



REPUBLIC OF KENYA



Lokono (Criminal Case 19 of 2017) [2023] KEHC 22260 (KLR) (19 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 19 OF 2017
AC MRIMA, J
SEPTEMBER 19, 2023
IN THE MATTER OF
MUSTAFA IDDI LOKONO ACCUSED**

JUDGMENT

Introduction

1. This is, once again, one of the matters which was delayed partly due to the advent of the dreadful worldwide Covid-19 pandemic.
2. The accused herein, Mustafa Iddi Lokono, 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 25th July, 2017 at Kapkoi area of Kiminini Sub-County within Trans Nzoia County, the accused unlawfully murdered Nancy Narongoi Edome (hereinafter referred to as ‘the deceased’).
3. When the accused was eventually arraigned before this Court for plea-taking, he pleaded not guilty to the offence. The hearing of the case was conducted before Hon. Chemitei, J who took the evidence of all the prosecution witnesses. Yours truly received the defence, hence, this judgment.

The trial:

4. The Prosecution called a total of 15 witnesses in a bid to establish that the accused murdered the deceased.
5. The prosecution’s case was that the deceased was a fiancée to the accused. They lived in a house which was still under construction in Kapkoi area around Moi’s Bridge. The house belonged to the accused’s uncle and the accused had been designated as the Caretaker. He occupied one of the rooms where he lived with the deceased.
6. That, on 20th July, 2017, No. 79320 PC Cyrus Liyayi, who testified as PW6, was at the report office at the Moi’s Bridge Police Station. He received an assault report from the deceased who was accompanied by the accused. The deceased complained that the accused had assaulted her. PW6 booked the report



- and arrested the accused. He placed him in police cells. He then issued the deceased with a P3 Form with instructions to proceed to hospital, have it filled and to return it for further action.
7. The deceased went for treatment at the Moi's Bridge Dispensary and returned to the station. She then told PW6 that they had wanted to settle the matter amicably. As such, PW6 released the accused on a police free bond. The accused was to return to the police station on 24th July, 2017.
 8. The deceased returned the filled P3 Form on 22nd July, 2017. On 24th July, 2017, the accused went to the police station and met PW6. He told him that the deceased and himself had sorted out the matter at home. PW6 asked the accused to go to the station with the deceased as to formalize the withdrawal of the complaint. It was the accused who then told PW6 that the deceased had travelled to Nairobi. PW6 then extended the accused's bond to 28th July, 2017.
 9. PW6 received the news of the death of the deceased on 25th July, 2017. He went to the scene and met with other police officers from Kitale Police Station whom he briefed of the case he was handling. PW6 later handed over the police file on the assault case together with the P3 Form to the officer who was investigating the death of the deceased.
 10. The P3 Form issued to the deceased, the accused's free bond and the Investigation Diary on the assault case were later produced as exhibits during the murder trial.
 11. Lucy Etabo was a sister to the deceased. She testified as PW1. She lived in Nairobi, but was at her parents' home in Moi's Bridge on 23rd July, 2017. She was well aware of the relationship between the accused and the deceased.
 12. PW1 had agreed with the deceased to travel to Eastleigh in Nairobi to buy clothes for purposes of selling at Moi's Bridge. They were to leave on that very day. It was the deceased who woke up PW1 in the morning. PW1 went to see the deceased. On meeting, the deceased told PW1 that the mother of the accused had called and told her that she wanted to talk to her before she left for Nairobi. The deceased asked PW1 to call her frequently so that the mother of the accused would see the urgency in them leaving.
 13. So as to give the deceased time to have a discussion with the mother of the accused, PW1 returned to her parents' home, washed her father's clothes and prepared lunch for her children. PW1 then left for Moi's Bridge stage. She called the deceased, but to her utter shock and surprise, the phone kept ringing, but was not picked. At around 5pm, PW1 called her other sister one Gladys (not a witness) and informed her that she could not reach the deceased.
 14. While PW1 was still at the Moi's Bridge stage, the accused called her. He asked to meet PW1 at the shop which the deceased had wanted to operate. PW1 proceeded there, but the accused was not there. The accused called PW1 again and asked her to meet by the road side. PW1 asked him about the deceased and the accused told her that he had escorted the deceased at around noon and that the deceased had already left for Nairobi. PW1 returned home to the surprise of her family members. The day was a Sunday.
 15. The following day, being a Monday, the 24th July, 2017, the accused called PW1 at around 6am and told her that he had called the deceased who confirmed that she was shopping in Eastleigh in Nairobi. PW1 then left for Nairobi. PW1's husband was equally surprised that PW1 was not in the company of the deceased.
 16. While in Nairobi, PW1 received a message in her phone, allegedly from the deceased, and informed her mother who was at their home in Moi's Bridge. PW1, however, unsuccessfully continued calling the deceased until 4pm. She decided to sleep. Later PW1's mother called and informed her that the



- deceased had been killed at Moi's Bridge. She called one Gladys (not a witness) who confirmed that indeed the deceased had been killed. PW1 returned to Moi's Bridge on the following day.
17. Alfred Simiyu Odera and Isaac Ida Salamba testified as PW2 and PW3 respectively. They were masons who worked on the site where the accused and the deceased stayed. The accused was the Caretaker of the house.
 18. PW2 testified that at around 2pm on 25th July, 2017, the deceased opened a window on the first floor of the house and called for help. She was screaming and said she had been tied and locked inside the room. She said she was on a bed next to the window. She also requested for a phone to make a call.
 19. PW2 raised alarm. He called a teacher from a nearby school to assist the deceased with a phone. The teacher was one Evelyne Andanje, who testified as PW4. PW2 then rushed to call neighbours.
 20. On return, PW2 heard screams and found the accused coming out of the house who immediately disappeared into the maize plantation. PW2 and other people who were at the scene gave chase to the accused in vain. The accused's mother also answered the call and came out of her house.
 21. PW2 had gone to Moi's Bridge in the morning with the accused, but had parted ways at around mid-day. PW2 returned to the site to join the other masons.
 22. With the aid of PW3, they opened the house and found the deceased tied on the neck and legs against the bed. She appeared lifeless. PW2 reported the matter to the police and returned with police officers to the scene.
 23. PW3 stated that when the deceased screamed and as PW2 went to call the neighbours, PW4 came and he, PW3, placed a ladder on the wall where PW4 climbed so as to talk to the deceased. PW4 managed to give the deceased the phone to make a call. Suddenly, the accused appeared, took away the phone and dropped it down. The accused then pulled the deceased inside and the deceased screamed once.
 24. PW3 and others rushed to the back of the house where they met the accused. They asked him not to assault the deceased. The accused told them that the deceased was parking her belongings. The mother of the accused arrived and PW3 went back to his work. Shortly, PW3 heard the accused's mother screaming that the accused was running away. The accused disappeared into a nearby maize plantation.
 25. It was PW3's testimony that a young man went through the ceiling and found that the deceased had been tied around the neck and legs against the bed. PW3 eventually saw the deceased in that state.
 26. PW2 and PW3 had known the accused for over three years and they confirmed that the accused was the house's Caretaker.
 27. The evidence of PW2 and PW3 was corroborated by PW4. She confirmed that PW2 had called her to the scene and informed her of the problem that befell the deceased. When PW4 reached the scene, she managed to talk to PW2 as well as the owner of the house who was her brother-in-law.
 28. PW4 confirmed that she climbed the ladder to the window of the room where the deceased was. She talked to her and even asked where she came from and her parents. As they talked, the accused, who was a son to PW4's brother-in-law, suddenly appeared inside the room and snatched the phone from the deceased. He threw it to the ground. By then, the deceased was talking to the owner of the house.
 29. Fearing for her safety, PW4 quickly descended and took off. She later heard screams that the deceased had died.
 30. PW5 was Hassan Sabuni. He was a brother to the owner of the house which was under construction. He stated that while he was at the scene before the incident, a lady opened a door on the ground floor



which was locked with a steel door and asked him if he had seen the accused as she wanted to travel. The lady asked for his phone and PW5 gave her the phone. The lady called the accused, but he did not pick. He, thereafter left.

31. On 24th July, 2017, at around noon, the owner of the house called PW5 and told him to go to the house as the accused was beating a girl inside the house. He obliged. On reaching the scene, he asked his son to get inside the room through the ceiling. It was confirmed that the deceased was dead. PW5, among others, reported the matter to the police. By then the accused had already disappeared.
32. On seeing the deceased on 25th July, 2017, PW5 confirmed that she was the one he saw earlier and who attempted to call the accused through his phone in vain.
33. The father to the deceased one William Edome, testified as PW7 and the mother to the deceased one Grace Arakai Edome, testified as PW8. They attested that they rushed to the scene on receiving the news of the deceased. They both confirmed seeing the deceased dead; tied around the neck four times with a rope and her legs tied as well against the bed
34. Several police officers also rushed to the scene on receiving the news of the death of the deceased. They included PW6, PW11 and PW12.
35. PW11 was No. 23139 Insp. Fredrick Simiyu Sirenge, a Scenes-of-Crime officer. He took photographs of the deceased at the scene. He processed and produced the photographs as exhibits together with the requisite Certificate.
36. PW12, No. 58473 Cpl. Isaac Machuka, confirmed attending the scene and retrieving the body of the deceased after the scene was processed. He produced the ropes and strings used in tying the deceased around the neck and legs. He further stated that the body of the deceased was taken to the Mt. Elgon Hospital mortuary for preservation.
37. PW13 was the investigating officer. He was No. 101709 PC Paul Njuguna. He was instructed to take over the conduct of the case on 26th July, 2017, a day after the deceased died.
38. He went to Moi's Bridge Police Station where he met PW6 and was briefed of the assault case. He collected the P3 Form, Investigation Diary and the accused's free bond. He thereafter visited the scene with PW6. He was shown the scene and interrogated PW2, PW3 among others.
39. PW13 searched the room where the body of the deceased was found and retrieved the accused's identity card number 22241694 and Driving Licence No. COC 0912579 together with the accused's passport photographs. He prepared an inventory. PW13 later released the documents to accused's brother.
40. On 28th July, 2017, PW13 attended a post mortem examination of the deceased's body at Mt. Elgon Hospital mortuary. The autopsy was conducted by Dr. Okumu, who testified as PW10. The body was identified by PW9, Joseph Etabo, a brother to the deceased and PW7.
41. On general observation, PW10 found that the deceased had multiple bruises on the face and anterior chest. There was a red tissue around the neck. He also found hemorrhage on the right side and collection of blood on the right side. There was severe trachea hemorrhage. A pressure blood clot was present on the skull.
42. PW10 concluded that the deceased died as a result of severe head injury due to assault and strangulation. The Post Mortem Report was produced in evidence.
43. During his cross examination, PW10 explained that the deceased had been assaulted, but had no cut on the head.



44. PW14, Job Sabwani Wanjala, a Diploma Holder in Mental Health, then attached to Kapenguria County Referral Hospital, testified that he had examined the accused on 28th July, 2017 and found him unfit to plead. He placed him on medication.
45. On 23rd October, 2017, PW15, Dr. Felista Wangeci Mwangi, a Consultant Psychiatrist attached at the Moi Teaching and Referral Hospital in Eldoret also examined the accused. She found her fit to plead thereby paving the way to the trial.
46. After close of the prosecution's case, this Court found that the accused had a case to answer and was placed on his defence.
47. The accused opted to give sworn defence without calling any witnesses.
48. In his evidence, the accused stated that he had been framed by PW2 and PW3 who admitted that they had stolen bags of cement at the construction site where was the Caretaker. He narrated the events of 25th July, 2017 where he stated that he went to his uncle's place (the owner of the house which was under construction) at Moi's Bridge with PW2, where after interrogation, PW2 admitted the theft and was asked to make good of the lost cement bags. That, PW2 was obviously unhappy with him and vowed to teach him a lesson. He then, in collusion with PW3, implicated him with the murder of the deceased.
49. He further stated that, after the meeting aforesaid, he went to work in another site with one Bashir since the accused was a Carpenter. At around 5pm, he was arrested by two officers that he was wanted at the Moi's Bridge Police Station. That, he accompanied the officers to the station where he met PW2, PW3 and PW4 who had been arrested. He was interrogated and released while the others were not. He was, however, advised to remain at the station until late in the night as the members of public were still very hostile and could harm him.
50. The accused stated further that he left the police station at around 7pm and informed the officers that he was travelling to Nakuru for his safety until when he was arrested a month later on allegations of killing the deceased. He denied having run away and taking part in the death of the deceased. He relied on an alibi defence.
51. He admitted that he was a fiancée to the deceased. While admitting that the body of the deceased was found in the house where he lived on the ground floor, he stated that the body was found in another room in the first floor and that the room thereat did not have any doors.
52. The accused vehemently denied the testimonies of PW2, PW3 and PW4 and held to the issue of being framed up.
53. After the close of the defence case, parties filed elaborate written submissions. Learned Counsel for the accused urged this Court vide his submissions dated 29th November, 2022 to acquit the accused since the prosecution had failed to discharge its burden of proof to the required standard. Contra, the prosecution in its submissions dated 28th November, 2022 urged this Court to find that the ingredients to a charge of murder had been established beyond reasonable doubt. Several decisions were referred to in the submissions.

Analysis:

54. 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.

55. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased:

- 56. 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).
- 57. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there were several witnesses who vouched that they saw the deceased dead and was subsequently buried. Some witnessed a Post Mortem examination conducted on the lifeless body of the deceased.
- 58. The second way in which the death of the deceased was proved was through the evidence of PW10, Dr. Okumu, who conducted the autopsy on the body of the deceased on 28th July, 2017.
- 59. PW10 observed a litany of injuries on the head, neck and the chest of the deceased. He concluded that the cause of death of the deceased was severe head injury due to assault and strangulation.
- 60. This Court, therefore, finds and hold that the death of the deceased in this case was proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:

- 61. In this matter, the prosecution availed three eye-witnesses who vouched the involvement of the accused in actions that led to the death of the deceased. The witnesses were PW2, PW3 and PW4. Their evidences have been captured in details above.
- 62. The cumulative effect of the evidence of the said PW2, PW3 and PW4 placed the accused at the scene. It was also proved that the accused assaulted the deceased and disappeared immediately after committing the overt act. The incident took place during day time and in full glare of all those who were at the scene. The deceased raised alarm of her being in danger and later the accused was seen assaulting the deceased. Further, going by the evidence of PW2, PW3, PW4 and PW5, it is possible that the deceased's phone had been taken away and that she had been locked in the room for some days before she was killed.
- 63. To this Court, the defence did not shake the prosecution evidence in any way whatsoever. The evidence of the accused having assaulted the deceased some few days before the deceased died was adduced by the police and was not controverted or at all. The P3 Form, Investigation Diary and accused's free bond remained testimonials to that.
- 64. The witnesses testified before this Court. No adverse remarks were made on their demeanors. The Court believed their testimonies. The issue of grudge, therefore, seems to have been an afterthought. Without shifting the incidence of proof to the accused, it was surprising that none of the three eye-witnesses were, at least, cross-examined on the issue of grudge and theft of the cement bags.
- 65. When such serious allegations are taken up by an accused at the defence stage, the tail-end of the proceedings, it becomes unfair to the prosecution witnesses who are denied the opportunity



to specifically respond to the allegations. As such, the accused's evidence is rendered of very weak probative value, if any. That is the position in this case.

66. Further, the accused's position that when he was arrested on the fateful day, PW2, PW3 and PW4 had already been arrested and that he was released on interrogation, but the rest were detained cannot be truthful. Again, the allegations came at the defence stage and none of the relevant witnesses were examined on the same. No request for the Occurrence Book was made to substantiate the allegation. The accused's position does not, therefore, outweigh the corroborated prosecution's evidence. The same fate follows the allegation that the accused informed the police that he was leaving to Nakuru for his safety.
67. The upshot is that the accused's defence is not holding. The prosecution managed to place the accused as the assailant who committed the overt act that caused the death of the deceased.

Whether there was malice aforethought:

68. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.

69. Section 206 of the *Penal Code* defines 'malice aforethought' 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 fight or escape from custody of any person who has committed or attempted to commit a felony.

70. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.

71. In *Joseph Kimani Njau vs Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki vs Republic* (1993) KLR 171, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.



It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55". (emphasis added).

72. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which malice aforethought can be inferred in the case of *Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63 as follows: -
 - a. The nature of the weapon used; whether lethal or not;
 - b. The part of the body targeted; whether vulnerable or not;
 - c. The manner in which the weapon is used; whether repeatedly or not;
 - d. The conduct of the accused before, during and after the attack.
73. The deceased sustained serious injuries. She was tied with a rope on the neck four times and assaulted. The photographs taken at the scene show that the deceased groaned in much pain as she died.
74. The deceased died of two separate causes. They were strangulation and severe head injury. According to PW10, each of the causes would distinctly cause the death of the deceased.
75. The head is such a critical part of the human anatomy. It goes beyond any peradventure that once the human head is subjected to serious injuries, then death was eminent. Inflicting severe head injuries on someone can only be intentional. The rationale was apparent that it was to deprive the deceased of his life. That is the same fate with the act of strangulation.
76. The accused, therefore, must have purposed to do harm to the deceased. The manner of execution of the mission was very deliberate and targeted. The accused aimed the head; a vital and delicate organ, with all his might. He also strangled her.
77. By considering the cumulative actions of the accused in the manner he executed the killing, it is without any shred of doubt that the accused purposed to kill the deceased.
78. The prosecution case proved malice aforethought in this case.
79. In the premises therefore, this Court finds and hold that the prosecution proved its case on the charge of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
80. The accused herein, Mustafa Iddi Lokono, is accordingly convicted of murder pursuant to Section 322(2) of the [Criminal Procedure Code](#).
81. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 19TH DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

Mr. Bikundo, Learned Counsel for the Accused.



Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

