



**Republic v Lokomar (Criminal Case 8 of 2020)
[2023] KEHC 21621 (KLR) (3 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 8 OF 2020
AC MRIMA, J
AUGUST 3, 2023**

BETWEEN

REPUBLIC STATE

AND

JOSEPH EYANG'AN LOKOMAR ACCUSED

JUDGMENT

Introduction

1. The accused herein, Joseph Eyang'an Lokomar 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 were that on January 27, 2020 at Sikhulu village, Kwanza Sub-county within Trans Nzoia County, the accused person murdered Adekei Lokomar (hereinafter referred to as 'the deceased').
2. When the accused was arraigned before this Court, he pleaded not guilty to the offence. He was tried. The hearing of the prosecution's case began before Hon. Kimaru, J (as he then was) where three out of the four witnesses testified before the Learned Judge. After the close of the prosecution's case, this Court found that a prima facie case had been established to, and placed the accused on his defence.
3. The accused gave a sworn testimony and did not call any witnesses. The evidence of the last prosecution witness and accused's defence was taken by yours truly.

The trial:

4. The prosecution called a total of four witnesses in its bid to establish the charges drawn against the accused. The accused is the deceased's son and he is also the husband to Mary Eyang'an who testified as PW1. They had been married since 1994 and were blessed with four children including Harriet Akeno (testified as PW2), a Form two student at Gidea Girls. She was aged 17 years old at the time of her testimony and PW3, Anthony Kaka, a Class five at pupil aged 11 years old when he testified.



5. After conducting a voir-dire examination, this Court confirmed that PW3 understood the meaning of an oath and thus gave sworn evidence.
6. PW1 recalled that she was constantly at loggerheads with her husband as long as their marriage subsisted. On one incidence, the accused cut her with a panga. Evidence of their unstable relationship was corroborated by PW2 who added that the accused had developed a propensity to beat anybody when drunk.
7. When PW3 came home from School on January 27, 2020 at around 4:00p.m., he found a drunk accused and deceased quarreling. The accused was demanding for money from the deceased who was unwilling to give him.
8. In the heat of the moment, the accused grabbed a stool (which was produced as an exhibit) and stunned the deceased on the neck. The incident occurred in the kitchen. On witnessing this, PW3 dived out to tell PW1 who was at the neighbour's house. PW1 was reluctant to go home because she was afraid that the accused would assault her.
9. During the evening hours of the same day at around 5:00p.m., the accused had assaulted PW1. She testified that the accused beat her with a stick without reason. She only managed to escape to her neighbour's home, one Mama Serah. As a result, PW1 elected to spend the night away from her matrimonial home. She did not report this incident to the Police.
10. PW2 was on the same day, at around 5:00p.m., heading home from school when she met her brother, PW3, on the way. PW3 narrated that the accused had quarreled the deceased by demanding money from him. As the deceased was unwilling to give the accused the money, the accused hit him with a stool on the neck. That, the deceased was sleeping in the kitchen.
11. When PW2 arrived home, she found the deceased struggling to talk. He had blood stains on his face. She wiped the deceased's face with some hot water and a piece of cloth.
12. PW2 continued that PW1 was not at home and did not spend the night there. When cross-examined however, PW2 stated that her evidence at the Police Station was that PW1 had slept at home in the kitchen.
13. PW2 proceeded to cook supper for the family. When the supper was ready, PW2 called out the accused who was in the main house to eat. That, he ate and went back to sleep. PW2 tried to feed the deceased with PW3 but he could not eat. The deceased then asked PW2 to change his position on the bed, and she so did.
14. On the following morning of January 28, 2020, PW2 found the deceased lying unresponsive in the kitchen. She thought he may have died. She told PW3 to remain at home as she went to school.
15. On her way to school, PW2 found PW1 heading home and informed her what had transpired.
16. PW1 arrived home at around 8:00a.m. She was welcomed by PW3. PW3 asked her to find how the deceased was. PW1 found him lifeless and covered in a blanket on the mattress. The deceased was wearing a coat and a white trouser. She also saw a slasher and a bloodstained sweater next to the deceased. The mattress on which the deceased laid on was also bloodstained.
17. PW1 raised alarm and neighbours flocked their homestead including the village elder one Omuse.
18. Thereafter, the matter was reported to the police. PW4, No 78189 Cpl. Daniel Mwangi, was the investigating officer. He received the report from the DCIO and proceeded to the crime scene where the deceased's body was. He interrogated the persons who were gathered including PW3 and ascertained



- what had transpired. He searched the place and the house and recovered a broken stool which was bloodstained and was allegedly used in assaulting the deceased. He collected the clothes and the stool as exhibits. The scene was processed by the Scene of Crime personnel and later the body was moved to the mortuary.
19. PW4 continued with investigations by recording witness statements and pieced the evidence together. He observed that the accused changed his clothes after the ordeal and escaped. The accused was later arrested by members of the public on the same day.
 20. An autopsy was conducted on February 4, 2020 and witnessed by PW4. It was revealed that the cause of death was due to severe head injury by blunt object. PW4 subsequently charged the accused with the present offence.
 21. PW4 produced the red sweater, the coat, the white trousers and the stool as exhibits. He confirmed that none of the exhibits were taken for forensic examination.
 22. After evaluating the evidence adduced by the prosecution, this Court determined that the accused had a case to answer. He gave a sworn testimony.
 23. In his evidence, the accused denied killing his father. He stated that on January 27, 2020, he was nursing his cattle following an outbreak of foot and mouth disease. In the course of tying his cattle, a friend, aboard a boda-boda, advised him to buy 'muunya' to treat the disease.
 24. On the strength of that advice, the accused left his homestead to buy the said muunya, a by-product of the chang'aa making process. He found a Vendor. As he waited to be handed over with it, the accused indulged in chang'aa in the company of others. He stated that he must have overindulged as he woke up during the night hours and found himself at the Police Station.
 25. He continued that he could not recall if he hit the deceased with a stool or battered his wife. He dismissed any possibilities of injuring the deceased since he had lived with him for seven years and he was senile. While admitting that the deceased in his lifetime received inua jamii funds, he denied that they had fought on that fateful day because of the money. He maintained that he did not know why he was arrested.
 26. He called upon this Court to acquit him of the charge.
 27. Parties were thereafter directed to file their respective rival written submissions. Mr Majanga Deverell, Learned Counsel for the accused in his submissions dated January 28, 2023, argued that the prosecution had failed in its duty to prove that the accused committed the offence. He urged this Court to acquit the accused. Learned Counsel for the State Ms. Selina on her part relied on the Court record.

Analysis:

28. In criminal cases, for the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR, summed up the elements of the offence of murder 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.
29. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.



The death of the deceased:

30. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
31. In this case, the death of the deceased is not in doubt. It was proved by PW1 and PW4 who vouched that they saw the lifeless body of the deceased. PW4 even removed the body to the mortuary and later witnessed an autopsy conducted on the body of the deceased.
32. Although in this case the Post Mortem Report was not produced, nevertheless, the prosecution managed to prove the death of the deceased.
33. The question now which begs for an answer is whether the cause of the death of the deceased was also established in the absence of medical evidence.
34. As stated above, the Post Mortem Report was not produced. It seems there was no effort made, or at least the record is silent, to avail the Doctor who conducted the autopsy to testify. Alternatively, any other Doctor who knew the Doctor who conducted the autopsy and was familiar with the colleague's hand writing would have produced the report in accordance with the *Evidence Act*, Cap 80 of the Laws of Kenya.
35. There was another way of handling the matter. PW4 would have equally attempted to produce the report as an exhibit unless the defence opposed. Such an attempt was not made. Lastly, the prosecution could have sought for an adjournment to avail the Doctor since the record did not have a 'last-adjournment-order'.
36. The result was that the Post Mortem Report was not produced and there was neither an explanation as to why the witness did not attend Court nor why other avenues were not considered to avail the report in Court.
37. In such circumstances, the presumption that had the witness testified, the testimony may have been adverse to the prosecution, therefore, arises. (See *Bukenya & Others versus Uganda* (1972) E.A. 594, *Kingi versus Republic* (1972) E.A. 280 and *Nguku versus Republic* (1985) KLR 412).
38. The general practice adopted by trial Courts when ascertaining the death of a deceased and its cause is to take medical evidence mostly through a Post Mortem Form.
39. The Court of Appeal in *Ndungu vs. Republic* (1985) eKLR succinctly pronounced itself on the issue as under: -

.....where a body is available and the body has been examined, a post mortem must be produced, the trial Court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post mortem examination is cross examined. Here, no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some hospital or police file. No adjournment was applied for to obtain the original report. The haste to produce the unsatisfactory copy is in the circumstance inexplicable and was unhelpful to the prosecution and to the Judge.

40. Having said so, this Court remains well aware that there are exceptional instances where a Court may apply the principle that in some cases, the cause of death can be established without medical evidence.



41. The Court of Appeal in *Ndungu vs Republic* case (*supra*) in disagreeing with the Tanzanian decision in *Republic vs Cheya & Another* [1973] E.A. 500 which held that the absence of medical evidence as to the death of the deceased in that instant case was not fatal as the prosecution could rely on other factors in evidence, rendered itself as follows: -

.....The judgment in Cheya case gives no report of what injuries were sustained although there is reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case (sic) of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available, some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution. Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class. To return to Cheya it is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision.....

42. Later, in 2015 the same Court re-affirmed the above in *Chengo Nickson Kalama vs Republic* [2015] eKLR where it held: -

.... The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a postmortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt.

43. Turning to the matter at hand, PW4 testified that he attended a post mortem examination of the body of the deceased on February 4, 2020. He stated that according to the medical officer who conducted the autopsy the cause of death was severe head injury by blunt object. However, PW3 who witnessed the deceased being assaulted by the accused stated that the accused hit the deceased with a stool on the neck.
44. The cause of death cannot, therefore, be easily reconciled from the varying testimonies of PW3 and PW4. There is, hence, lingering doubt as to whether the deceased died as a result of the injuries on the head or those on the neck or he may have died out of natural causes. As such, this case is not among those which the principle that in some cases, the cause of death can be established without medical evidence can apply.
45. This Court now finds and hold that the cause of death of the deceased in this case was not established.



46. Having found as such, this Court returns the verdict that since it is not know how the deceased met his death, dealing with the rest of the issues will not add any value. Therefore, it can only be prudent that the matter ends here.

Disposition:

47. The accused is, therefore, found not guilty of the murder of the deceased.

48. Consequently, the accused is hereby acquitted pursuant to Section 322(1) of the *Criminal Procedure Code*. He is hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF AUGUST, 2023.

A. C. MRIMA

