



**Republic v Lokitonei (Criminal Case E005 of 2019)
[2024] KEHC 5872 (KLR) (22 May 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E005 OF 2019
RN NYAKUNDI, J
MAY 22, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

LOYANAE LOKITONEI ACCUSED

JUDGMENT

1. The accused person was charged 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 on 11th April, 2019 at Elelea village in Lokori Turkana East Sub-County, with others not before court murdered Ekai Ekadeli.
2. The Accused person pleaded not guilty placing the prosecution to disapprove his innocence as provided for in Art 50(2)(a) of *the Constitution*. The Prosecution was led by Mr. Kakoi while the defence was represented by learned counsel Mr. Odhiambo.
3. In discharging its burden of proof as per the provisions of Section 107(1), 108 and 109 of the *Evidence Act*, the prosecution called seven witnesses to establish the elements of murder being;
 - a. The death of the deceased
 - b. That his death was through unlawful acts or omission of the accused
 - c. That the accused had malice aforethought as defined in Section 206 of the Penal Code
 - d. As such, the quality of identification evidence placed the accused person at the scene of the crime.



A summary of the Prosecution's case.

4. PW1 Lokuchoi Ewat identified herself as a student at Cap-yet youth polytechnic in Lokori. She stated that on 11th April, 2019 around 1850hrs she was at Elelea village within Lokori when she heard some people screaming from a nearby lugger and she rushed there only to find people surrounding a juvenile who was lying down who she came to realize later that was his wife's brother by name Ekai Ekadeli Benjamin. When he looked at the body he found the deceased bleeding profusely and looked unconscious. With another relative known as Lolibo, they decided to rush the deceased to AIC Lokori Hospital for treatment where the doctor rendered first aid and bandaged the stabbed wounds which were on the left side of the body, on the chest and also around the ribs. She further stated that at around 2300hrs the doctor at Lokori referred them to Lodwar County Hospital for further treatment and while there, the deceased succumbed.
5. PW2 Samson Ejore stated that he is an NPR officer within Turkana east Sub-County. He testified that on 12th April, 2019 at around 12noon he received information that there was an incident that had happened at Lokori on 11th April, 2019 in which there were three men believed to be "Ngorokos" who stabbed one juvenile boy and fled towards Lokwamosing direction. He stated that he immediately together with his colleagues started tracing the fingerprints of the assailants and within a short period they discovered that one suspect remained at Lokwamosing while the other one proceeded towards the direction of Lopii. They decided to follow the one headed to Lopii using the police vehicle of Lokwamosing. When they arrived at Lopii village the driver parked the vehicle outside the fence of the Manyattas and they alighted for the search of the suspect whom they believed was inside of one of the Manyattas. They managed to find him in the Manyatta taking Busaa and they effected arrest. The interrogated him of who stabbed the boy at Lokori where he responded positively that he did the act. They recovered a dagger from him and it had some blood stains and also the shirt he was wearing had some blood stains.
6. PW3 Lolibo Peterson gave evidence to the effect that on 11th April, 2019 at around 1845hrs he heard some people screaming and she immediately rushed to the direction of the screaming and on the way he met his aunt screaming and she told him to rush and see Ekai Ekadeli who had been stabbed. When he reached at the place, he found Ekai lying unconsciously and bleeding. He testified that with another person known as Cisse they rushed Ekai to AIC Lokori Hospital for treatment and upon arrival he was attended by the doctor putting drips on him and bandaged the stabbed wounds to stop the bleeding. That after 30 minutes Ekai started talking and when they asked him what had happened where he replied to us that he had gone to a nearby lugger for a short call of nature not knowing that the assailants were monitoring him since he had a spotlight. The witness further stated that the deceased mentioned that the suspects were three in number and they were unknown to him but he could identify them.
7. PW4 Ewosit Nakali testified that on 12th April, 2019 at around 0700hrs while at home he was told that there was someone who had stabbed another person and ran away. He told the court that together with other NPR officers and three civilians they decided to follow the footprints of the assailants which led them to Lopii. When they reached at Lopii they met with other two NPR officers whom they asked if they had seen a young man who was not from their village. They directed them to one house where the person entered. They headed to the house and found the suspect sitting in the house and they effected the arrest and called the police from Lokwamosing police station to take him to the station.
8. PW5 Lokaale Epem Lotit told the court that he is an NPR officer and that on 12th April, 2019 he was instructed by their in-charge to follow up on the footprints of the assailants in a stabbing incident. Together with his colleagues they started following from where the incident happened that is behind Elelea. They traced the footprints which led them to Lokwamosing. On arrival at Lokwamosing police



statine they requested accompaniment of other three more NPR officers. He testified that while they were wandering at Lokwamosing in search following the footprints, they met with other two more NPR officers from Lopii who informed them that they have met someone heading to Lopii in haste movement. The witness further stated that among themselves they agreed to communicate to in-charge Lokwamosing Police station to help them with a vehicle to take them to Lopii. On their arrival at one of the villages at Lopii they found some wazees who directed them to where the assailant was hiding. While they were still in search they met another person who told them that the likely person they were looking for had entered into a busaa den and they headed there swiftly. They surrounded the structure and luckily found the suspect enjoying busaa and they effected arrest.

9. PW6 Dr. Ameyo Boneventure stated that he conducted a post mortem on the deceased's body at Lodwar Referral Hospital on 15th April, 2019. According to PW6 it was alleged that the victim had been stabbed by unknown people and from the injuries he succumbed while undergoing treatment at Lodwar referral Hospital. In the external appearance of the body, PW6 made the following positive findings. That the deceased had suffered a cut wound anterior left side of chest 4CM extending from 4th to 6th Rib 7 Cm deep stab wound lateral aspect of left chest 2x1cm. Stab wound 12th Intercostal space (RT) 3x1x1cm. Stab wound 5th intercostal space, 1CM deep. Cut wound (lineal) right arm (medial) aspect 8cmx1x0.5 cm. Stab wound posterior aspect of right Deltoid muscle. As a result of the examination PW6 formed the opinion that the cause of death was left tension hemothorax secondary to penetrating stab wound.
10. PW7 Police Detective No. 80546 PC Samson Yegon told the court that on 12th April, 2019 he acted on an assault report, reported to the police station thereafter it happened that the victim passed on as a result of the injuries inflicted by the assailants. He visited the scene and the hospital with regard to the incident which revealed that the attack arose from a fight between suspects and the victim. The only trace of evidence seen at the scene was streams of blood but the murder weapon was never recovered. The second visit to the scene and working in conjunction with the Kenya Police Reservist managed to arrest the accused person with a blood-stained knife and a shirt. It was further the testimony of PW7 that the recovered exhibits were kept in police custody which now are presented to this court as exhibits. He also recorded the witness statement which were used to recommend to the Director of Public Prosecution that the accused be indicted for the offence of murder contrary to Section 203 of the Penal Code.

Decision

11. At the close of the prosecution case, the court is mandated under section 306 of the CPC to rule on whether a prima facie case has been established to warrant the accused person to be placed on his defence. This means that the prosecution evidence on record is credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction for the offence charged under Section 203 of the Penal Code. If that threshold is met, the accused shall be ordered to enter upon his defence on the charge or the amended charge as the case may be according to the information provided by the prosecution. In the case of Public Prosecutor V Chin Yoke (1940) MLJ Rep 37, the court by adopting the definition given in Mozley and Whiteley's Law Dictionary (5th Ed): "A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side"
12. Looking at the subject more broadly, a trial court in a criminal set up has to delve into the legal evidential burden prescribed in Section 107 (1), 108 and 109 of the *Evidence Act*. A prima facie case is based on those elements which establish existence or non-existence of alleged facts for a party placing reliance



on those facts to secure judgment in his/her favor. The maximum evaluation test in section 306 of the Criminal Procedure Code is to weigh on a balance of scale of justice with a frontier of the burden of proof of beyond reasonable doubt being the ultimate threshold to be met by the prosecution. It is for that reason there are two typologies laid down in Section 306 of the CPC. The first being that of a prima facie case and the second being that of a motion of no case to answer. The legal burden in a criminal case can only be discharged on the totality of the evidence because the accused's evidence may out the prosecution's evidence in a different scale or light. The two conceptual framework have to be harmonized with the predominant principles in *Re Winship* 397 US 358(1970), 369-375 in which Harlan J stated that:

“First in a Judicial Proceeding in which there is a dispute about the facts of some earlier event, the fact finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact finder can acquire is a belief of what probably happened. The intensity of this belief – the degree to which a fact finder is convinced that a given act actually occurred – can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases “Preponderance of the evidence” and “proof beyond a reasonable doubt” are quantitatively imprecise they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusion The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

In a criminal case we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”

13. The Court of Appeal of Eastern Africa reinforced the position in the celebrated case of *R.T. Bhatt v Republic* (1957) EA 332-334 & 335 to define what constitutes a prima facie case at the close of the prosecution case.

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence.”



14. The Preliminary question in this matter is whether in these half-time submissions, from the evidence of the seven witnesses the prosecution has established a prima facie case. that satisfies this court that on the quantity and quality of its evidence, considered on a reasonable basis if the accused elects to offer no evidence in rebuttal, this court can enter a verdict of conviction. That inquiry can be answered by looking in the evidence as a whole on the wider issues to be proven by the prosecution for the offence of murder contrary to section 203 of the Penal Code. The static elements of the offence of murder as known in our penal code constitutes the elements stated elsewhere in this ruling.

Issue No. 1 the death of the deceased.

15. It is trite that death can be proved by direct or circumstantial evidence. In the instant case the prosecution adduce evidence from the pathologist who produced the medical report at Exhibit 1 confirming that Ekai Ekadel whose body was at Lodwar Referral Hospital passed away on the 11th April, 2019. On examination of the deceased's body the death certificate number 0861540 was issued by the pathologist as conclusive evidence to establish beyond reasonable doubt the death of the deceased. This element is therefore not in doubt from the vested burden of proof on the state to establish each ingredient of the offence beyond reasonable doubt.

Issue No. 2 whether the death was unlawfully caused.

16. As for the cause of death in issue it is an established presumption in law that any incident of murder is unlawful. This presumption may however be rebutted by the accused providing proof that the homicide was committed under any of the excusable circumstances as provided for in Art 26(3) of *the Constitution* and in Sections 17, 207 and 208 of the Penal Code. This involves excusable and justifiable circumstances recognized by the law namely: that the death was in self defence of self or property or any other person whose life is in imminent danger or accidental or upon provocation or was committed in execution of a lawful order. See R versus Gusambizi S/o of Wesonga (1948) 15 EACA 65. The standard required for proof of a rebuttal when an accused raises any of the defenses known on law is merely on a balance of probabilities. In the instant case. From the appraisal of the seven witnesses summoned by the state it was purely a case based on circumstantial evidence. As pronounced by the Court of Appeal in Abanga alias Onyango vs. Republic Cr. Appeal No. 32 of 1990:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

17. The chronology of events of the case by the prosecution has the following characteristics: That on the 11th April, 2019 PW1 at 1850hrs his attention was drawn to the people screaming from a nearby Luggage and on rushing there he found out that the deceased was lying down and on identification he found out it was a brother to his wife. This victim was to be picked from the scene and taken to Lodwar Referral Hospital for treatment where he succumbed to death while undergoing care and management. This is the same chronology given by PW2 who is a National Police Reservist and his piece of evidence



is around the question of pursuing the arrest of the assailant suspected to be hiding in a manyatta taking busaa. According to PW2 on arrest of the suspect in company of PW7 recovered a shirt and a bloodstained dagger suspected to form part of the exhibits which may have been used or have a nexus to the commission of the offence. Thereafter, the body of the deceased was subjected to a complete post mortem examination in which PW6 confirmed multiple injuries having been inflicted against the deceased. From the autopsy report PW6 concluded that part of the cause of death was those injuries inflicted to hemothorax secondary to the penetrating stab wound. The circumstantial evidence lays down proof of facts in which an inference can be drawn that the deceased's death was from unlawful acts of assault. There is no doubt the proximate cause of the deceased's death cannot be described as one which falls within the exceptional circumstances recognized by the law. Again, the evidence is of a conclusive nature to exclude any hypothesis to the unlawfulness of the death. The medical evidence shows that within all human probability the accused was killed by another human being. What is not consistent with the evidence is whether the accused before court is the one who can be fully held accountable for this heinous crime. The admitted fact is that the deceased's body was found on 11th April, 2019 in a lugger and no other pieces of evidence was able to be corrected by the investigating officer on how it found itself at that scene. The only evidence which appears to have been pressed into by the prosecution was that of the National police Reservist that they followed footprints to a manyatta where the alleged suspect was having his busaa but in possession of a blood-stained dagger and a shirt. It is to be noted that this exhibits even with that prominence being given by the prosecution witnesses as to their relevance to the case were never subjected to forensic analysis. That could have ruled out any suspicion and conjecture as to whether this bloodstained dagger and t-shirt had any DNA profiles with the deceased. In view of this court, the shaky nature of the evidence adduced it will be unsafe to make a positive finding of placing the accused person at the scene of the crime relying on the physical exhibits of the bloodstained dagger and t-shirt. Notwithstanding that position and whether the accused person was the one who committed the unlawfully act which caused the death of the deceased, it's beyond peradventure that the prosecution have discharged the burden of proof that the deceased's death was unlawfully caused.

Issue No. 3 Malice aforethought.

18. The notion of malice aforethought is aptly demonstrated in section 206 of the Penal Code, which in brief has the following elements:
 - An intention to cause the death of another
 - An intention to cause grievous harm to another
 - Knowledge that the Act or Omission will cause death.
 - Intent to commit a felony
 - Intention to facilitate the escape from custody of a person who was committed a felony
19. Malice aforethought can be express or implied. Express malice is when one, with a sedate deliberate mind and formed design doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as laying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. Express malice aforethought is said to mean (assuming the absence of justification or excuse or any mitigating circumstances sufficient to reduce the homicide to manslaughter): (i) An intent to kill the very person killed (ii) An intent to kill the very person killed or to inflict greater bodily injury upon him; (iii) an intent to kill some person; (iv) an intent to cause death or great bodily injury to some person. Implied malice aforethought in this sense is inferred as a



matter of facts from the acts of the accused. See *Rex v Tubere s/o Ochen* 91945) 12 EACA 63. See also “A re-examination of Malice aforethought” by Perkins <https://openyls.law.yale.edu>

20. In this realm from the prosecution probative evidence whoever killed the deceased had this manifestation of revenge, hatred and an unjustifiable motive. This is a murder committed with implied malice from the circumstances of the case which displays the following characteristics. The victim was killed and dumped in lugger he suffered multiple bodily injuries as reflected in the post mortem report. the specific bodily harm targeted the most vulnerable parts of his body being the left side of the chest, stab wound on the posterior aspect of right deltoid muscle, fracture ribs at the level of the 5th and 6th intercostal spaces and the left lobe of the liver. Both of these instances are in law an unlawful killing with malice aforethought and therefore murder. The intention of the perpetrators was to cause death of or grievous bodily harm to the deceased. Therefore, the prosecution has discharged the burden on proof beyond reasonable doubt on this element.

Issue No. 4 Identification of the assailant

21. The difficulty in this case is on identification of the accused person as a relevant factor to the offence against the accused person. The leading case in East Africa is the decision of the former court of Appeal in *Abdalla Bin Wendo and Another v. R.* (1953), 20 EACA 166 cited with approval in *Roria V. R.* (1967) EA 583 in which the court laid down the following guidelines on identification:

The testimony of a single witness regarding identification must be tested with the greatest care.

The need for caution is even greater when it is known that the conditions favoring a correct identification were difficult.

Where the conditions were difficult, what is needed before convicting is ‘other evidence’ pointing to guilt.

Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone.

22. The case by the prosecution is dependent wholly on the evidence of PW2 and PW7 who alleged that they followed the footprints which ended up in a manyatta where the accused person was taking Busaa. The piece of evidence which this court was asked to place more weight as being probative to positively identify the accused person was all about a bloodstained dagger and a t-shirt. There is special need to caution myself on the evidence by these witnesses for reasons that the dagger and the t-shirt evidence was never subjected to forensic analysis to establish any presence of the DNA profile with the deceased person. Closely related with this, the court was never told what was special about the footprints of the accused person. In exclusion of the other footprints which may have used the same path as the accused to the Manyatta. There is nothing of significance under observation which could have singled out the accused footprints from the rest of the residents within that village. In my judgment the quality of identification of the accused in this case was poor and if relied on it by this court to place the accused at the scene of the crime, there is indeed a greater danger of convicting the wrong person in these proceedings. The court was never told why the exhibits were never subjected to forensic analysis at the government chemist. It is evident from the above cited passage that indeed the perpetrators of the crime were never brought to book and if that person is the accused person I am unable to find any piece of evidence that is favorable to a positive identification sufficient enough to find him culpable for the murder of the deceased. The extrinsic evidence given to establish identity falls short of the set threshold of the many jurisprudential decisions in this matter.



23. As observed above, there is a reasonable doubt about the guilt of the accused person on identification to discharge the threshold of a prima facie case to place the accused on his defence under Section 306 and 307 of the penal code. In short, the more plausible approach is the success of a motion of no case to answer demonstrated by the evidence in a clear straight forward and accurate tapestry. The accused person be and is hereby acquitted of the charge of murder contrary to section 203 of the Penal Code.

DATED AND SIGNED AT LODWAR THIS 22ND DAY OF MAY, 2024

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R. NYAKUNDI

JUDGE

