> " Every homicide is presumed to be unlawful except where circumstances make it excusable or it 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 or in defence of property."

16. This allegedly causative acts or omissions need not be the sole cause of death but must be a substantial or significant cause of death or have substantially contributed to the death. In Campbell versus The Queen (1980)2 A Crim R 157 at 161 the court observed that it is enough if injuries are told that the question of cause is not a philosophical or scientific question but a question to be determined by them applying their common sense to the facts as they find them, appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.

17. The evidence presented before this court reveals a deliberate attack. PW1 testified that while traveling on a motorcycle with the deceased and her son, they were ambushed by an assailant who emerged from a bush and discharged a firearm, striking the deceased in the head. The manner of this attack - an ambush from concealment followed by a targeted shot - clearly constitutes an unlawful act. There is no evidence suggesting any legal justification such as self-defense or accident that would render this killing lawful. Article 26(3) of *the Constitution* is unequivocal: "A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law." No such authorization existed in this case. In the end, and as far this case is concerned, the prosecution has discharged its burden in establishing that the death of the deceased was unlawfully caused.

18. Turning to the element of Malice Aforethought. Section 206 of the *Penal Code* defines malice aforethought as follows;

> " (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."

19. From the post mortem report presented by Dr. Wayaa Jonathan (PW3), it is evident that the death of the deceased was caused by traumatic brain injury secondary to a gunshot wound. This finding corroborates the testimony of PW1, Ekitela Amaler Mzee, who witnessed the deceased being shot in the head during the ambush. The medical evidence showed that the deceased had a skull fracture and perforation in the stomach as a result of the bullet injury. The testimony of PW1 regarding the circumstances of the shooting and the ambush from the bush, together with the medical evidence, clearly establishes that this was a deliberate act carried out with malice aforethought. The targeted shooting of the head, a vital organ, and the subsequent attempt to shoot another survivor demonstrates an intent to cause death, which constitutes malice aforethought under Section 206 of the *Penal Code*.

20. In Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 [1997] eKLR), the Court of Appeal cited the case of REX VS TUBERE S/O OCHEN (1945) 12 EACA 63 with approval where it was in stated as follows:

> "If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late." (see also Ernest Asami Bwire Abanga alias Onyango v Republic Nairobi CACRA No. 32of 1990)

21. This court on evaluating the evidence by the prosecution placed the accused on his defense under section 306 as read with section 307 of the *Criminal Procedure Code*. This was on the strength that a prima facie case had been discharged by the prosecution to call for rebuttal evidence from the accused. He therefore elected to exercise his constitutional right of offering no evidence leaving only the court to revisit the elements of the offence, the law and admissible evidence within the scope of section 107(1), 108 and 109 of the *evidence Act*. The findings of this court resonates well with principles in S V Chabalala 2003(1) SACR 134 SCA at paragraph *15* in which the court stated as follows:

> "The correct approach is to weigh up all elements which point towards the guilt of the accused against all those which are indicative of his weakness, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities. On both sides and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.
>
> The result may prove that one scrap of evidence or one defect in the case for either party was decisive but can only be an ex post facto determination and a trial court should avoid the temptation to latch on to one obvious aspect without assessing it in the context of the full picture presented in evidence"

22. Although the motive of the murder is not clear but both direct and circumstantial evidence manifest existence of malice aforethought on the part of the accused person consistent with the guidelines in the case of Robert Onchiri Ogeto v. Republic (2004) KLR 19 in which the court observed as follows:

> " The prosecution does not have to prove the motive for commission of any crime, neither is evidence of motive sufficient by itself to prove the commission of a crime by the person who posses the motive. See Karukenya & 4 Others v Republic [1987] KLR 458. By section 206 (a) of the *Penal Code*, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. It can be reasonable inferred that when the appellant stabbed deceased with a knife on the chest he intended to cause death or grievous harm to the deceased. That being the case, we are satisfied that the appellant was properly convicted for the offence of murder."

23. In this case, the mens rea and the unlawful acts by the accused person are deducible from the testimony of PW1 who told the court that on the material day, the deceased was working as a motor cycle rider and as at the time PW1 was the pillion passenger. According to PW1, they drove along the way and on arrival at a particular location where there was some bush, she heard gunshots and the motorcycle lost control. It is at that moment each of them were thrown off balance to the ground and the deceased was hit by a bullet on the head. He was able to realize the culprit as the accused person before court. That evidence on the shooting by the accused while armed with a firearm was never controverted. Thereafter, the post mortem which was carried showed that the cause of death was traumatic brain injury secondary to gunshot bullet injury.

24. There is no evidence in this entire trial to show that the situation in which the Accused found himself was of such a nature that there was an imminent attack or provocation such that it was both reasonable and necessary to take the particular unlawful Act which caused the death of the deceased. There was no fight at all as there was no evidence to support it. This use of a firearm by the Accused targeting the deceased's vulnerable part of the body defined as the head all in all can be summed as premeditation to cause the death of the deceased. *The constitution* of Kenya under Article 26(1) guaranties the Right to Life of Every Kenyan and unless there is justification, or excuse or accidental death each citizen has a right to preserve the life of another at all seasons and times. This is culpable homicide which falls within the provisions of Section 203 of the *Penal Code* and founded on Malice aforethought defined in Section 206 of the *Penal Code*. Towards this end there exist no extenuating circumstances to rule otherwise in so far as the offence is concerned as against the accused person.

25. As a consequence, thereof, the nature of the evidence is such that it is sufficient to prove the elements of the offence of murder beyond reasonable doubt to enter a verdict of guilty and conviction against the accused person. By dint of the accused not offering any defense, the case of the prosecution carried the day in so far as the indictment of the offence against the accused person is concerned.

Ruling on Sentence

26. The offence of murder as defined in section 203 of the *Penal Code* provides for a penalty of death as stipulated in section 204 of the same Code. However, that maximum sentence is reserved for the rarest of cases and circumstances of the crime. The case of Francis Muruatetu v. Republic (2017) eKLR provides legal tools for determining the appropriate punishment for the offence dependent upon the peculiar circumstances of each case. In addition, reference is to be made to the Sentencing *Policy Guidelines of 2023* and case law. To provide guidance to trial court in exercising judicial discretion as to the fair and proportionate sentence to be imposed in cases of similar circumstances.

27. During the sentencing hearing, legal counsel Mr Lele submitted on mitigation which included the accused being a first offender, the fact of him being remorseful and that he has been in remand custody for the last five years. In so far as the state is concerned, the director Mr. Kakoi invited the court to look at aggravating factors one of which being that the accused was armed with a lethal weapon identified as a firearm.

28. In Veen v. The Queen (No. 2) (1988) 164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ stated at 476:

> " sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of other who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."

29. Similarly, 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 stature 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."

30. I have considered all the factors isolated in each of the submission made by counsel on mitigation on behalf of the accused person, the aggravating factors by the Prosecution Counsel. Given the strength of the principles in the above cited cases, including the lead authority by the supreme court commonly referred to as Muruatetu 1, both denunciation, retribution and rehabilitation have some measure of contribution to guide this court towards proportionality test in sentence. As a consequence, I sentence the accused person to a term of 40 years' custodial sentence with a discounted period spent in pre-trial detention as the case may be pursuant to section 333(2) of the *Criminal Procedure Code*.

31. It is so ordered.

32. 14 days right of appeal explained.

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF APRIL, 2025

R. NYAKUNDI

JUDGE