



**Republic v Ekai (Criminal Case E006 of 2023)
[2025] KEHC 4710 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E006 OF 2023
PJO OTIENO, J
APRIL 3, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

EVANS LOKOMWA EKAI ACCUSED

JUDGMENT

1. On the 17/2/2023, David Epem Lokwanyie a student at St. Jude Kaikor Secondary School as at the date of giving evidence, was at home with the deceased Sylvia Ebel, his mother, and the accused. At about 8pm one Benard Eyapan walked into the home with a goat to sell. The accused told Mr. Eyapan that if the goat could not be sold, it had to be slaughtered. The accused then had the goat slaughtered then, him and the deceased, commenced roasting.
2. The witness told the court that he was in the company of the deceased, accused, accused brother called Benard Eyapan and the witness' younger siblings.
3. After the roasted goat was eaten, the accused ordered the deceased to go and breastfeed their baby. However before the deceased could make a move, the accused attacked and started to beat her all over the body. He recalled that the deceased's face was deformed but she ultimately left the home of the accused for her mother's home with the accused in toe.
4. The witness decided to accompany the mother but the accused ordered him to go back home. The accused and the deceased went on their way. The witness went home and slept but at about 5am he heard movements outside the house and concluded that it was the deceased and the accused.
5. He went to the house where the deceased was and found the accused had left. The witness found the deceased sleeping on a mat unable to move but was able to talk was in deed told by the deceased that she had been badly beaten by the accused. He observed that the deceased had blood in her mouth,



- the body, including eyes, were swollen and eyes closed. Even the stomach was swollen and one incisor tooth was missing.
6. At about 8 o'clock the next morning, accused mother came to the home and promised to go and bring a goat to be slaughtered but did not come back. The witness made tea but the deceased could not take it. PW1 then came and took the deceased to the hospital at about 4.00pm. She received treatment and was brought back home and died on the third day, a Monday, after the assault on Saturday.
 7. From the date of assault to the date of death, the accused did not visit the home of deceased. He recalled that the accused and deceased had cohabited for about for months and would always quarrel. He then identified the sports shoes the accused used to assault the deceased and marked the same as MFI 1.
 8. On being cross-examined, the witness told the court that the deceased was his mother whom he had seen get assaulted by the accused even before the fateful incident. No report was however made to the police. He then said that the deceased and the accused had a child together to suggest that both could have cohabited for about one year. He added that the deceased was beaten while inside the house, a manyatta, and he was able to observe the assault by peeping through the window because the house had a window and a door. He added that the house was lit by a solar lamp which enable him to see. To him, the fight erupted because the accused was insisting that the child be breast fed yet the child was sleeping. He reiterated that the accused was not only boxing the deceased but also hitting her with the shoes although the deceased never fought back. He concluded by saying that when both, the accused and deceased, left the home, he did not know where they went but recounted that both came back to the home at about 5am the next morning.
 9. On being questioned by the court, the witness said that the deceased told him that she had been beaten by the accused in the field and that the deceased tried wailing but the accused strangled her with the beads she was wearing on the neck.
 10. The first witness, PW1 had been Kisike Lokwami Ebei, a sister to the accused who was called about the illness of the deceased. She went to the deceased and took her to hospital in the cause of which the deceased told her that she had been assaulted by the accused.
 11. The third witness to testify was PW3, DR Ekiru Kidario, attached to Lodwar County General Hospital, who conducted autopsy on the body of the deceased. The examination was conducted on the 28/2/2023 at the County Referral Hospital Mortuary at 12.30pm. The body was labeled and additionally identified by the Chrisantus Kisike and Kisike Abeyi.
 12. Externally, the examination revealed that the body was for a female African of good nutrition and measuring about 117 centimeters long. At the time of examination both rigor mortis and algor mortis had set in. The body had lacerations on the mandible and maxilla on the left, both shoulders, right elbow, posteriorly, lower knee joint and lumbar region. The lower hip had blood crust.
 13. Internally, both the respiratory and cardiovascular systems were unremarkable. The pancreatic organ was ruptured leading to discharge into the peritoneum while the genito-urinary system was normal. While there were lacerations on both sides of the face, when the skull was opened no haemorrhage was seen. The nervous system and spinal column were normal. The witness formed the opinion that the death was due to pancreatitis and inter peritoneal black fluid. He established no correlation with the assault asserting that pancreatitis may result from infection leading to rupture while pointing out that a blunt trauma is unlikely to damage the organ however great the impact. He added that the black fluid in the peritoneum was a sign of a chronic situation not a sudden blow, however heavy, could not have led to bleeding the peritoneal cavity. He produced the autopsy report as P exhibit 1.



14. On cross-examination, the witness maintained that the pancreatic organ was ruptured and inflamed suggesting infection or effect of alcoholism or substance abuse even though the liver was normal.
15. Upon re-examination, the witness excluded substance and alcohol abuse from possible causes of death. When questioned by the court, the witness said that had it been alcohol or chemical, there would have been effects on the liver and stomach. He said that the inflammation here referred to swelling and the change of colour from pink to black. The black colour on the peritoneum was a sign of discharge of acidic substance in the area.
16. The last prosecution witness, PW4, was No.92412 PC Job Ouma, stationed at Kibish DCI's office, who had taken over investigations after the actual investigators were transferred.
17. His evidence was based on the perusal of the file to establish what initial investigations did.
18. From that perusal he established that a report was received at the Kibish DCI office and officers were dispatched to the scene and secured it pending further investigations. On visit by DCI officers to the scene, the deceased's body was found lying in the house with visible injuries on the entire body. Interviews with those at the scene revealed that the deceased had been assaulted by the accused who was the husband on the 17/2/2023. The accused then escaped and was only arrested by the villagers at Napeto about 70km away after which the body and the accused were escorted to Lodwar.
19. Witness statements were recorded, from among others, PW2 who saw the accused assault the deceased. On the basis of such witness statement a decision to charge was made.
20. The evidence of the investigating officer attracted no cross-examination from the defence. The court however found the evidence tendered to have established a prima facie case and placed the accused on his defence.
21. The accused exercised his right under the law and elected to give sworn testimony. In that evidence the accused advance the defence of alibi asserting that being a boda boda operator, on the 15/2/2023, he had a passenger destined for Ethiopia who paid him Kshs.3000 and a he goat for the journey. He set on the journey but while just about to reach his destination, the motor cycle broke down. The passenger took an alternative mode to reach destination as the accused travelled back to Kibish to buy the spare part but did not get it. He thus decided to go to Kaikor, arrived at 2.00pm on the 16/2/2023 and decided to rest.
22. While in his house his mother came from the shop and he narrated to her what had happened. The mother offered to sell goats and get the money for spares but the goats were at a place called Nalita, about 60kms away from home hence he made a journey to that place on the 17/2/2023 arriving at about 5pm.
23. Because his father was not at Nalita having gone to look for a lost Carmel, the accused and the mother spent the night at Nalita on 19th and 20th February, 2023. While still there on 21/2/2023 and when preparing to leave, four people arrived in two motor cycles and told him that his wife had fallen sick and taken to hospital.
24. He decided to go with them but instead of being taken to the hospital he was taken to the home of the deceased where he was assaulted and later taken to the police station, at Lodwar and charged with the offenses before the court.
25. He pointed out that even though the deceased was his wife, she was older than him and was a drunkard, a habit he hated. The deceased also had breathing problems.



26. On being cross-examined by the prosecution, the witness said that he knew that he was facing the charge of having killed his wife with whom he had lived since 2020. He confirmed that he cohabited with the deceased and lived with three children, two from the deceased and one between him and the deceased.
27. He, then said that while leaving home with his mother, he left the deceased at home with his sister called Irotin who he was not calling as a witness just as he was unable to call a neighbour called Naringo. He offered no explanation for inability to call them. On sickness, he told the court that there was a time the deceased was unwell but he had no documents to show.
28. With such cross-examination and the defence seeking not to re-examine, the defence case was marked closed and both counsel directed to file submissions.
29. The court has perused and derived the desired assistance from the submissions filed and will only give a summary of the same as below.
30. For the prosecution, it is contended that it had availed evidence to prove the case beyond reasonable doubt and pushed for a conviction. In the submissions, the prosecution identified only two issues for determination; whether the injuries observed on the body of the deceased were caused by the accused and resulted in death, and whether the opinion of the doctor in the post mortem report bound the court.
31. The prosecution underscores the fact that the evidence of PW2 demonstrate that the accused assaulted the deceased. To the prosecutor, in assaulting the deceased, the accused must be taken to have known that he was committing a felony and that the death having occurred within 2 days, the death was relatable to the assault. In any event, the deceased did inform her sister, PW1 and her son, PW2 that she had been assaulted by the accused. Soon thereafter she succumbed treatment notwithstanding. The prosecutor deems the talk between the deceased and PW1 and 2 to constitute a dying declaration.
32. Section 33(a), *Evidence Act*, on admissibility of a dying declaration was relied on as the basis of accepting and relying on the evidence of PW1 as corroborated by PW2 to found a conviction.
33. On whether the doctor's opinion on cause of death binds the court, the prosecutor submits, while relying on the decision of Naftali Chege & 3 others – vs – Republic, that such evidence ought to be considered, not in isolation, but together with others available evidence so that if there is proper and cogent basis for rejecting the expert opinions a court would perfectly do so.
34. The court was urged not to fell hamstrung by the opinion of the doctor which was informed only by looking at the body, while the court held the benefit of a wider view derived from listening to both the expert and the eye witnesses.
35. On the other hand, the defence, having isolated the ingredients of the offence of murder as reiterated in the decision of Antony Ngare – vs – Republic [2014]eKLR, submitted that the cause of death had by the autopsy report been dissociated from the assault. To the defence the cause of death was not relatable to the assault but infection.
36. On connection between the accused as the perpetrator of the commission leading to death, it is submitted that the only evidence is from PW1 & 2 and is insufficient to prove the offence charged. It is asserted that the evidence did not place the accused at the scene of murder just as no murder weapon was recovered and produced.
37. On the element of malice aforethought it was submitted that no iota of evidence was availed. To the contrary, it was submitted that the accused was normally married to the deceased, even if the marriage



was never always rosy, the accused cherished the deceased as a wife. It is thus urged that the court finds that no malice aforethought was duly established.

Issues, Analysis and Determination

38. Because the law places the onus upon the prosecution, in every criminal case, to prove the offence charged beyond reasonable doubt, and because the offence of murder is committed when one commits unlawful causing the death of another, when accentuated by malice aforethought, it behoves the prosecution to prove beyond reasonable doubt that; the person named as deceased, indeed died, that the death was out of an unlawfully commission or omission by the accused and that in causing the death he acted out of malice aforethought.
39. In this matter, the death of deceased has been sufficiently proved by the evidence of PW1 2 & 3 and confirmed by the evidence of the accused. It is thus not in doubt that the deceased died on the date and place disclosed in the information.
40. What is in contention is whether the accused has been connected to the death and if so corrected, whether there is evidence that in engaging in the commission or omission leading to death, he was propelled by malice aforethought.
41. The only eye witness to the incident was PW2, the son to the deceased. He told the court that he was at all times, that evening with the deceased and the accused till the family had dinner out of the roasted goat. He witnessed the accused assault the deceased before he was ordered to get into the house. Later on, the next day, he heard the accused and the deceased struggle and again saw the accused beat the deceased in the house and when he went to the house the deceased and the accused occupied, he found the deceased lying on the mat helpless and unable to move with entire body swollen. He spoke to the deceased who told him that she had been assaulted by the accused.
42. That witness struck the court as cogent and truthful. He remained unshaken even upon cross-examination when he said he was able to see the accused assault the deceased while both were inside the house because he peeped through the window into the house which was lit by a solar lamp. The court thus finds that the accused was squarely placed at the scene of the offence by the unchallenged evidence of PW2.
43. Besides the evidence of what PW2 saw and perceived, there was also the evidence of both PW1 and 2 that the deceased told both that she had been beaten by the accused. The deceased spoke to the both witnesses on the 18/2/2023 before her death on the 21/2/2023.
44. How the court treats that piece of evidence shall depend on whether the court gets satisfied that the same qualifies as a dying declaration. When to receive a dying declaration is coded under section 33(a) of the *evidence Act* which provides;-

Statement by deceased person, etc., when Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases:-

- a. Relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted CAP. 80 [Rev. 2012] Evidence [Issue 1] 18 in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not,



at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

45. In the circumstances of this case, PW1 spoke to the deceased when the deceased called her. The deceased told the witness that she sustained her injuries from the hands of the accused. The same position was reiterated by PW2 who spoke to the deceased on the morning of 18/2/2023. The court determines that the talk the deceased had with both PW1 and PW2 about having been assaulted by the accused just days before she died constitute a dying declaration and is thus admissible as such and as an exception to the rule against hearsay evidence.
46. The law in this area was reiterated by the court of appeal in Philip Nzaka Watu – vs – Republic [2016]eKLR where the court said;

“ ... a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. ... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

47. It is therefore, the determination by the court that the evidence of PW2 on what he personally saw and the dying declaration made to PW2 & PW1 place the accused at the scene as the person who assaulted the deceased. It is thus held that there is proof beyond reasonable doubt that the accused was at the scene of the offence on the night of 17th/18th February, 2023 and did in fact assault the deceased inflicting the injuries seen by PW1, 2 & 3 on the body of the deceased.
48. That evidence also proves that the accused acted unlawfully in assaulting the deceased. When he did so and inflicted the injuries the evidence on record disclose, section 206 of the penal code infers that the accused must have intended to cause death or harm to the deceased. That inference establishes malice aforethought.
49. The court, up to this juncture, is satisfied that the deceased is indeed dead and that the accused has been proved to have assaulted the deceased occasioning to her injuries that are classifiable as harm.
50. The foregoing conclusion would have been sufficient to establish the three ingredients of the offence of murder, and the court would have been entitled to pen off, had it not been for the evidence of PW3 which advanced the position that the injuries inflicted upon the deceased were not the proximate cause of the death.
51. The witness is recorded to have testified before court the effect that:-

“ I formed the opinion that the death was as a result of pancreatitis with inter-peritoneal black fluid. In this case there was no correlation between assault and the rapture of the pancreatic organ. Pancreatitis is caused by infection leading to rapture. Blunt Trauma is very unlikely to cause such damage to the organ. The presence of black fluid was a sign of chronic situation not a sudden blow however heavy. With a heavy blow, there could have been blood in the peritoneal cavity”.



52. Because the court ought to treat an expert opinion with respect and deference, while retaining its right never to be bound by such opinion, it has anxiously interrogated some of the comments in the opinion.
53. The interrogation of the report has struck in the court the view that the report may not be entirely accurate. The court has posed the question as to who is qualified to prepare an autopsy report and is convinced that the professional should be a pathologist. An autopsy report ought to provide a diagnosis to explain the changes in the tissues examined. For forensic autopsy, the desire is normally to assist the court establish the cause of death, if the same can be assigned to particular acts of omission of an accused person.
54. In common parlance a pathologist is that specialized doctor who specializes in diagnosing deceases by studying tissues, cells and fluids. He may also be referred as a consultant of laboratory medicine¹. The forensic pathologist is also called a student of human suffering. His report is relied upon to help understand what led the suffering resulting in death.
55. In the evidence by PW3, the court was told that the only basis to erase correlative between the indubitable extensive lacerations, was the fact that the pancreas had been ruptured and that the rupture was incapable of resulting for trauma however great.
56. To the court, after a little research, pancreatitis is the inflammation of the pancreas whose major cause is excessive consumption of alcohol or gallstones. In his evidence the witness told the court that he ruled out alcohol as the cause of the inflammation. He however did not give a description of what he saw. He was content to say that the black fluid seen was acidic but did not tell the court what acid it was. He also failed to tell the court if the acid had affected the neighbouring tissues in any way. To this court, the pancreatic organ produces no acids but pancreatic enzymes which by themselves are just pro enzymes prior to release and before activation by the gastric acids in the duodenum. The opinion that the black fluid was acidic without a scientific test conducted may not be well founded an opinion to form a basis for the courts decision.
57. The court views the report and opinion expresses by the witness as incoherence and inconclusive. For that reason the court chooses with lots of hesitation to disregard the opinion.
58. The other reason why the opinion is disagreeable is the fact that there was no evidence of sickness by the deceased prior to the incident yet chronic pancreatitis as the name suggest presents itself as a severe and very uncomfortable condition.² In the doctors own words the body he examined was for a female of good nutrition. The court finds that not to align with the body of a victim of chronic pancreatitis.
59. Having disregarded the report, the court is left with the evidence by PW2 and the dying declaration. It has been determined herein before, that there is sufficient evidence to connect the accused with the assault upon the deceased. There is equally a finding that in assaulting the deceased in the manner disclosed by PW2 and the injuries disclosed by the report filed, the accused must have intended, at the very least, to cause harm upon the deceased hence malice aforethought.
60. The court thus finds that there has been proof beyond reasonable doubt that the accused assaulted the deceased inflicting extensive bodily injury upon her from which she succumbed. In afflicting such injuries, the court finds that the accused was accentuated by malice aforethought. He is thus found to have committed the offence of murder and convicted as charged.

DATED, SIGNED AND DELIVERED AT LODWAR, THIS 3RD DAY OF APRIL, 2025.

¹ www.mypathologyreport.ca

² <http://pubmed.Ncbi.nlm.nih.gov>



PATRICK J O OTIENO
JUDGE

