



**Republic v Lodoto & another (Criminal Case 96 of 2017)  
[2023] KEHC 19733 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19733 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 96 OF 2017  
EM MURIITHI, J  
JULY 6, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MBOI LOBEYOK LODOTO ..... 1<sup>ST</sup> ACCUSED**

**EMMANUEL LOKWAWI EKTELA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. On February 5, 2018, Mboi Lobeyok Lodoto and Emmanuel Lokwawi Ektella (the accused) were arraigned in court to plead to the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. It was alleged that on November 9, 2017 at Kambi Garba in Isiolo Township within Isiolo County jointly with another not before court murdered Franco Ngolungore.
2. After they denied the charge, the prosecution called 5 witnesses to prove its case.

**Evidence**

3. PW1 Francis Akapilau Kuwom testified that, 'I work as a firewood cutter and sometimes I burn charcoal. On October 9, 2017 at 8.00 am we went to cut firewood in the bush. I was with the deceased Franko Mulongole. After cutting the firewood when we were coming back we found the river had swollen Isiolo river. We stayed a bit and we waited for the river to calm and later we went to cross at about 6.00 pm in the evening. We crossed and went and sold the firewood and went shopping. The deceased and I did the shopping. There was a shop nearby. We went to buy food. At the shop were many people. I can't recall the people who were buying but I recall the people who came when we were going. When we were leaving the shop three men came. I was with Franco the deceased. As we were going I was in front and the deceased was behind me. The three men came and got hold of the deceased. The three men were (1) Lanche (2) Mboi and (3) Jemci. Lanchao is not before the court. Mboi is before the court. He is the 1<sup>st</sup> accused (pointing). I also do not see Jemci. He was not arrested. At the time



there was light and I saw Mboi. It was not dark. When the three got home of the deceased, I heard the deceased crying so I came back. When I went back the deceased was able to run away and the three men came towards me. I saw one of the attackers with a knife. It was the one who is not before the court who had the knife. It was Jemci. He is the one who stabbed the deceased. The two of them Mboi and Jemci are the ones who got hold of the deceased. They were holding his hands. I saw my life was in danger and I had a panga and I had to protect myself. After the deceased ran away they wanted to nab me. I tried to protect myself with my panga and I ran away. I left Mboi and the others there and I ran away. I followed the deceased and found him in another homestead. I found the boy in Martha, a lady. He was sleeping at the doorstep. He was unconscious and I found some people were standing there. I asked the people who were there to take him to hospital. I went with the people who took to hospital. We went to Isiolo General Hospital. At the hospital the boy died and I was told to go and inform the relatives. I went and informed the elders. One of the elders is in court. That was in the morning of the following day. I came from hospital and I informed the relatives in the morning. I knew Mboi before the incident. We were neighbours in the same village. I knew him since he was a young boy.'

4. On cross examination, he stated that, 'I went to cut firewood. (statement shows witness reached the river at 8.00 pm). It was not 8.00 pm. It was 8.00 am when we went to cut the firewood. When we reached the river and found it swollen. It was 5.00 pm in the evening. (statement – witness reached and stayed at the river at 8.00 pm at night). We went to cut charcoal firewood at 8.00 am in the morning. After cutting we found the river overflowing. So we waiting upto 5.00 pm in the evening. And we went to do our shopping at 8.00 pm. When we came from the bush cutting firewood we reached the river at 5.00 pm when the river calmed down after the river subsided we managed to cross to the other side at 6.00 pm. We reached the shops at 7.00 pm. We did our shopping and left the shop at 8.00 pm. What kind of lighting was in the area? There was moonlight. From the shops to where we met the three men it was a short distance away. It was not far from the shop – 'kidogo tu.' Mboi is the 1<sup>st</sup> accused. I have known him from when he was young and I even know his family. He was dressed in rasta hair. He had rastas and I knew his face. He had rasta and I knew he was Mboi. There were other people with rasta hair at that time. I knew him also for his general body. He was in a short and a trouser. I was not very far from the deceased. (statement that the witness heard the deceased screaming and he came back). It suggests that you were some distance away? It was not very far because I came back and found the boy was on the ground and he started running and the attackers came towards me. (statement that he found the 2 holding the deceased). The other one was stabbing him. He Jemci was the one who was stabbing. (statement that he came back and found the two coming towards him). I was not very far because when the boy was stabbed. I was just near. When the three men saw that I was ready to attack them and I had a panga that is when they came towards me. It is at that time that the deceased ran away. Could you have seen the events when the 2 young men were coming towards you? I saw the boy stabbed. Could you describe what clothes they were putting on? It was not Mboi who stabbed but he is the one who was holding the deceased. I had a panga so I just protected myself. They did not hurt me. (Why did they not attack you?) I did not allow him to come closer. I just protected myself with the panga. They saw the panga and they stayed away. (statement that witness took deceased to hospital). I took the deceased using a motor bike. When the attackers approached me I ran away. I know the 2<sup>nd</sup> accused person as Lanche. I saw him that night. He was holding a cane. That is all I can remember concerning the 2<sup>nd</sup> accused. Is it possible to identify 3 men while trying to defend yourself? In the night? I knew the attackers. I even heard talking to the boy and I knew their homes. You cannot tell what they were putting on? I can't tell what they were putting on.'
5. PW2 Simon Boran testified that, 'I work as boda boda rider. On November 10, 2017 I left home going to work as usual for my boda boda. I found a group of people on the way. They were crowding outside a shop where we usually buy foodstuff. They told me that there was a person who had been killed the



previous day at the place. I was told Mboi was involved. I went to the police station. I made report that there was one of our people who had been killed the previous day. The person who had been killed is Francis Mulungore. We came back with the police to the scene. We were told that the people who had killed the deceased ran away. The police went away. We stated our search and we found Mboi. Mboi had locked himself in a house. We had followed the footsteps and we were directed by a small child who had seen him. We broke the door and got in. Mboi is the 1<sup>st</sup> accused. We were many in the group. We were about 10 youth. I was the leader of the group. When we arrested them we escorted them to Isiolo Police Station with about 3 boda boda cycles. On the following day on November 11, 2017 we went and an operation to look for the other killers. We found the other person called Lenche. Lenche is the name by which the 2<sup>nd</sup> accused is known at the village. We found him having locked himself inside a house. It was in the area near Shambani farm the place where the killing occurred and where we found him is a 30minute walk. We had found a lady at water point and she directed us to a house where she said she had seen Lenche. We too Lenche to the police station. I left the matter with the police at the point.'

6. On cross examination, he stated that, 'I know the 1<sup>st</sup> accused is my neighbour. We have lived together since I was born. I also know the 2<sup>nd</sup> accused since I was born. At that shop, I was informed that a person had been killed. I found a crowd of people more – than 20. I can recall some of the people. There was a lady Martha Akiru, Susan Chichi the owner of the shop and others I do not recall. It is Martha who told me about the killing. I went to the scene on November 10, 2017. I was not there when the killing happened. I was just told.'
7. PW3 Martha Akiro Lokier, testified that, 'On November 6, 2017 I was at home. My brother Ngorungore came home with a stab wound on the left of his chest. It was 8.30 pm in the evening. He fell at his door crying for help saying that he had been stabbed. I did first aid by tying the wound with a lesa. I asked a relative of mine called Sacho Emonong to take my brother to hospital on his motor cycle. I did not go with him. The deceased is a relative to my husband. I am his sister in law. At my home there was myself, my husband, Phillip, Ndonyi a neighbour and the children. The deceased's uncle Francis was not with the deceased when he came to my house and fell at the door. After tying the wound with a lesa, he was taken to hospital by Sancho and Francis on his motorbike. I could not go as I had a small child and it was raining. I later learnt that Franko Murongore died. I learnt from the uncle the next day when he came home.'
8. On cross examination, she stated that, 'I know the 1<sup>st</sup> accused very well. I know him. He is my in law. My sister Mary Longale is the 1<sup>st</sup> accused brother Sancho. The 2<sup>nd</sup> accused is also my in law. He has married a sister to Mboi. My relationship with Francko Ngolungore the deceased is relative to me through my husband family. On November 9, 2017 at 8.30 the deceased came suddenly calling for help saying 'mniokoe Mniokoe.' He never said anything else. He said help me, help me. He had been stabbed on the right side below the ribs. We tied a lesa. His uncle did not do anything at the time. He only said the following day that it was 3 youths who stabbed the deceased. They were 1. Mboi 2. Lenche 3. Jamci. It was the deceased's uncle who said that the 3 had stabbed. I did not know who of the 3 stabbed the deceased. I did not take the deceased to hospital. I do not know how and who stabbed the deceased. He only came to seek for help at my house.'
9. PW4 Dr Mohammed Abdikadir, a medical officer at Isiolo Referral hospital produced the deceased post mortem report which had been filled by his colleague Dr Magara, as P exhibit No. 1. The deceased body had an injury of 8cm × 3cm on the left part of the lower chest between the ribs 8 – 9 and both ribs had fractures. There was an injury on the spleen and diaphragm, and the cause of death was found to be a rupture of the spleen and excessive bleeding.



10. When asked on cross examination what caused the injury, he stated that, 'The injury would have been caused by blunt object what causes the breaking of the ribs and rapture of the spleen. It was the same object that caused the injury.'
11. PW5 Sgt Daniel Wambu Muthini from CID Nairobi Kasarani, testified that, 'In 2017, I worked at Isiolo CID. I had worked for about 1½ years. I worked in the same investigation of crime. On November 10, 2017 I filed a report a day earlier on November 9, 2017 about a killing where the person died while undergoing treatment at Isiolo hospital. The deceased is called Franco Boru Ngare. I went to the hospital and confirmed the body was at Isiolo Hospital mortuary. I was with PC Otieno and Cpl Ekapten. I started looking for the relatives and I went to the scene of crime at Kambi Garba in isiolo along the Isiolo – Moyale road. At the scene I found 2 witnesses. One was a lady where the deceased went to ask for help. The lady was a witness in this matter. Martha Akilu. The lady mobilized for the deceased to be taken to hospital. I did find a friend of the deceased one Francis, who told me that they were coming with the deceased from the shop when they were attacked by person who they knew. He gave me the names of James and Mboyi and Lenche. He said these were the ones who attacked them while they were coming from the shops at about 8.00 pm. After that I recorded that statements of the lady and the deceased's friend and started looking for the person named. We did not get them as they appeared to be in hiding assisted by some people in the area. On November 10, 2017 later in the day members of the public arrested the suspect Mboyi and he was taken to the police. On November 11, 2017 members of the public arrested the other person Lango Emmanuel and he was brought to the police station. They were arrested by members of the public and brought to the station. The 3<sup>rd</sup> suspect has never been found. We presented them to Isiolo court and requested for time to look for the 3<sup>rd</sup> suspect. We did not find the 3<sup>rd</sup> suspect. We organized with the relatives of the deceased and did post mortem at Isiolo. After the post mortem we released the body for burial. Later the suspects were charged at Meru High court after approval of the DPP. On November 10, 2017, I received the 1<sup>st</sup> accused from members of the public at the station. Emmanuel lance is the 2<sup>nd</sup> accused. They were the ones who were arrested by members of the public from their hiding and brought to the station (pointing at the accused).'
12. On cross examination, he stated that, 'I am the investigating officer. I was at the post mortem. The report said there was a lot of blood at the injury. He said the death was because of the excessive bleeding as a result of the injury. Injury by blunt object. I was there at the post mortem. It is possible there was a blunt object and sharp object. We did not get the weapons. I am not the one who arrested the suspects. They were arrested from the hiding places by members of the public. The 3<sup>rd</sup> accused has never been found. He may have relocated to a distant place. I do not know how it happened. I only saw the injury on the body.'
13. DWI Mboi Lobeyok Lodoto, the 1<sup>st</sup> accused gave sworn testimony that, 'I came from Shambani, Isiolo, I work as construction worker. The deceased in this case is not known to me. The 2<sup>nd</sup> accused is also not known to me. I heard the witnesses. On November 9, 2017 I went to work at construction site at Chechelez Isiolo. I proceeded with my work until lunch time about 1:00 pm. When we went for Lunch and came back at 2:00 pm we proceeded with work until closing at 5:00 pm. We were paid and we went home. I was alone I was not with the 2<sup>nd</sup> accused. I went home. I drew water and made supper as usual and slept. On the following day I work up ready to go to work as usual. On the way, I met with some youth who told me that I was required to go with police offices. It was early in the morning in November 10, 2017. I did not know what the police wanted from me. I was asked to get into a vehicle. I was arrested at a road side near Ewazo River between Shambani and Kapemba area. It Isiolo river. I was taken to Police Station at Isiolo. I did not know why I was arrested. They later told me that I was charged with murder. On November 9, 2017 night I was at home. I got home at 5:00 pm. I was alone



- at home. I recall that when we went for lunch. I never saw the deceased. I did know the deceased. We have no relationship with the deceased. It is not me who did the act. PW1 said it was I Njencee. I do not have any relationship I recall I met Njencee at about 1:00pm as we were going for lunch. I saw him at 1:00 pm and we went for lunch. I never saw the 2<sup>nd</sup> accused that day.'
14. On cross examination, he stated that, 'I do not know Francis Logolo PW1. I also do not know PW 2. I do not know any of the prosecution witnesses except Martha (PW3) Lokanyi. I have never had a grudge against any of them as I do not know them. They could have lied to commit. PW1 said he saw you? I have never seen him and I do not know him. He may have said he saw me. I was never arrested by the public. I was arrested by Police. The people who told me that you are required by police was Martin. I was taken to court without being told of any offence against me. I did not know the deceased.'
  15. On re-examination, he stated that, 'I never saw Francis on that day. I never saw Francis that day.'
  16. DW2 Emanuel Lokwani Ektella, the 2<sup>nd</sup> accused gave sworn testimony that, 'I reside at Isiolo. I worked as a construction worker. I do not know 1<sup>st</sup> accused. We have no relationship. I got to know him because of this case. I do not know the deceased. I heard the prosecution witnesses. I recall that on November 11, 2017. I was arrested. I was at home in the morning. I went to work at Maisha Bora and at Mulika. Finally as a construction worker. I went for lunch at 1: 00 pm until 2:00 pm. I left work at 5:00PM. I went home ate and slept. At 1:00 pm before I went home. I met a group of youth trailing footsteps and asked me whether I had seen Njencee. I said I had not seen him and they asked for help the trace them. I told him that I was going home. At home while I was taking lunch a group came and children told me that there were people outside. There were many people. They told me that I would not go back to work. They took me by boda boda and took to the police station. I met the 1<sup>st</sup> accused at the station. The people said I was one of the attackers. PW1 said he saw me, the 1<sup>st</sup> accused and the Njencee. I only saw Njencee on November 9, 2017, 2 days before the November 11, 2017 when I was arrested. We met on the way. I never saw him on any other dated. I never knew the deceased.'
  17. On cross examination, he stated that, 'I was arrested by members of the public. It was not the police. I knew 1 person among the public. He was a witness in the case. And signed. He is a boda boda rider. We had a grudge even a boda boda which he alleged I had stolen. The elders solved the boda boda case. It was the same year 2017. Francis Longot PW1, I do not know him. I heard his evidence. He never said he saw me commit the act.'
  18. On re-examination, he stated that, 'Francis Longot PW1. It may be PW1 saw him before but on that day I did not see him.'

### Submissions

19. The prosecution submitted that the evidence adduced by PW1 pointed to identification of the accused by way of recognition, and thus the identification was favourable and free from the possibility of error and cited *Anjononi & others v Republic [1976-80] 1 KLR 1566* and *R v Turnbull [1976] 3 All ER 549*. It urged that the use of a dangerous weapon by the accused to viciously stab the deceased was indicative of malice aforethought on their part, and cited *Nzuki v Republic [1993] eKLR*. It urged the court to find the accused guilty of murder and convict them.
20. The accused submitted that the conditions favoring identification were difficult and the credibility of the eye witness was questionable, and cited *Abdallah bin Wendo v Republic [1953] 20 EACA 166*. They urged that since the witnesses did not claim to have known them, it was pertinent to have an identification parade. They faulted the prosecution for failing to either produce the murder weapon or prove malice afterthought on their part. They urged the court to acquit them in view of the contradictions and insufficiencies in the evidence of the prosecution.



## **Analysis and Determination**

21. This being a murder case, the prosecution must prove beyond reasonable doubt; the fact and cause of death, that the death was as a result of an unlawful act or omission on the part of the accused and that there was malice aforethought.
22. There is no doubt the prosecution has been able to prove the fact and cause of death to the required standard. PW4 testified that the post mortem concluded the cause of death was a rupture of the spleen and excessive bleeding.
23. The issue in contention is whether the said death was caused by an unlawful act of omission or commission on the part of the accused. The evidence on record is that, on the material day, PW1 had gone with the deceased to a nearby shop to buy food. 'When we were leaving the shop three men came. I was with Franco the deceased. As we were going I was in front and the deceased was behind me. The three men came and got hold of the deceased. The three men were (1) Lanche (2) Mboi and (3) Jemci. Lanchao is not before the court. Mboi is before the court. He is the 1<sup>st</sup> accused (pointing). I also do not see Jemci. He was not arrested. At the time there was light and I saw Mboi. It was not dark. When the three got home of the deceased, I heard the deceased crying so I came back. When I went back the deceased was able to run away and the three men came towards me. I saw one of the attackers with a knife. It was the one who is not before the court who had the knife. It was Jemci. He is the one who stabbed the deceased. The two of them Mboi and Jemci are the ones who got hold of the deceased. They were holding his hands. After the deceased ran away they wanted to nab me. I tried to protect myself with my panga and I ran away. I left Mboi and the others there and I ran away. I followed the deceased and found him in another homestead. I found the boy in Martha, a lady. He was sleeping at the doorstep. He was unconscious and I found some people were standing there. I asked the people who were there to take him to hospital. I went with the people who took to hospital.' On cross examination, he stated that, 'I was not very far from the deceased. The other one was stabbing him. He Jemci was the one who was stabbing. When the three men saw that I was ready to attack them and I had a panga that is when they came towards me. It is at that time that the deceased ran away. I saw the boy stabbed. It was not Mboi who stabbed but he is the one who was holding the deceased.'
24. PW2 learnt of the death of the deceased and the alleged involvement of the 1<sup>st</sup> accused from people on November 10, 2017. He then led a group of youth to arrest the accused from their hide outs.

## **Identification of the assailants**

25. It is not in contention that PW1 and PW3 were able to identify the accused whom they had prior knowledge of. PW1 testified that, 'I knew Mboi before the incident. We were neighbours in the same village. I knew him since he was a young boy.' When PW1 was cross examined on the lighting used to identify the assailants, he stated that, 'There was moonlight. From the shops to where we met the three men it was a short distance away. Mboi is the 1<sup>st</sup> accused. I have known him from when he was young and I even know his family. He was dressed in rasta hair. He had rastas and I knew his face. He had rasta and I knew he was Mboi...I knew him also for his general body. He was in a short and a trouser.'
26. PW3 is the one who gave first aid to the deceased when he was stabbed, and then mobilized people to take him to the hospital. She stated on cross examination that, 'I know the 1<sup>st</sup> accused very well. I know him. He is my in law. My sister Mary Longale is the 1<sup>st</sup> accused brother Sancho. The 2<sup>nd</sup> accused is also my in law. He has married a sister to Mboi.'
27. PW3 stated that the deceased uncle said that it was Mboi, Lenche and Jamci who stabbed the deceased, but that uncle never took the stand to testify.



## The defences

28. The defences by the accused were mere denials. DW1 denied knowing the deceased, the 2<sup>nd</sup> accused, PW1 or PW2 but he confirmed he knew PW3. His testimony was that he went to work on the material day as usual at the construction site at Chechelez Isiolo and returned home at 5.00 pm where he stayed until his arrest the following day on his way to work.
29. DW2 on the other hand equally denied knowing the 1<sup>st</sup> accused, the deceased or PW1. He does not state where he was on the material day but he confirms that he was arrested on November 11, 2017 while he was at home.
30. Both DW1 and DW2 affirmed that they had seen Njemcee on the material day.
31. The eye witness, PW1 was categorical that the person who stabbed the deceased was Jemci, who is neither the 1<sup>st</sup> nor the 2<sup>nd</sup> accused. However, the witness confirmed that the 1<sup>st</sup> accused held the deceased so that he could be stabbed.
32. Section 20 of the Penal Code provides for principal offenders as follows,

' 20.

- (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
  - (a) Every person who actually does the act or makes the omission which constitutes the offence;
  - (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
  - (c) Every person who aids or abets another person in committing the offence;
  - (d) Any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.
- (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
- (3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.



33. Section 21 of the Penal Code provides that:

' When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'

34. This court finds that in holding the deceased so that he could be brutally stabbed by the assailant who is at large.

35. The next issue is whether there was malice afterthought, which is defined under Section 206 of the Penal Code as follows:

' 206. 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.'

36. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 is that malice aforethought can be either direct or indirect, depending on the facts of each case. That position has been clearly elucidated by the Court of Appeal in *Bonaya Tutu Ipu & another v Republic [2015] eKLR* as follows:

' It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v Uganda*, CR App No 95 Of2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v Tubere s/o Ochen*[1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.'



37. In holding the deceased so that he could be stabbed right below the ribs, the 1<sup>st</sup> accused had knowledge, as required by section 206 (b) of the Penal Code, that his actions would probably cause the death or grievous harm to the deceased.
38. The 1<sup>st</sup> accused is, consequently, guilty of the offence of murder, as a principal offender within the meaning of section 20 (1) (b) and (c) of the Penal Code, as if he is the person who indeed stabbed the deceased. The mere denial of the charge by the 1<sup>st</sup> accused who claimed to have been at work the whole day on the date of the killing on November 9, 2017 before being arrested on the following day did not raise any reasonable doubt in the face of the consistent evidence of the prosecution witnesses as to the role he played in the incident and his subsequently arrest from his hideout by members of the public.
39. The participation of the 2<sup>nd</sup> accused in the murder transaction is not clear, and there is no evidence of common purpose within the meaning of section 21 of the Penal Code to implicate him.

### **Verdict**

40. This court, therefore, finds that the prosecution has proved malice aforethought on the part of the 1<sup>st</sup> accused.
41. From the totality of the evidence tendered by both the prosecution and the defence, this court finds that the prosecution discharged the burden of proof of beyond reasonable doubt, for the offence of murder against the 1<sup>st</sup> accused herein, as contemplated in *Woolmington v DPP [1935] AC 642*.
42. The prosecution was, however, not able to prove its case against the 2<sup>nd</sup> accused beyond reasonable doubt. The eye witness, PW1, claimed to have seen the 2<sup>nd</sup> accused, who he knew, holding a cane on the material night, but he could not remember anything else about him. There was not sufficiently inculpatory evidence against him inconsistent with any other reasonable hypothesis other than that of guilt to justify his conviction. It is unsafe to convict the 2<sup>nd</sup> accused on the evidence.

### **Orders**

43. Accordingly, for the reasons set out above, the court finds the 1<sup>st</sup> accused Mboi Lobeyok Lodoto guilty of the offence of murder contrary to section 203 and 204 of the penal code and accordingly convicts him.
44. Due to the insufficiency of the evidence led in respect of the 2<sup>nd</sup> accused Emmanuel Lokwawi Ektela, this court finds him not guilty of the offence of murder and acquits him.
45. 2<sup>nd</sup> Accused Emmanuel Lokwawi Ektela shall be released unless he is otherwise lawfully held.

Orders accordingly,

**DATED AND DELIVERED THIS 6TH\* DAY OF JULY, 2023**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES**

**Mr. Masila Principal Prosecution Counsel for DPP.**

**Mr. Wamache Advocate for the Accused.**

