



**Republic v Lukongo (Criminal Case 11 of 2019)  
[2024] KEHC 3951 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3951 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 11 OF 2019  
SC CHIRCHIR, J  
APRIL 18, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**WYCLIFFE MUSA LUKONGO ..... ACCUSED**

**JUDGMENT**

1. Wycliffe Musa Lukongo ( the accused ) was charged with the offence of murder contrary to section 203 as read with section 204 of the [penal code](#).
2. The particulars of the offence are that on the night of 23<sup>rd</sup> and 24<sup>th</sup> day of January, 2019 at Sinyulu village, Shikunga sub-location, within Kakamega County, murdered Susan Mirimo.
3. The accused denied the charge and the matter went to full trial.

**The Evidence.**

4. PW1, was the Accused's mistress. She told the court that her relationship with the accused was well-known to his two wives, the deceased ,and another by the name Rose. On the material day, she and the accused arrived at the accused's house. They found the deceased drunk. The accused confronted her questioning her on why she was drunk yet she was still breastfeeding their 9-month-old child. she witnessed the accused beating the deceased with an eucalyptus stick. She further testified that the Accused then took a wooden stool and threw it on the deceased .The stool hit the deceased on the head . She saw the blood from the head spluttering, and the deceased suddenly went quite.
5. PW2 was the deceased's co- wife . She witnessed the accused beating the deceased with a stick. The accused had arrived home at 9 pm together with PW1. As the fight went on she walked away into her bedroom with the deceased's 9 month old child . she further stated that after a while the commotion suddenly stopped. She came out of her bedroom at 5am the following morning and found the deceased



lying on the floor. The deceased was pleading on the head. She sought the help of a neighbour with an intention to take her to hospital only for the neighbour to tell her that the deceased was dead.

6. PW3 was the Assistant Chief of Shikunga, Butere Sub-County. He got a call informing him that the deceased had been killed by the accused. He went to the deceased's home and found the body covered in a blanket. Later in the same day at about 11am the Accused was found in a forest, was arrested and taken to the police. He further testified that he saw blood on the floor and a bloodied stool
7. PW4 was the father of the Accused and the deceased's father-in-law. On 24/1/2019 he work up at 7.00am to the sound of screams and weeping from the accused's house. He went there and found the body of the deceased on the sitting room. He is the one who called PW3, who arrived with the police. He witnessed the post-mortem Examination of the deceased's body.
8. PW5 was the the investigation's officer. He went to the deceased's home on the material day. He found the deceased's body and noted that the body had injuries on the leg and the head. He did not find the Accused in the home. He further stated that at about noon they got information that the accused had been found and the members of the public were about to assault him. He rushed to the scene with his colleagues and found that the accused had been rescued by the chief. He was unable to trace the murder weapon.
9. PW6, was the doctor who conducted the postmortem. He conducted the examination on 30/1/2019. The body was identified by one Zipporah Kalome and Wilfred Mukongo and the two also witnessed the procedure. On examination he found a deep cut wound and a dent at the occipital region measuring approximately 6cm Long. There was also a Haematoma, measuring 5x5 cms. There were no visible marks on the skull. The nervous system was intact. He concluded that the death was caused by severe head injury following blunt trauma to the head. The post mortem report was produced ( P-Ex No. 1).
10. On cross- examination, he stated that he was not a specialised pathologist; that the injury on the head was as a result of blunt force trauma ; that the weapon used was blunt. He admitted a fall could also cause such an injury.
11. In his defence, the accused DW1, told the court that it was pw1 and the deceased who were fighting; that he only intervened in an attempt to separate them; that both women were drunk; that it was when he was trying to separate them that he realised the deceased had died. He confirmed that PW2 went into the bedroom when the fight started. He insisted that the evidence of PW1 was simply an attempt to get back at him. He told the court that he had two wives being Rose Atieno (PW2) and Susan, the deceased. He acknowledged that he was having an affair with PW1. He used to live with his two wives, while PW1 lived at her own place.
12. He further stated that he was later accused of assaulting the deceased , he decided to present himself to the police for fear of his life. He claimed that PW1 also hit him on the head; that he had no reason to kill his wife and that PW1's testimony was simply an attempt to get back at him.
13. On cross examination, the accused acknowledged that he had two wives and that PW1 was his girlfriend. That he had come to the house with the said girlfriend; that he did not know why they were fighting.
14. During re-examination, he stated that he had been drunk and wanted to separate the two women and that while all this was going on his 1<sup>st</sup> wife was in the bedroom .
15. On cross examination by the court, the accused testified that he administered first aid on the deceased and could not take her to hospital since it was late at night. That he noticed her situation got worse at 4.00a.m. That's was when he knew that his wife was dead.



## Determination

16. Section 203 of the [penal code](#) defines murder as follows:

“any person who of malice a forethought causes death of another person by an unlawful act or omission is guilty of murder.”

17. In [Anthony Ndegwa Ngari v Republic](#) [2014] eKLR, the elements of the offence of murder were expounded as follows: -

- (a) the death of the deceased occurred;
- (b) that the accused committed the unlawful act which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

## The death of the deceased

18. According to PW6, death was due to severe head injury following blunt trauma to the head. The body of the deceased was positively identified by the PW4, the deceased's father-in-law. The death of the deceased and its cause was therefore duly proved.

## Whether the accused committed the unlawful act which caused the death of the deceased

19. PW1 and PW2 witnessed the confrontation between the Accused and the deceased. PW1 further witnessed the Accused throwing a stool on the deceased's head, after which the deceased suddenly went quiet. Her evidence is consistent with the post-mortem report which indicate that the deceased died as a result of an injury to the head. The accused, in his defence told the court that it was PW1 and the deceased who were fighting. I however found him less candid. He never told the court how the fight between the two women ended up in death. He also alleged that he did not know the cause of the quarrel between the two women. If this testimony was to be believed, how could he not know the cause of the quarrel yet he was present. He further told the court that the deceased was drunk. If that was the case, then it should have been easy for him to subdue her without inflicting fatal injury on her. On PW 1, the accused stated that she was simply trying to get back at him, However he did not say why PW1 was getting back at him. Further PW2 was his wife . why would his own wife testify against him . there was no suggestion that there was a feud between him and his wife Rose. In short the I don't buy the Accused's defence . I persuaded by pw1's testimony that the accused hit the deceased on the head and it is this injury that caused her death.

20. Am satisfied, that the accused was positively identified as the person who killed the deceased.

## Was there malice aforethought.

21. Section 206 of the [Penal Code](#) defines malice aforethought as the intentional killing of the deceased or to do grievous harm to any person whether that person is the person actually killed or not or knowledge that the act or omission will result into the death of a human being. The section gives the instances when malice aforethought may be inferred. It states that:-

“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."

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

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts...” ( Emphasis added)

23. In *Rex v Tubere s/o Ochen* {1945} 1Z EACA 63, Eastern Court of Appeal observed:

“In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.” ( Emphasis Added)

24. In the case of *Hyam v DPP* {1974} AC the Court held inter alia that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.” ( Emphasis Added)

25. It emerged from the evidence of PW1 and PW2 that there was a quarrel between the accused and the deceased. However the deceased not only threw a stool on the deceased, he did so on her head. He knew that throwing a stool on a person’s head was likely to cause grievous harm or death. In this regard I find support on the court’s decision on *Joseph kimani Njau’s case* ( *supra*).

26. It is my finding therefore that malice aforethought was established.

27. The prosecution has proved its case beyond reasonable doubt. I therefore find that the Accused is guilty of murder contrary to section 203 as read with section 204 of the *penal code* and I hereby convict him accordingly.

**DATED , SIGNED AND DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 18<sup>TH</sup> DAY OF APRIL 2024.**

**S. CHIRCHIR**



**JUDGE.**

In the presence of :-

Godwin – Court Assistant

The Accused .

