



**Republic v Longiro (Criminal Case 16 of 2020)
[2023] KEHC 22281 (KLR) (20 September 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL CASE 16 OF 2020
AC MRIMA, J
SEPTEMBER 20, 2023**

BETWEEN

REPUBLIC STATE

AND

FLOMENA CHEYECH LONGIRO ACCUSED

JUDGMENT

Introduction

1. The accused herein, Flomena Cheyech Longiro, 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 26th November, 2020 at Chepkono village of Pokot South Sub-County within West Pokot County, the accused unlawfully murdered Bismark Achira (hereinafter referred to as ‘the deceased’).
2. When the accused was eventually arraigned before this Court for plea-taking, she pleaded not guilty to the offence. The hearing of the case was conducted before two Judges. They were Hon. Bwonwong’a, J. (now retired) and Hon. Korir, J. (as he then was).
3. Yours truly had the duty of writing this judgment.

The trial:

4. The Prosecution called a total of 9 witnesses in a bid to establish that the accused murdered the deceased.
5. The prosecution’s case was that the accused lived in the same homestead with the deceased in Chepkono village. She was a sister to Patrick Longiro who testified as PW2 and Philip Longiro who testified as PW3. The accused was younger to PW3, but older to PW2.



6. The accused's daughter one Shadrine Chepchumba testified as PW1 and a son to the accused's late brother testified as PW4. He was one Alex Musto Serii.
7. The deceased was a farm hand to the one who had leased PW3's land. The deceased hailed from Lukuyani within Kakamega County. He was a younger brother to Lilian Dayo who testified as PW5. A cousin to the deceased one Kenneth Kihindi Kidovasi testified as PW6.
8. PW7, Elijah Lokur Lomuton, was the Chief of Kapiyonge Location wherein the Chepkono village is within.
9. It was PW2's testimony that on 25th November, 2020, the accused employed him to split some firewood for her at an agreed sum of Kshs. 1,200/= . That, he completed the task, but the accused gave her Kshs. 100/= and promised to give the balance later. At around 5pm, PW2 went to take the local alcohol commonly known as chang'aa. He ordered a drink worth the Kshs. 100/= which the accused had given him. On finishing, PW2 returned home only to meet PW3 on the way.
10. PW3 asked PW2 to accompany him back to the drinking place. PW2 obliged. That, they partook alcohol until past 11pm when they returned home. PW2 went to his house as he left PW3 heading to his house.
11. PW2 woke up at around 6:30am and lit fire outside his house. According to PW2, the accused arrived and sought to find out if he had spent the night in his house. PW2 asked the accused why she wanted to know as much. That was when the accused wondered why PW2 did not answer her call of help the night before when she had been attacked by some people including the deceased. The accused then informed that she had injured the deceased on the head and his legs were broken. The accused asked PW2 to accompany her to where the deceased was.
12. PW2 followed the accused. They went to where the deceased was. He was laying on the ground outside his house. The accused's house was adjacent to that of the deceased. PW2 saw the deceased. He was injured on the head and his legs were truly broken. The deceased was still alive and the deceased asked PW2 to get a phone and call the deceased's employer who was a lady from Kamelel. Since PW2 did not have a phone, he left with the accused and PW1 to PW2's brother one Oliver (did not testify) to make the call.
13. Oliver was not at his home, but they got his wife. They were assisted with a phone and as the accused was trying to call the deceased's employer, PW2 returned to where the deceased was so as to ask him of what had happened. The deceased told PW2 that it was the accused alone who had assaulted him using an axe and pieces of firewood. PW2 further stated that the deceased told him that the accused hit him with an axe on one leg and he fell. She then hit him on the other leg. The deceased then lay on the ground facing upwards. It was then when the accused aimed the axe to his head, but the deceased used his arm to shield it. The accused then screamed and asked her children to also scream and call PW2 by his name for assistance. They did so and the accused asked her children to scream louder. PW2 did not hear any screams. It was likely that PW2 was not in his house by then.
14. The deceased told PW2 that it was a blessing in disguise that he did not hear the screams as he could have also been attacked by the deceased. Asking why the deceased thought so, PW2 was informed that as the children screamed, the accused hid herself next to the door ready to ambush him. It was the deceased who further told PW2 that the accused showed him a lot of money and told him that he was going to bribe the police and allege that the deceased and PW2 are the ones who had attacked her. PW2 stated that the deceased asked him to call his employer so as to come and take him to hospital. PW2 went away to look for another phone.



15. PW2 later returned to see the deceased. Since the house of the deceased was next to that of the accused, PW2 heard the accused talking to her children while mentioning his name saying that Patrick had escaped her traps many times. According to PW2, the accused vowed to go for other means to finish him.
16. Shortly, the daughter of the deceased employer arrived with PW3. Alongside the accused, PW2 together with PW3 and the deceased's daughter they decided to get transport to take the deceased to hospital. PW2 and PW3 were dispatched to go and inform the Area Chief, PW7 herein and to ask him to inform the deceased's relatives.
17. Before PW2 and PW3 left, they carried the deceased and placed him inside his house as it was about to rain. They then went and met PW7. They explained what had happened back at their home and PW7 called the police at Kibichbich Police Station. As there seemed to be no available police vehicle, PW2 and PW3 returned home.
18. On the way, PW3 decided to go look for money to take the deceased to hospital. He went to see their elder sister Monica (not a witness). PW2 was to go see how the deceased was fairing on and to ensure that he prepared some food for him as the accused and her children had left the home. They had proceeded to the house of one Rose (not a witness).
19. PW2, however, approached their home with a lot of caution. He immensely feared an attack from the accused. He proceeded to the deceased's house and opened the door. He went in and found the deceased. His position had been changed from the one they had placed him before they left to see PW7. He was laying facing upwards and one of his gum boots had been removed. Initially, they had placed the deceased on his right arm since his left arm was broken.
20. On close observation, PW2 noticed that the deceased was not breathing. He touched his neck and body and realized that the deceased had died a while ago. Shocked, PW2 rushed to the house of Rose where the accused and her children were. On seeing him, the accused approached PW2 to hug him, but PW2 had already noticed that the accused was armed with a knife and he avoided contact with her. PW2 explained to Alex (not a witness) what had happened. Using Alex's phone, PW2 called their older sister Monica and he also informed her of the happenings.
21. It was agreed that PW2 should go to Monica's place. He then returned to his house to get a torch as it was around 7pm. While on the way to his house, PW2 met the accused on the way. He, again avoided her. The accused, however, saw PW2 and asked him to accompany her to take some alcohol. PW2 declined. The accused stopped and intently looked at PW2. A motorcycle appeared and PW2 quickly boarded and left. PW2 saw the accused stab the road with a knife. PW2 safely reached Monica's place and spent their due to the lateness of the hour. PW2 met PW3 at Monica's home.
22. PW7 called PW3 the following morning for details and direction to the home where the deceased was. PW3 informed PW7 that indeed the deceased had passed on. PW7 asked PW3 to inform the police and the relatives of the deceased.
23. According to PW2, the accused had a grudge with him over the land belonging to their brother one Benjamin Longiro where the accused forcefully and wrongly built a house thereon. The house was burnt down after the death of their mother by unknown arsonists, hence, the animosity. Benjamin used to live on another land in Kaptabuk.
24. PW3 largely corroborated the evidence of PW2. He confirmed seeing the deceased injured and they carried him inside his house. He also talked to the deceased on what had befall him and the deceased told him that he had been injured by the accused. PW3 stated that he had no issue at all with the accused



- and denied a conspiracy to get the accused jailed so as to deprive the accused her land. He stated that they lived on the family land which had no title documents.
25. It was PW4 who testified that the accused had gone to his house in the early morning of 26th November, 2020 and asked him if he had spent there. On asking the reason behind the enquiry, the accused told her that he had been attacked last night and raised alarm, but she was surprised that no one appeared. That, in self defence, she had injured one of the attackers on the head and legs. She later realized that it was the deceased.
 26. PW4 stated further that the accused told him that he had already notified PW7. The accused then asked PW4 to accompany her back to the home, but PW4 declined. PW4 then called PW3, who was his uncle, and updated him of the development.
 27. After a voir dire examination, PW1 stated that she saw the deceased who was also known as Mukhwasi with injuries. His legs had broken. PW1, however, did not know who injured him.
 28. In the evening of 26th November, 2020, PW5 received a call and was informed that his brother, the deceased herein, had been attacked and injured. As she had to organize for transport, PW5 asked the caller to take the deceased to hospital. She purposed to travel and see the deceased the following morning. PW5 was later called by PW7 and was likewise informed of the attack on the deceased.
 29. PW5 left for Kapenguria early the following morning. While on the way, she received a call from PW7 that the deceased had passed on. PW5 went up to the Chief's office where she was told that the body was still at the homestead. She was accompanied to the home.
 30. On arrival, PW5 found a deserted homestead. The body of her brother was laying on the floor of a house and there was a lot of blood around. PW5 noted cuts on the legs, the stomach and the head. There was also a lot of blood outside the house. As PW5 was still wondering what to do, the police arrived.
 31. PW7 confirmed having received information on the incident from PW3 and that he asked him to organize and take the deceased to hospital. He also called and informed the OCS, Kibichbich Police Station and PW5. PW7 further stated that when he received the news on the death of the deceased, he informed the police and again called PW5.
 32. As PW7 was on his way to the homestead, he learnt that the body had already been removed by the police and the accused arrested. He returned to his home.
 33. PW9 was the investigating officer. He was No. 72924 Cpl. Terer Maluche. He was instructed to take over the conduct of the case on 27th November, 2020, a day after the deceased died. He received instructions from the DCIO Pokot South.
 34. PW9 proceeded to Kibichbich Police Station where he received a brief of what had happened. He was accordingly updated by the Deputy OCS. He booked his mission in the station's Occurrence Book and was led to the scene. On arrival, the police searched the compound in vain. The homestead was deserted and had four houses. They then searched the houses and eventually found the body of the deceased. He was laying facing upwards and there was blood on the floor. As they were at the scene PW5 joined them and confirmed that the body was that of her brother.
 35. The scene was processed and photographs taken by the Scenes of Crime officers. The body was removed to the Kapenguria County Teaching and Referral Hospital Mortuary.
 36. PW9 looked for the witnesses and recorded their statements. He realized that the accused had reported an assault case at Chepkono Police Post on 25th November, 2020 at about 10pm. The accused had



- stated that the deceased attacked her at 8pm as she was cooking and injured her. The report was booked and she was asked to go to hospital. However, the accused had not sought any medical intervention from the 25th until the 27th when she was arrested.
37. Upon interrogating the witnesses, PW9 returned to the scene and recovered an axe, an iron rod and a piece of firewood as the weapons used in assaulting the deceased.
 38. On 2nd December, 2020, PW9 attended a post mortem examination of the deceased's body at Kapenguria County Teaching and Referral Hospital Mortuary. The autopsy was conducted by Dr. Daniel Munyony, and the report was produced by his colleague Dr. Timothy Chumani Mnangat, who testified as PW8. The body was identified by PW5 and PW6.
 39. On general observation, PW8 stated that his colleague had found the presence of rigor mortis and he had estimated the time of death to be one week. There was parietal hemorrhage and bleeding under the skin. The tibia and fibula bones on both legs as well as the left upper arm humerus bone were all fractured. The fractures were open. The head was also fractured at the back. There were abrasions on the forearm.
 40. It was concluded that the deceased died as a result of severe head injury due to blunt trauma and the fractured legs. The Post Mortem Report was filled in and produced in evidence.
 41. Upon conclusion of the investigations, PW9 recommended that the accused be charged with the murder of the deceased a result of which the Prosecutor agreed with him and the accused was accordingly charged. PW9 produced several exhibits including the axe, 6 photographs and the Certificate thereto, the iron rod, the firewood, and an OB extract from Chepkono Police Post. The accused's mental examination report had been produced by the consensus of the parties at the pre-trial conference.
 42. After close of the prosecution's case, this Court found that the accused had a case to answer and was placed on her defence.
 43. The accused opted to give an unsworn defence without calling any witness.
 44. In her evidence, the accused stated that on the 25th November, 2020 at around 9pm, the deceased went to the kitchen where she was cooking. He was enraged and asked her if she knew him well. The accused asked the deceased to go and sleep and come back the following day, but the deceased refused and insisted that it was the day he was looking forward to. He asked the accused whom she was with and he was told that the children were there. The deceased then left to his house.
 45. Suddenly, the deceased returned while armed with a hoe/jembe. He raised it and wanted to hit one of the children, but the accused shouted at him. The deceased instead hit the accused on the head with the jembe. As the accused tried to leave the house, the deceased hit her again on the back. She fell down and screamed and the children too. She ran out to the shamba and her children followed her. As she escaped, the accused heard people running to their home and heard sounds of beatings from sticks.
 46. The accused went and spent at the house of her sister-in-law, Rose. She then reported the matter to Chepkono Police Post and she was asked to return the following day with some money for the P3 Form.
 47. The accused returned to her house in the morning and found the deceased having been beaten. He was at the door to his house. She asked him of what had happened and the deceased told her that he had been assaulted by some people yester night. The accused then informed PW3 and called the deceased's employer.



48. As no one had money to assist the deceased, it was the accused's testimony that they agreed to look for money elsewhere. The accused went to one Chemagaa (not a witness) to get her Kshs. 3,000/= as she had sold some charcoal to him. As Chemagaa returned quite late, the accused decided to spend there and, in the morning, she was surprised to be arrested by the police.
49. The accused admitted that she had a land dispute with his brothers, but denied having any issue with the deceased. She denied killing the deceased.
50. After the close of the defence case, parties left the matter to the decision of the Court.

Analysis:

51. 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 v. 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.
52. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased:

53. 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).
54. 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.
55. The second way in which the death of the deceased was proved was through the evidence of Dr. Timothy Chumani Mngat, which was tendered by PW8. It was Dr. Timothy Chumani Mngat who conducted the autopsy on the body of the deceased on 2nd December, 2020.
56. PW8 testified of a litany of injuries on the head, legs and the arm of the deceased. He concluded that the cause of death of the deceased was severe head injury due to blunt trauma and the fracture of the legs.
57. 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:

58. In this matter, there was no eye-witness account on what exactly happened until the deceased died. The deceased was found long injured, but still alive. It was the deceased who narrated the ordeal that befell him to PW2 and PW3.
59. Since both PW2 and PW3 did not witness the incident, this Court is duty-bound to carefully scrutinize the instant evidence given that it is on record that PW2, PW3 and the accused, being siblings, were embroiled in a land dispute. The evidence of PW2 and PW3, therefore, amounts to what is legally referred to as dying declarations.



60. As such, the starting point is the law. Section 33(a) of the *Evidence Act*, Chapter 80 of the Laws of Kenya provides as follows: -

33. Statements, written or oral or of electronically recorded of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases:

(a) Relating to cause of death:

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

61. Further, Courts have had several occasions and interrogated the above provisions. In *Pius Jasunga s/o Akumu -v- R* (1954) 21 EACA 333 the predecessor of the present Court of Appeal had the following to say: -

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval.....It is a rule of law that in order to support a conviction there must be corroboration of a dying declaration (*R -v- Eligu s/o Odel & Another* (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.

62. Later, the Court of Appeal in *Stephen Muturia Kinganga v. Republic* (2013) eKLR reiterated the foregone.

63. Deriving from the above, there are four ingredients of a dying declaration. They are: -

- i. The statement must have been made by the deceased.
- ii. The statement must refer to the accused.
- iii. The statement must relate to the cause of the death of the maker or to any of the circumstances of the transaction which resulted in the death, regardless of whether the maker was or was not, at the time of making the statement, under any expectation of death.
- iv. The statement must be corroborated.

64. This Court will now weigh the evidence of PW2 and PW3 against the foregoing. First, there is no doubt that the alleged statements were made by the deceased. PW2 and PW3 had separate occasions and talked to the deceased who told them of what had happened and asked them to call his employer and to also take him to hospital.

65. Second, the statements referred to the accused beyond any peradventure. Third, the statements related to how the deceased sustained the injuries. In fact, the deceased never contemplated death at all. He



- remained positive that he will be taken to hospital for treatment. Either way, the statements disclosed who inflicted caused the injuries and the manner thereof. Fourth, the statements of PW2 and PW3 duly corroborated one another.
66. Having passed the above quadruple test, the evidence of PW2 and PW3 must be further subjected to the defence tendered by the accused. The accused opted for an unsworn defence. He essentially raised two main issues. One, that he did not see who injured the deceased after she ran away with her children, and, two, PW2 and PW3 were framing her on account of a land dispute.
 67. On the first issue, the accused alleged to have been hit with a jembe on the head and back by the deceased. She then fell. When she reported the matter to Chepkono Police Post, she was advised to seek medical intervention and to return for a P3 Form on the following day. Despite the alleged injuries, PW9 ascertained that the accused neither sought any medical intervention nor returned to the station.
 68. The manner in which the accused opted to deal with the issue raises very strong doubts as to the authenticity of the alleged confrontation by the deceased and the subsequent injuries on herself. In a nutshell, the accused's conduct was not consistent with a person injured on the head and back with a jembe by a person who was described by the pathologist as a male African adult, of good physique, with good nutritional status and 5.7 feet tall.
 69. There were also the contradictory accounts on what happened to the deceased as put forth by the accused. According PW2, PW3 and PW4, the accused told them that she had been attacked by some people and the deceased was one of them and that she had injured him. Surprisingly, the accused did not inform the police as such at Chepkono Police Post. Instead, she only stated that she was the one who had been injured.
 70. Further, the accused did not talk of an attack by a group of people and that one of them was the deceased in her unsworn defence. Instead, she narrated how the deceased alone attacked her. She only alleged that the deceased may have been attacked by some people who came to her rescue when she had already left with her children. Therefore, the contradictory nature of the evidence by the accused on the same issue again raises serious doubts on the genuinity of the defence.
 71. On the issue of the possible grudge, whereas there seems to be an ongoing land dispute between the siblings, the deceased was not one of them and there was no evidence that linked the deceased to the land dispute in any way.
 72. PW2 and PW3 testified before this Court. Their demeanors were observed. No adverse remarks were made on any of them. The Court believed the testimonies. They were truthful witnesses.
 73. On a careful consideration, this Court is unable to find that the accused was framed by PW2 and PW3. As a result, the defence, despite being unsworn (which denied the State the opportunity to cross-examine the accused), does not in any manner displace the prosecution's theory that it was the accused who attacked the deceased and caused the injuries which later resulted to his death.
 74. 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:

75. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.
76. 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 flight or escape from custody of any person who has committed or attempted to commit a felony.
77. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.
78. In *Joseph Kimani Njau v Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki v 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 v. Director of Public Prosecutions* (1975) AC 55". (emphasis added).
79. 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 v. 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.



80. The deceased sustained serious injuries. His legs were seriously fractured. His arm as well. The fractures were open. The head was also fractured. In fact, had it not been that the deceased shielded his head and sustained some defence injuries, he would have possibly been killed instantly. The photographs taken at the scene show that the deceased must have groaned in much pain as he died.
81. The deceased died of two separate causes. They were severe head injury and the fractures on the twin legs.
82. 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 fracturing one's both legs since there would be enormous bleeding.
83. 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 broke both legs and an arm.
84. By considering the cumulative actions of the accused in the manner she executed the killing, it is without any shred of doubt that the accused purposed to kill the deceased.
85. The prosecution case proved malice aforethought in this case.
86. 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](#).
87. The accused herein, Flomena Cheyech Longiro, is accordingly convicted of murder pursuant to Section 322(2) of the [Criminal Procedure Code](#).
88. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 20TH DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

