



**Republic v Lokutan (Criminal Case E013 of 2021)
[2024] KEHC 5873 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5873 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E013 OF 2021
RN NYAKUNDI, J
MAY 22, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

DAVID ETOOT LOKUTAN 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 22nd September, 2021 at Alukat village in Turkana Central Sub-County within Turkana County the accused is said to have murdered Simon Ekuom Kapengi.
2. The accused pleaded not guilty to the offence as stipulated under section 203 of the Penal Code. The lead prosecution counsel in these proceedings was Mr. Kakoi for the state whereas the defence was under the retainer of Learned counsel Mr. Ekusi duly appointed under article 50 (2) (h) of *the Constitution*.
3. The prosecution summoned 7 witnesses who tendered evidence to prove the following elements of the offence;
 - a. The death of the deceased,
 - b. The death was unlawfully caused
 - c. That in causing death of the deceased accused's unlawfully acts were accompanied with malice aforethought.
 - d. That additionally the accused was the person who committed the offence on the material day as against the deceased.



e. A bird's view of the prosecution case goes thus:

PW1: Dr. Wa-yaa Jonathan testified that on 7th October, 2021 he carried out a post mortem examination in reference to the body of Simon Ekuom alleged to have been assaulted prior to his death on 23rd

September, 2021. In a detailed report PW1 made the following diagnostic on the deceased body as having sustained multiple Linear Abrasions on the Posterior aspect of both legs, the back and chest, Healed abrasions on both knees anteriorly, Extensive scalp hematoma and in the nervous system bilateral subdural haemorrhage. As a result of the examination PW1 opined that the cause of death was severe head injury secondary to bilateral subdural haemorrhage secondary to blunt force trauma to the head.

4. PW2 Rose Narohin Ngipuwo gave evidence to the effect that on 22nd September, 2021 the deceased also happened to be her husband left the house to go and have a drink at Alukot village. In a short while PW2 heard screams emanating from that homestead and on rushing there she demanded money from the deceased to go and buy some food. However, it turned out that the deceased picked a quarrel with her necessitating her to leave that homestead. When he came home they had a quarrel and a fight ensued. In addition, it was the evidence by PW2 that she left for Kerio Center only to receive information from Esther that they had also fought with the deceased. Unfortunately, PW2 did not see her husband alive again. On arrival at home she witnessed the assault of her husband by one Etoot the accused person in this case, and another suspect who is not before court. According to PW2 in consultation with other members of the family one Patrick Nawi who drives a probox motor vehicle was asked to assist in escorting the deceased to Kerio Health Center where he was treated and discharged. The condition of the deceased did not improve and therefore it became necessary to have him referred to Lodwar County Referral Hospital. It was while undergoing treatment, the deceased succumbed to death.
5. PW3 was David Lowalel a member of the National Police Reservist stated in court that on 22nd September, 2022 he went fishing and came back at around 6PM when he saw a number of people around the scene where the deceased had been murdered. In the same scene PW3 was also shown the accused person together with his accomplices armed with two sticks. A report was made to the Police station which commenced investigation to establish culpability of the accused person in committing the offence.
6. PW4 was Esther Lokwasinyen whose evidence was to the effect that on 22nd September, 2021 while travelling back from the hospital to her home she heard some screams of people fighting. This prompted her to rush to the scene and on observation she saw the deceased being taken to his homestead by the assailants where the accused person was one of them according to her positive identification.
7. PW5 evidence came from Navilongori Lochakai to the effect that on 22nd September, 2021 he was telephoned by the wife of the deceased to assist in taking him to the hospital. He fulfilled that role and on arrival at the hospital they were informed that the deceased had already passed away.
8. PW6: Benard Ewoi testified as to the events of 22nd September, 2021 while he was working at Kerio Health Center. During that time a patient was brought in by four people with an history of having been assaulted. The quick physical examination by PW6 upon the body of the deceased he established that he had no pulse and was in a comma. That is what disclosed to the family that the patient is dead.
9. PW7 No. 85030 CPL James Kurgat on instruction from the DCIO he conducted investigations on the murder incident involving the deceased. According to PW7 the investigation revealed that the



deceased had been assaulted by his In-laws at Alukat village. He was later to be rushed to Kerio Health Centre where he was pronounced dead. He recorded statements from witnesses and on visit to the scene he recovered sandals, t-shirt, wooden stick and also took photographs to document the scene. He also participated in the post mortem examination which was done on 12th October of 2021. It was opined by the pathologist that the deceased died as a result of severe head injury. 10. In support of the prosecution case, PW7 produced the following exhibits: A t-shirt, a pair of sandals and sticks. That was the close of the prosecution case and at the end of it all the accused person was

placed on his defence. The accused elected to give a sworn statement in which he denied the offence of killing the deceased. He also raised the defence of alibi that he was never at the alleged scene as alleged by the prosecution witnesses.

Analysis & Decision

10. The above evidential material shall form the basis upon which the standard and the burden of proof of beyond reasonable doubt would be tested to establish whether the prosecution has discharged its role to warrant this court to rule in its Favor to secure judgment as stated in such legal instruments under section 107(1), 108 and 109 of the Evidence Act. In proving the existence or non-existence of facts in issue by the prosecution is a matter of evidential burden vested with the state at all material times as a right insulated in Art. 50(2)(a) of the Constitution on the presumption of innocence unless the contrary is proven.

11. The Black's Law dictionary defines evidence as:

“Any species of proof of probative matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects etc. for the purposes of inducing belief in the minds of the court or jury as their contention. All the means by which any alleged matter of fact, the truth of which is submitted for investigation is established or disproved. Any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion of the existence or non-existence of some matter of fact. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. That which tends to produce conviction in the mind as to existence of a fact. The means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact.

Testimony is evidence given by a competent witness under oath or affirmation as distinguished from evidence derived from writings and other sources. Testimony is a particular kind of evidence that comes to a tribunal through live witnesses speaking under oath or affirmation in presence of tribunal, judicial or quasi-judicial.”

12. One of the first formulations on the standard and burden of proof of beyond reasonable doubt is traceable to Thomas Starkie in “A Practical treatise of the Law of Evidence” who observed that:

“What circumstances will amount to proof can never be matter of generation of definition; ... On the other one hand, absolute, metaphysical and demonstrative certainty to the exclusion of every reasonable doubt: ... On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matter of the highest concern and importance to his won interest.....” see also the principles as illuminated in the cases of Republic versus Nyambura



and four other (2001) KLR 355, Sekitoleko v Uganda (1967) EA 531, Msembe & another versus Republic (2003) KLR 521, Mbuthia v Republic (2010) 2 EA 311.

13. In Kioko versus Republic (1983) KLR 289, the court of Appel held that the law does not require the accused to prove his innocence save in a few exceptional cases under Section 111 of the *Evidence Act*. The test remains that of beyond reasonable doubt not of any doubt at all.
14. As stipulated elsewhere in this judgment the four ingredients remain constant in which the prosecution must endeavour to discharge the above burden of prove beyond reasonable doubt. This case is a mixed grill of both direct and circumstantial evidence.
15. First and foremost, the evidence adduced by the prosecution witnesses including the post mortem report by PW1 established beyond reasonable doubt that the deceased Simon Ekuomi Kapengi is dead. The defence never countered by way of evidence to disapprove existence of the fact of death of the deceased. It is trite that prove of death in our criminal justice system is by way of medical evidence or on the other and by cogent circumstance evidence. See Benson Ngunyi Nundu v Republic Nairobi CACRA No. 171 of 1984 and Republic v Cheya and another (1973) EA.
16. The next question is whether the death of Simon Ekuom Kapengi was caused by an unlawful act or omission imitated and executed by the accused as against the deceased. It is the cause of death which exactly links the accused person with the commission of the offence the evidence may be either direct or circumstantial. The court must look for the proximate cause of which gave rise to the termination of the right to life under Art 26 of *the Constitution*, which is not excusable or justified. The court has also to bear in mind the legal ingredients of Section 213 of the Penal Code on causation issues and proof on homicide category of offences.

The death need not be caused by the immediate act of the accused. Section 213 of the Penal Code defines causing death to include acts which are not the immediate or sole causes of death. The accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances:

- a. He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death;
 - b. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of living;
 - c. He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused.
 - d. He by any act hastens the death of person suffering under any disease or injury which apart from such an act or omission would have caused the death; and
 - e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.
17. What must be caused in homicide cases to constitute the element of unlawful act is some acceleration death, since everyone must die sooner or later. It follows therefore that every killing is merely an acceleration of death and it makes no difference for this purpose the victim is already suffering from a



fatal injury or is under the sentence of death. It is therefore pertinent to state from this passage under Section 213 of the Penal Code that causation is the causal relationship between conduct and result. It should be noted that causation only applicable where a result has been achieved and that result is an act or omission which caused the death of the deceased.

On this element, we have the evidence of PW1 Dr. Wayaa who conducted the post mortem report which showed that the deceased had bruises on the back and on both knees. It was opined by PW1 that the deceased suffered severe injuries to the head which was predominantly the main cause of death having been inflicted by a blunt force trauma by a third party. In addition, PW2 gave a narrative on causation issues arising out of the fight initially between one Esther and later the accused person and other conspirators who are not before court. In the same vein, PW3 confirmed as having visited the scene and saw the accused person and others dragging the body of the deceased which lay motionless on the ground. In the same scene PW3 stated in court that the accused person and others were armed with sticks. According to PW4 on the fateful day she also saw the deceased being taken to his homestead by the accused person being part of the people who transported him to his homestead. That is after responding to some screams to the same village. The Investigations carried out by PW7 established circumstantially that the deceased was beaten by known assailants in which one of them is the accused person before court. In answer to this prima facie evidence, the accused raised an alibi defence which was dislodged by the evidence of PW2, PW3, PW4, PW5 and PW6. The manner in which the deceased met his death was unlawful. The wounds sustained during the assault can properly be said be the cause of death. This death in question was not justified or excusable.

18. As regards murder in Section 203 of the Penal Code, proof of it as against the accused person being culpable is incomplete without the ingredient of malice aforethought. The definition of Malice aforethought under section 206 of the Penal Code which provides:

“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 had committed or attempted to commit a felony.”

19. It is settled law that Malice aforethought can be determined by way of evidence from the prosecution on the type of weapon used, the gravity of multiple injuries inflicted on the deceased, the part of the body on which the injuries were inflicted by the assailant and the conduct of that assailant before, during and after the commission of the offence. There is also a need to establish through direct or circumstantial evidence that the accused person or any other suspect to the offence inflicted the injuries as founded in the medical report to have done so with malice aforethought. Taking into account the testimony of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 the inflicting of injuries on the deceased leading to her death discloses malice aforethought. The manner in which the assailants behaved upon inflicting severe injuries to the head gives rise to one conclusion that the accused and other persons not



before court intended to kill or cause harm to the deceased. I am satisfied that the charge of murder has been proved beyond reasonable doubt.

20. For the foregoing reasons, I find the accused guilty of the offence of murder and do convict him as per law established under section 203 and 204 of the Penal Code. The status conference shall be held on 16th May, 2024 for purposes of admitting submissions on aggravating and mitigation factors, the victim impact statement and the pre-sentence report.

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

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R. NYAKUNDI

JUDGE

