



**Republic v Marous (Criminal Case E011 of 2024)
[2025] KEHC 10803 (KLR) (21 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E011 OF 2024**

**PJO OTIENO, J
JULY 21, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

ERAIT MAROUS ACCUSED

JUDGMENT

1. The accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were given to be that on the 10th day of July, 2024 at Nakukulas village in Turkana East subcounty within Turkana County, the accused murdered Josphat Lomodok.
2. He denied the charges pleaded not guilty. At the case conference, Mr. Kosgei, counsel for the accused, indicated to the court that the accused was not disputing killing the deceased but was pleading the defence of provocation.
3. Being that the accused and the deceased are family members, parties attempted negotiations at the family level but the attempts failed.
4. In order to discharge its burden of proof under Section 107(1) of the *Evidence Act*, the prosecution tendered evidence from six witnesses.

The Evidence

5. PW1 was Maruas Lorua who told the court that he lived in Nakukulas and that he was a herder. He recounted that on the night of 09.07.2023 he was at his house when the deceased, who is his step brother, visited him and took away his phone in order to speak to his children. The deceased did not return and at about 11PM he decided to look for him at a dance that was happening nearby. He did not find him there and decided to return home. When he got back to the house, he found the deceased



- having sex with his wife. When the deceased saw him, he fled. The witness tried to pursue the deceased but he was pricked by a thorn and fell down. He slept until 5AM when he was woken by an alarm to the effect that Pokot raiders were nearby.
6. He added that when the deceased realized that he had been injured, the deceased slept at a nearby house where his other brother found him and took his phone from him. He later returned to his house and found that his wife had killed herself and so he called people to the scene. He told the court that initially some of the people accused him of killing his wife. The police then came and collected the body.
 7. He identified the accused is the son of his deceased wife and that when the accused learned of the death of his mother and the circumstances leading to her death, he was heartbroken and in the course of mourning, the accused shot the deceased with a gun. He stated that he did not know where the accused got the gun from but identified the gun used in the shooting as the one in court. He added that at the time the deceased was shot, there were a lot of people at the scene.
 8. On cross examination he stated that the accused was his biological son. He added that they did not get anything at the scene to suggest that his wife had ingested poison. He also stated that after the shooting, the accused surrendered himself to the police adding that he had not seen the accused with the gun prior to the incident. He clarified that what the accused meant by saying that the gun belonged to his father was that it belonged to his father who was killed by Pokot raiders and that the accused's father was a brother to the witness.
 9. On being questioned by the court on his relationship with the accused's mother, he made it clear that the mother to the accused was formerly married to his brother who had not paid dowry and that following the death of his brother, he paid her dowry thus becoming his wife.
 10. PW2, Paul Ekiru Alokas, also testified that he was a resident of Nakukulas village and the assistant chief of Kocholin sub location. He recalled that on 10.07.2024 he received a call from Nakukulas village elder informing him of the death of a lady by the name of Aragei Marus. He then called the in charge of the police-post who informed him that he was on his way to the scene. As he set to visit the scene, he heard a gunshot. The police then called him and advised him against going to the scene as there was a boy armed with a gun who had shot somebody in the presence of the police. He called the OCS who accompanied him to the scene where they found two bodies, that of a lady and a man. He added that it was the in charge of the police post who told him that it was the accused who had shot the man. They then went to the police post where they found the accused under arrest. He was then tasked to help recover the gun which was later surrendered to him by the elders.
 11. On cross examination he confirmed that he did not witness the shooting.
 12. PW3 was No. 1133529, PC Vincent Murega, who recounted that on 10.07.2024 at about 8PM he was at the police station with the in charge, who assigned him to go to Nakukulas village and visit the scene of an alleged suicide. He proceeded as directed to the scene and found a body of the deceased female lying outside the manyatta. The witness and set to go back to the scene and while about 50 meters from the scene, they heard a gunshot, looked back and he saw a young man shooting at a man lying on the ground. The young man then fired two more shots in the air dispersing the crowd and ran away. He was pursued by a mob but managed to escape. The suspect accompanied by his uncle later surrendered to the police.
 13. The scene was processed for the second time and the bodies were removed taken to a mortuary in Lodwar. He added that he was able to see the gun man for the first time that day. He further identified the gun in court as the gun he saw on the material date.



14. On cross examination he stated that he was about 50 meters away when saw the accused take the second shot at the deceased. He added that when he went back to the scene, he did not see the murder weapon. He also stated that from where he heard the first gun shot, he could identify the gun to be an AK47.
15. The fourth witness was No. 80524 PC Simon Mucheri. He testified that he a firearms examiner attached at the DCI Headquarters, Ballistic section where he had worked for 8 years. He further stated that he acquired his training and skills from the Regional Ballistics Lab in Khartoum, Sudan and from the HPSS Embakasi.
16. He asserted being conversant with the signature of one Francis Karori with whom he had worked for 8 years and the person was standing in for. He had a ballistic examiner's report, prepared by the said Mr Karori, with him which recorded that on 11.11.2024, 93252 one Sergeant Laban Mutembei forwarded exhibits to the ballistics laboratory for examination. The documents were marked;
 - a) AK 47 riffle Serial No, 82ko5838 (PEXH 1);
 - b) 3 fired cartridge cases (PEXH 2);
 - c) 1 AK 47 magazine (PEXH 3) and
 - d) exhibit memo form marked PEXH 4.
17. While reading the report, he stated that IP Karori examined the exhibits and established that PEXH 3 was an AK 47 assault rifle in caliber 7.62mm designed to chamber rounds of ammunition in caliber 7.62mm x 39mm. He added that the rifle was in good condition and that it was test fired by use of 3 rounds of ammunition from the laboratory. He produced the test cartridges as PEXH 5.
18. He added that the magazine was also examined and it was established to be an AK47 assault magazine with a capacity of 30 rounds of ammunition in caliber 7.62 x 39mm. The report stated that the rifle was a firearm as defined under the Act and that the spent cartridges were of caliber 7.62 x 39mm.
19. Microscopic examination of the exhibit of the recovered spent cartridges and the test fired ones revealed that all were fired by one gun.
20. He added that the comparative microscopic examination of PEXH 1 to PEXH 3 in conjunction with the test cartridges fired from the rifle revealed sufficient marching firing pin identification and injector markings to enable the holding of the opinion that they were all fired from an AK 47 assault rifle serial no. 82K05838.
21. The microscopic examination of the test cartridges' cases in comparison with the previously submitted spent cartridges of equivalent caliber and concerned with other incidences did not reveal any march leading to the conclusion that the gun was not able to be associated with a previous crime other than the instant case. He concluded his testimony by producing the report of Mr. Karori dated 13.11.2024 as PEXH 6.
22. On cross examination he stated that PEXH 1 was not modified and clarified that there are many versions of AK 47 depending on the country of manufacture. He added that it was not possible to establish how many bullets had been fired from the particular gun.
23. PW5 was No. 240188, IP Onesmus Mutua, OCS of Lokuamsin Police Station. He recalled that on 10.07.2024 at about 0800hours he was at the Nakukulas police post as the in charge when he received a call from one Paul Aloka, the assistant chief Nakupalas, with the information that there was a suicide incident in his sunlocation.



24. The witness informed his OCS then proceeded to the scene, which was about 170 meters from the post, while accompanied by a colleague by the name of Vincent Obangi. On arrival at the scene, he found the body of a female lying lifeless on the ground covered with a maasai shuka. He was then approached by a man who identified himself as the husband to the deceased and who also informed him that the deceased had drunk poison and he handed over to him a container labeled oxytra 5% insecticide, as the suspected poison. He added that he examined the body and saw no physical injury. He recounted that as he was leaving the scene and just about 50 meters away, he heard a gunshot and on looking to confirm who was shooting, two other shots were fired. He confirmed having seen the accused shooting the deceased with an AK 47 rifle. He then saw the accused running from the scene carrying an AK 47 as he was being pursued by a group of young men. The witness returned to the scene and found the deceased who was well known to him lying down with three-gun shots on him. He informed the OCS on phone and when the OCS got to the scene with reinforcement. By the time the OCS arrived, the scene had been deserted hence the police team organized for the bodies to be moved to the Lodwar Referral Hospital Mortuary. The accused later surrendered and he arrested him and placed him under custody. He also convinced the villagers through the assistant chief to surrender the gun which they did shortly thereafter. He detained the firearm whose serial number was 82K05838 using caliber 7.62mm x 39mm. He produced the gun as PEXH A1 and added that the rifle had an empty magazine whose normal capacity was 30 rounds. He produced the magazine as PEXH 2. He indicated that he recovered 3 spent cartridges at the scene which he produced as PEXH 3a, b & c. He also identified the accused at the dock as the person he saw fire the gunshots at the deceased.
25. On cross examination he stated that he was told by the husband to the deceased lady that the deceased lady had committed suicide and that the crowd at the time of shooting was about 50 people. He added that he had worked in Turkana for two years and had met the accused prior to the incident thus he knew him very well. He further stated that the chief and clan elders brought the gun to him but he did not know where it was recovered from.
26. No. 63420, CP Patrick Mugambi gave evidence as PW6 and introduced himself as an investigator attached to the DCI Turkana East. His evidence was that on 10.07.2024 he was in the office when he received information from the OCS Lokowomsin to the effect that there had been a murder incident in the area. He was proceeding to the scene to contain the situation. Because of the distance between Lokori and Nakokulas, he was unable to join the OCS. In the evening of that day at about 0830 hours he was handed over the suspect, an AK 47 rifle, three spent cartridges and an empty container labelled oxytra 5%.
27. On 12.07.2024 he escorted the accused to Lodwar Law Courts to seek custodial orders and on 23.07.2024 an autopsy was carried out on the two bodies.
28. The autopsy report of the deceased female showed that her cause of death was cardiorespiratory arrest whereas the cause of death for the male deceased, the subject of this case, was established to be exsanguination due to severe abdominal aorta secondary to gunshot penetrating the abdomen and pelvis.
29. The postmortem reports for the two were then produced as PEXH 4 and PEXH 5 respectively. He identified that the accused in the dock was the one handed over to him adding that he forwarded the firearm, an empty magazine and three spent cartridges to DCI headquarters for ballistic expert examination and identified the three exhibits in court as the ones he had forwarded for examination.
30. On cross examination he stated that according to the expert report, the weapon produced in court was the murder weapon. He further stated that although he was aware that there was a government data



base for guns, he did not confirm to whom PEXH 1 had been assigned. He added that he had worked in Turkana County for a year and was aware that the county has many unlicensed firearms.

31. On reexamination he stated that he ascertained PEXH 1 as the murder weapon because it was connected to the spent cartridges.
32. The evidence of PW6 marked the close of the prosecution case after which the court evaluated the evidence tendered and ruled that a prima facie case had been established against the accused person who was thus placed on defence.
33. The accused, Erait Marious was the only defence witness. He elected to give sworn testimony. He recounted that on 09.07.2024 between 7-8PM he was at home when the deceased, who was a brother to his father, came to their home carrying alcohol. The deceased called his mother indulged in alcohol and gave her the alcohol. His mother drunk it and then the deceased questioned her why she had taken the substance. Her mother then got shocked and said that the substance did not taste alcohol. She wailed and the deceased ran away attracting the attention of a man called Ekal and a lady called Ekai. Ekal then went to get two packets of milk from his shop and on returning, the accused's mother was almost dying and the milk was never given to her. He called his uncle, PW1, who at the time was at Kaputiir and told him that his brother had killed her mother. His uncle came the next day. He also decided to call the chief, PW2, on phone, but he was at Lokori at the time although he still informed him that his mother had been killed. He slept and the next morning he found the body where it had rested. PW1 then returned home that morning and when people saw him, they started wailing. He stated that rage consumed him and he started crying, lost consciousness and could not remember what happened thereafter because he only to learn later that he had shot the deceased. The police later visited his home but did not arrest him because he surrendered himself at the police station.
34. He added that it was the drink that the deceased gave his mother that killed her and that had he wanted to kill the deceased out of revenge, he would have killed him the night his mother died. He further stated that the gun he used to kill the deceased was a family gun that was used to herd goats. He stated having elected to be a herder and not go to school. His evidence was further that he was not aware that it was an offence to hold an unlicensed gun because he grew up knowing the family had a gun. He concluded his examination in chief by stating that he did not plan on killing the deceased and that it was his act of returning before the burial of his deceased mother that provoked him.
35. On cross examination he stated that he heard the deceased mention to his mother that the bottle had alcohol, was struck by the death into loss of reason and only realized that he had killed the deceased herein after he regained his consciousness.
36. On being questioned by the court the accused stated that he was named after PW1 but refuted the claim by PW1 that his mother was married to him. To him, PW1 referred to accused's mother as a wife because she was an in law. He also countered the claim by PW1 that there was a dance at the village on the material night. He concluded by stating that his relationship with PW1 is cordial and that there was no animosity between them.

Accused Person's Submissions

37. In his submissions, the accused concedes that he killed the deceased with a family gun then advances the defence of provocation under section 207 of the penal code as the causation of his actions. He contends that the prosecution has failed to discharge its burden of proof specifically to show that the accused's actions were actuated by malice aforethought. He stresses that the shooting was an impulsive act, triggered by the sudden reappearance of his uncle at the homestead, adding that the admitted fact that he did not attack his deceased uncle the night his mother died underscores the absence of



premeditation. He refers the court to the decision of the court of appeal in *Choge v R* (1985) KLR 1 to advance the assertion that the absence of planning or deliberation negates malice aforethought. He then argued that the sight of the uncle the following morning before burial constituted a provocative act sufficient to deprive a reasonable person of self-control. The decision in *R v John Okumu Oloo* (1977) KLR, was cited for the contention that provocation need not be immediate but a consequence of the culminative effect of events causing a loss of self-control.

38. He further submits that he is 19-year-old with no prior criminal history and that the sudden loss of his mother, a central figure in his life, combined with the harrowing experience of spending the night beside her rendered him emotionally vulnerable and that the court should consider his emotional state as a factor in assessing intent as determined in the case of *R v Hussein s/o Hassan* (1956) 23 EACA 573.
39. He concludes by submitting that the illegality of the firearm does not have any bearing on malice aforethought since it is on record that the firearm was used for herding livestock in a dangerous area. For these reasons, he asks the court to acquit him of the offence of murder or in the alternative, convict him of manslaughter.

Issues, Analysis and Determination

40. Having carefully considered the evidence by the prosecution which converges with that of the defence admitting the death of the deceased to have resulted from a gun shot fired by him, together with the submissions, the death of the deceased and identity of the accused as the perpetrator are not in dispute.
41. The issue that remains for determination by the court is whether in his actions, the accused was accentuated by malice aforethought. Should that element of the offence be established, the only other question would be to determine if the accused was provoked by the deceased into killing him.
42. As stated before, Josphat Lomondok is dead. The death is proved by the evidence of the witnesses, the post mortem report dated 23.07.2024 produced as an exhibit, and unequivocally admitted by the deceased. Even the fact of the death resulting from the shot fired by the accused is not denied but conceded. The death and identity of the accused being admitted facts are not in contention and thus invites no determination by the court. The court, therefore, finds that the fact of death has been conclusively proved and admitted together with the fact that the responsibility for the said death lies with the accused who admitted having pulled the trigger which released the fatal shots.
43. Even after the death is so proved together with the identity of the accused as the perpetrator, the prosecution's burden is not discharged if the element of malice aforethought is not demonstrated. Because malice aforethought goes to the state of mind of the accused, the law codes the circumstances that would justify inference of the state of mind. It is enough if the circumstances point to an intention to kill or cause grievous harm.
44. In this matter, the circumstances disclosed is clear that the accused's mother died allegedly after being lured to ingest a substance suspected to have been poisonous. The death occurred at about 2.00am in the morning before the deceased subject of this case was shot about six hours later. To determine manifestation or presence of malice aforethought the court is entitled to consider; the weapon used, whether it was a lethal weapon or not; The part of the body that was targeted, whether a vulnerable part or not; The manner in which the weapon was used, whether repeatedly or not, or number of injuries inflicted, as well as he conduct of the accused before, during and after the incident. See *R v Tubere S/o Ochen* [1945] 1 E.A.C.A. 63,
45. Here the accused used a heavy firearm, AK47 rifle and shot at the deceased three times The accused has testified that he has held and operated what he termed as the family gun for years. He was therefore



aware of the lethal effect of using a gun. The deceased was shot at on the abdomen and pelvis leading to the instant death at the scene. The fact that the accused aimed struck at vital organs of the deceased gives the impression that the gunshots were calculated and aimed at ending the life of the deceased out of revenge. These events infer malice aforethought on the part of the accused. With the prosecution satisfying the three elements of the offence charged, the next and only outstanding task for the court is to establish if the actions by the accused were justified as having been provoked.

46. The defence of provocation in murder cases is recognized in law and coded under section 207 of the *Penal Code*. The statute provides that when a person unlawfully kills another under circumstances which would constitute murder, but does the act which causes death in the heat of passion caused by sudden provocation and before there is time for his passion to cool, is guilty of manslaughter only.
47. It is important that the defence is only available against the offense of murder. It is not a complete offense against other homicides. Where the offense of murder is proved as here, the defense serves the purpose of commuting same to manslaughter and never an acquittal.
48. For one to avail himself the defence of provocation it must be demonstrated that indeed the act or insult was the kind that deprived him, as a reasonable person, of the power of self-control, induce him to commit an assault akin to the assault committed by the person instigating the provocation and that the accused acted suddenly in the heat of the moment without the benefit of time to cool down.
49. The Supreme Court of Canada in the case of *R. v. Hill*, [1986] 1 S.C.R. 313, Dickson C.J. identified three general requirements for the defence of provocation to be as follows;

“First, the provoking wrongful act or insult must be of such a nature that it would deprive an ordinary person of the power of self-control. That is the initial threshold which must be surmounted. Secondly, the accused must actually have been provoked. As I have earlier indicated, these two elements are often referred to as the objective and subjective tests of provocation respectively. Thirdly, the accused must have acted on the provocation on the sudden and before there was time for his or her passion to cool.”
50. The accused testified that he was provoked by the act of the deceased giving his mother an insecticide to ingest under the pretense that it was alcohol leading to the death of the mother shortly thereafter. The mother to the accused is said to have died at about 0200hours yet the accused reacted to that alleged provocation the next day at about 1000hours. The court is of the view that the accused had the chance to digest his possible reaction to mother’s death and that in taking his gun and shooting the deceased, he acted with premeditation or just vengeance.
51. The Supreme Court of Canada in the case of *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350 observed that the requirement of suddenness serves to distinguish a response taken in vengeance from one that was provoked and that suddenness applies to both the act of provocation and the accused’s reaction to it.
52. When applied to the facts of this case, especially the defence case, the court finds that the defence of provocation is not available to the accused. The court thus finds that the defence put forth by the accused fails to displace the prosecutions case. The accused person is adjudged guilty for the offence of murder as charged and is thus convicted accordingly.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 21ST DAY OF JULY, 2025

PATRICK J O OTIENO

JUDGE

