



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Eyang'an & 2 others (Criminal Case E003 of 2022)
[2025] KEHC 5006 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E003 OF 2022
RN NYAKUNDI, J
APRIL 8, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

LOKENO IMAL EYANG'AN 1ST ACCUSED

ESEKON LOMELU ALIAS EKITENDE 2ND ACCUSED

NAKONEO LOKARAN ALIAS ERAGAE 3RD ACCUSED

JUDGMENT

1. The accused persons were charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence were that on the 1st day of February, 2022, at Ngakapuk village in Turkana East Sub-County within Turkana County the accused persons murdered Hassan Ekuwom.
2. During the plea taking each of the accused persons pleaded not guilty and it was the duty of the state to prove the guilt of each one of them beyond reasonable doubt. Essentially, it is the duty of the state to prove every element of the offence to meet the above threshold. In this trial, the lead counsel for the state was Assistant Director Mr. Edward Kakoi whereas Mr. Lele, Advocate appeared for the accused persons.
3. The basic principles of criminal law and the law of evidence that apply in this case are trite. In *Kioko v Republic* (1983) KLR 289 (1982-88) 1 KA 157 and in *Mbugua Kariuki v Republic* (1976-80) 1 KLR 1085, the important principles are that the state is required as a constitutional duty to try a person alleged to have committed the offence to prove the guilt of that person now accused before a trial court beyond reasonable doubt. This high standard of proof universally required in every democratic legal systems to uphold the Framework of Criminal Justice Administration as a component of our constitution, common law and our penal laws. That burden of proof never shifts to the accused persons



even if there may be suspicions that he/she was indeed the perpetrator of the crime in question. Once arraigned in court, that question must be answered beyond reasonable doubt. It is this standard and burden of proof vested upon the state at all material times in a criminal trial that the following evidence adduced by the state will be tested as against the accused persons.

Evidence: The State's version

4. PW1 – Peter Eleto Ewoi as a state witness told the court that he was a watchman in Lokorio Hospital and he was able to recall that on 31st January, 2022 he was asleep when he heard people making some screams. It would appear they were fighting and responding to an attack. When he came out of the house to check what was happening, his house was sprayed with bullets and he was forced to crawl to avoid being shot. It was also his further evidence that his flock of 15 goats had been stolen and he was scared of pursuing them fearing that he may be attacked by the assailants.
5. PW2 – Simon Eloto Ewoi. According to him, he remembered the events of 31st January, 2022 when he heard dogs barking and at the same time screams from people who said that “the attackers are here within the village.” PW2 further told this court that on stepping outside his house, he saw one Eragai armed with an AK47 but as he corked his gun and fired all over the place. That is when the attackers in company of Eragai entered their homestead and they drove away 15 goats and sheep. It is in the course of that conflict Hassan Ekwomi was killed as he followed the attackers to recover the animals.
6. PW3 – Akilimo Faustine told the court that on 31st January, 2022 at night he also heard some dogs barking and some neighbors came out and using a torch which he flashed noticing some people standing at their gate. He was able to notice that they were armed with an AK47. They made entry to the home and drove away goats and sheep. It was at that time that the deceased was killed.
7. PW4 – Wilson Ekataroti told the court that on 2nd February, 2022 he attended a post mortem examination at Lodwar Referral Hospital involving the deceased.
8. PW5 – Lugule Lokeno also recollected the events about the gunshots and the theft of livestock by the raiders in which also they shot at Hassan Ekuwom the deceased in this case. It was his evidence that they followed the attackers to recover the animals and he was able to identify the accused persons whom he knew prior to this incident. According to PW5 he saw the accused he saw the accused person Lada as they drove the goats. They were all armed with a firearm.
9. PW6 – Corporal Lokidongo Karesimol, a police detective attached to Kopulu Police post. His evidence was to the effect that he made an arrest of the accused persons before court however with no recoveries of the animals.
10. PW7 – Dr. James Ndano gave evidence on the post mortem carried out against the body of the deceased in which he produced before court as exhibit 1. As a result of the examination, PW7 formed the opinion that the cause of death was massive hemorrhage second to ruptured liver, stomach, spleen plus abdominal Aorta secondary to gunshot wounds.
11. PW8 – Inspector Alex Njoroge gave evidence on the recording of a confession statement of one Lokeno Imal, the 1st accused person. In the confession statement, he gave a recollection of the events which occurred on the 1st day of February, 2022 involving this incident in which the deceased Hassan was also killed. The statement was admitted in evidence as exhibit No. 2. At the close of the prosecution case, the accused person was placed on their defense which was recorded in as follows:
12. The 1st accused in his sworn statement denied the offence that he was even at the scene as alleged by the prosecution. The 2nd and 3rd accused person elected to keep silent as provided for in Art. 50 (2)(i) of *the Constitution*.



Analysis and Determination

13. In terms of section 203 of the *Penal Code* and pursuant to the principles in *Anthony Ndegwa Ngari v. Republic* (2024) eKLR, the Republic is supposed to prove each of the following ingredients beyond reasonable doubt:
 - a. The fact of death;
 - b. The fact that the deceased's death was caused by an unlawful act or omission.
 - c. That the accused committed the unlawful act which caused the death of the deceased; and
 - d. That the accused had malice aforethought.
14. There is no dispute from the post mortem report dated 2nd February, 2022. that the deceased Hassan Ekwom is dead.
15. It is now settled law that all homicides or the act of killing another person in breach of Art. 26 of *the Constitution* and section 203 of the *Penal Code* is presumed to be an unlawful death unless there is material evidence that it was caused by an accident, an act of God or in defense of a person or property or as authorized by the law. See *R v Gusambisi s/o Wesonga* (1948)15 EACA 65. In the present case, the prosecution adduced circumstantial evidence from PW1 to PW8 which demonstrates that the death of the deceased was unlawfully caused by the attackers who are livestock rustlers and in this incident the family of PW1 and PW2 and also the deceased lost 15 goats on the night of 31st January, 2022. It was during this heinous crime committed by the rustlers armed with AK47 riffles made entry to the homestead of PW1 and driving away 15 goats by force as they shot in the air all over the place to scare away the owners of the property. There is sufficient evidence that the deceased while in pursuit to recover the stole goats was shot at by the raiders who were later arrested and charged with the offence of murder before court. It is also clear from the post mortem report that the deceased died of gunshot wounds which ruptured the internal organs causing massive hemorrhage. In assessing this evidence, it rules out any other causes as the cause of death of the deceased. This was purely a homicide case and the prosecution has proved this element on causation beyond reasonable doubt.
16. The third element to be proven by the estate is malice aforethought as defined under section 206 of the *Penal Code*. 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.”



17. Malice aforethought can be inferred from the surrounding circumstances of the offence such as the nature of the weapon used, whether lethal or not, the part of the body targeted whether vulnerable or not, the manner in which the weapon was used and the conduct of the assailants before, during and after the offence. See *R v. Tubere S/o Ochen* (1954) EACA 63. In the present case, though the murder weapon was not recovered, the evidence from PW1, PW2, PW3, PW5 demonstrates that the murder of the deceased was caused by gunshot wounds from the assailants. The post mortem report Exhibit 1 as recorded by PW7 is to the effect that the wounds suffered by the deceased were caused by gunshots. This involved the respiratory system, cardiovascular system and the digestive system which are vulnerable parts of a human body. The pathologist concluded that this gunshot wounds occasioned massive rupture of the organs accompanied with hemorrhage. The conclusion of this court is that whoever inflicted the fatal injuries intended the deceased to die or had knowledge that the unlawful act of gunshots would probably cause death of that person. In the premises, I find the prosecution has having satisfied the criteria of this ingredient of malice aforethought beyond reasonable doubt.
18. Finally, this court must answer the questions as to whether the accused person directly or indirectly participated in the murder of the deceased. In the case of *R v. Turnbull* (1976) 63 CR Appeal 132 the court discussed the element of identification as follows:

“Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused special need for caution before convicting in reliance of correctness of the identification is necessary the Court should warn itself of the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could be mistaken. The Court should further examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition might be more reliable than identification of a stranger, but even then the Court should remind itself... That mistakes in recognition of close relatives and friends have been made sometimes.”

19. This is the most important ingredient in criminal law in so far as the offence of murder is concerned. In the instant case on identification, the prosecution relied on the testimony of PW5 whose evidence was to the effect that positively recognized the accused persons at lada as they drove the goats at a very proximate distance. This identifying witness also told the court that he had known him for a long time prior to the occurrence of this incident. There was no evidence from the defense to controvert the testimony of PW5 in placing each one of them at the scene of the crime. This evidence of PW5 as introduced in court is admissible within the guidelines of the principles in *Roria v Republic* (1967) EA 583, in which it was stated as follows:

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although



based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

20. I find no compelling evidence to render the testimony of PW5 to be mistaken on the evidence of recognition. There is also the statement under inquiry recorded by Alex Njoroge from the 1st accused person. That evidence taken together is qualitative, credible and reliable to establish this ingredient beyond reasonable doubt. As regards also this case, section 21 of the [Penal Code](#) provides that when two or more persons forming a common intention to prosecute an unlawful purpose in conjunction with another and in the prosecution of that purpose, an offence is committed under the doctrine of common intention each is liable to be convicted for that offence. In this case, there is evidence from PW5 that the accused persons formed a common intention to commit an offence of stock theft which subsequently causes the death of the deceased when he was in hot pursuit against them to recover the stolen animals. In the circumstance’s, I agree with the prosecution that there is evidence with regard to common intention to commit the crime of murder contrary to section 203 of the Penal code.
21. There is therefore available sufficient evidence of beyond reasonable doubt that the accused person committed the offence of murder contrary to section 203 as punishable under 204 from which I find each of them guilty and convict them accordingly of the offence as charged.

Sentencing

22. The court now faces the responsibility of determining a just and appropriate punishment for this grave offense. This moment represents the culmination of judicial process where justice must be crafted with precision, weighing the horrific nature of the crime against considerations of proportionality and purpose. In calibrating an appropriate sentence, I am mindful that justice requires more than mere retribution; it demands a thoughtful application of legal principles established in the landmark Muruatetu decision and articulated in our Judiciary Policy Guidelines 2023. The sentence must serve multiple functions: it must reflect society’s condemnation of armed violence resulting in death, deter similar acts of brutality, recognize possibilities for rehabilitation, yet maintain proportionality to the specific circumstances of this case.
23. The accused persons before court were charged and convicted for the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The offence ordinarily attracts a death penalty but its mandatory nature was declared unconstitutional in the Muruatetu case. The court therefore is called upon to impose an appropriate sentence considering the circumstances surrounding the offence.
24. In the present case, the court has carefully considered the evidence which has established that on the night of 31st January, 2022, the accused persons, armed with AK47 rifles, raided Ngakapuk village in Turkana East Sub-County. During this raid, they stole 15 goats and sheep from local residents. When the deceased, Hassan Ekuwom, attempted to pursue the raiders to recover the stolen livestock, he was shot. According to the post-mortem report, he sustained fatal gunshot wounds that ruptured his liver, stomach, spleen, and abdominal aorta, causing massive hemorrhage that led to his death.
25. The evidence from PW1, PW2, PW3, and PW5 clearly establishes that the accused persons entered the village armed with lethal weapons, fired indiscriminately to terrorize the residents, stole livestock, and deliberately shot at those who attempted to pursue them. This demonstrates a flagrant disregard for human life and the sanctity of property rights.
26. In considering an appropriate sentence, I am guided by the Judiciary Sentencing Policy Guidelines which identify several objectives that a court should have in mind:
 - 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.



- 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
 - 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - 5) Community protection: to protect the community by incapacitating the offender.
 - 6) Denunciation: to communicate the community's condemnation of the criminal conduct.
27. I have also considered the factors set out in the Muruatetu case being: Age of the offender, being a first offender, whether the offender pleaded guilty, character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other relevant factor.
28. This case presents aggravating circumstances of significant weight. First, the accused persons were armed with lethal weapons, specifically AK47 rifles, which they used to terrorize an entire village. Second, the attack was premeditated and executed with precision, suggesting planning and coordination. Third, they shot indiscriminately, creating an atmosphere of fear and terror among innocent villagers. Fourth, they caused the death of Hassan Ekuwom when he attempted to recover his stolen property, a right protected by law. Fifth, the attack has broader implications for community security and social order in a region already plagued by cattle rustling and inter-community violence.
29. Livestock rustling in the region has evolved from a cultural practice into a serious criminal enterprise, often involving deadly violence. This court takes judicial notice of the fact that armed cattle rustling has destabilized communities, caused loss of life, perpetuated cycles of revenge, and undermined development efforts in the affected regions. The court must therefore consider the broader societal impact of such crimes when determining the appropriate sentence.
30. In *State v Banda and Others* 1991(2) SA 352 (B) at 355A-C Friedman J explained that:
- “The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirement. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concerns.”
31. The 1st accused person in his sworn statement denied being at the scene, while the 2nd and 3rd accused persons elected to remain silent. However, during mitigation, all three accused persons, through their counsel, expressed remorse for the death of Hassan Ekuwom and emphasized that they are first offenders with no prior criminal records.
32. In considering the mitigating factors of the accused persons, I am mindful of the decision in *S v Rabie* 1975 (4) SA 855 AD at 862D-F, the court stated:
- “A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the



criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive for severity, nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contribute to criminality."

33. Taking all these factors into consideration, and striking a balance between the competing interests, I find that this case calls for a substantial custodial sentence. The heinous nature of the crime, the use of lethal weapons, the calculated manner of execution, and the need to protect society from such violence all point to the necessity of a severe sentence.
34. Having taken all the aforesaid factors into consideration together with the circumstances surrounding the offence, when striking a proper balance, the aggravating factors significantly outweigh any potential mitigating circumstances. Accordingly, each of the accused persons - Lokeno Imal Eyang'an, Esekon Lomelu Alias Ekitende, And Nakoneo Lokaran Alias Erage - is hereby sentenced to thirty-five (35) years imprisonment.
35. The period each has spent of 4 ½ in pre-trial custody, from the date of arrest until today, shall be considered part of the sentence in accordance with Section 333(2) of the [Criminal Procedure Code](#). The prison authorities are directed to compute this period and deduct it from the total sentence for each accused persons taking into account the committal warrant to prison as remedies to be the 8.3.2022.
36. Each accused person has a right of appeal against both conviction and sentence within fourteen (14) days from today's date of this judgement.
37. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF APRIL 2025

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R. NYAKUNDI

JUDGE

