



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Oketch & another (Criminal Case 14 of 2019)
[2023] KEHC 2647 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 14 OF 2019
WM MUSYOKA, J
MARCH 24, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

LAMECK LUCHIRI OKETCH 1ST ACCUSED

WILLIAM OKETCH ODHIAMBO 2ND ACCUSED

RULING

1. Lameck Luchiri Oketch and William Oketch Odhiambo are charged with murder contrary to section 203 of the *Penal Code*, cap 63, Laws of Kenya, as read with section 204 of the *Penal Code*. The particulars of the offence allege that on January 1, 2019, at Namayakalo village, Namamali sub-location, Namamali location, Matungu sub-county, within Kakamega county, they murdered Ramadhan Bolongo alias Mbongo, hereinafter referred to as the deceased. They pleaded not guilty to the charge, on April 5, 2019, and a hearing ensued, where 3 witnesses testified, on November 15, 2021.
2. PW1, Nancy Namenge Osakhala, was the spouse of the deceased. She testified that she and the deceased parted on December 31, 2018, at 4.00 pm, on the understanding that they would meet up later and go to an all-night prayer meeting. When she left for the night vigil he had not yet returned, and when she reported back home at 6.00 am the next morning, January 1, 2019, he had not yet come. Later that morning, a child, who was a neighbour, called her outside, and when she got out she found the 1st accused. He told her that there was someone at the river, and asked if she could go out and have a look, and confirm whether it was the deceased. At the river, she confirmed that the body there was that of the deceased. He had injuries on the head, neck and hand. The body was removed by the police, and was taken to the mortuary. She said that she did not know whether the deceased and the 1st accused had any issues. She said that she did not know what happened to the deceased.



3. PW2, Essah Nakhuyu Odoyo, testified that he and the deceased met, and went to Koyonzo market together. He took his phone to a mobile phone repair shop, and thereafter they had lunch together. They then went to the home of Obale to drink. He said that the deceased took a glass of chang'aa there, after which they left for a matanga, where they again consumed alcohol. At 2.00 am, he saw the 1st accused on a wall at the home of Namekala, and he was holding the deceased by the shirt, and pulling him. When he enquired as to what was happening, no one responded. PW2 then took the hand of the deceased, and tried to take him away, whereupon the 2nd accused hit his hand, and forced him to let go of his hand. They began to beat PW2, and he ran away, leaving the accused persons with the deceased. The next morning, of January 1, 2019, he heard that the deceased had died. He said that he recorded a statement with the police saying that the 1st accused was armed with a knife, and the 2nd accused with a rungu. He said that by the time he left the accused with the deceased, he had not been beaten.
4. PW3, Paul Were, was a cousin of the deceased. He was present when post-mortem was conducted on the body of the deceased. He mentioned that he saw injuries on the neck, what he described as a knife cut. He said that the pathologist did not inform them of the cause of death.
5. No other witness testified after November 15, 2021. The matter came up on January 31, 2022, May 4, 2022 and July 5, 2022, but no witnesses were available. A last adjournment was recorded on July 5, 2022, with respect to a hearing that was scheduled for November 8, 2022. The case for the prosecution closed on November 8, 2022, for lack of witnesses, none of the parties submitted on the matter of a no case to answer.
6. At this stage, I am required, by law, to decide whether to put the accused on their defence or not. I should determine whether the Republic has made out a *prima facie* case to warrant putting them on their defence. What amounts to a prima facie case was stated in *Ramanlal Trambaklal Bhatt v R* (1957) EA 332 (Sir Newnham Worley P, Sir Ronald Sinclair VP & Bacon JA), to be what a reasonable court, properly directing its mind to the law and the evidence, would convict on, if no explanation was offered by the defence. See also [Republic v Silas Magongo Onzere alias Fredrick Namema](#) [2017] eKLR (Nyakundi, J).
7. The elements of the offence of murder, as set out in section 203 of the *Penal Code*, are the fact of death, the cause of the death, the role of the accused person in the cause of the death, and the fact that the death is caused by the accused with malice aforethought.
8. From the material before me, there is *prima facie* proof that the deceased in fact died. 2 of the 3 witnesses who testified, were his spouse and a close relative, who stated that he in fact died, and PW3 attended the autopsy on his body. The fact of his death is, therefore, not in dispute.
9. The cause of death was not proved, as the pathologist did not testify, and a post-mortem report was not produced. No one witnessed the assault on him, which led up to his death. The 2 witnesses who saw the body mentioned the injuries they noted. However, none of them described the nature of the injury, and I cannot tell, therefore, whether the same could cause death, and I shall, accordingly, find that the cause of death was not established.
10. On whether the accused caused the death, or had a role in the causation, there is no evidence, by an eyewitness, that he saw hit the deceased being hit by the accused person. He, PW2, only testified that he saw the accused together with the deceased. He said that it appeared that he was being roughed up, as he was being held by the shirt, but he was categorical, that by the time he left them together he did not witness the accused assaulting the deceased. The available evidence points to the accused person being seen last together with the deceased by PW2, but there is no evidence that it was the 2 who caused the injuries on him which led to his death. There is no evidence on the cause of death, and, therefore, it



cannot even be surmised that the cause of his death had anything to do with assault, or by some other human agency.

11. The last consideration is on malice aforethought. Whether there was malice aforethought on the part of the accused would depend on the cause of death being certain, for criminal liability cannot attach on an accused person, where the cause of death is not determined, for the role of the accused in the causation is linked to the cause of death being determinate, and the question of malice aforethought depends on both. In the absence of evidence on the cause of death, I am unable to determine whether the accused had malice aforethought or not.
12. Consequently, I hereby find and hold that I do not have, before me, material upon which I can convict the accused persons, were they not to offer any explanation. I am not satisfied that a *prima facie* case exists, to warrant their being put on their defence. That being the case, I, accordingly, find the accused, Lameck Luchiri Oketch and William Oketch Odhiambo, not guilty, and acquit them, under section 306(1) of the [Criminal Procedure Code](#), cap 175, Laws of Kenya, of the charge of the murder of Ramadhan Bolongo alias Mbongo, contrary to section 203, as read with section 204, of the [Penal Code](#). They shall be set free, should they be still in remand custody, unless they are otherwise lawfully held.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF March 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Arwanda, Advocate for the accused person.

