

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAPENGURIA.**  
**CRIMINAL CASE NO. E008 OF 2023**

**REPUBLIC .....STATE**

**- V E R S U S -**

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**REUBEN LOTOLIM .....  
ACCUSED**

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**J U D G M E N T**

The accused, **Reuben Lotolim** faces a charge of Murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the charge are that on 13/8/2023 at about 0.00 hours at Loki Village, Kopurio village Kacheliba sub-county, he murdered **Korikwang Loitereng**

The Accused denied committing the offence and the case proceeded to full trial with the prosecution calling a total of three (3) witnesses.

When called upon to defend himself, he testified on oath and called three (3) other witnesses.

**PW1 Prisca Cheptang Korikweng** is the wife of the deceased. She testified that on 12/8/2023 she was at her home in Loki with her five (5) children and her husband. At about midnight, the door was hit, and she switched on a D-light (solar light) and she saw Reuben Litolim in the house; that her husband got out of bed, PW1 said that Reuben who is his brother-in-law was followed by five (5) other people. She did not recognize any of the other people; that the people got hold of the husband and she was slapped by one of the men when she screamed. The people pulled the deceased outside. One man had gotten hold of her. She heard her husband scream and she was released and ran to the neighbour's house with one child leaving other children behind. PW1 left the people assaulting her husband whom they had moved near the fence. She slept at her neighbour's house -Longorian where she only found the wives. She went back to her house the next morning about 5.00a.m. with the neighbour's wives. They found the deceased at the fence having cuts all over the body and he was dead. She went to call the deceased's brother called Longorian who informed her co-wife and other deceased's brothers. PW1 stated that the

deceased and accused had been quarrelling over land and accused's motor cycle; that the deceased had spoilt the Accused's motor cycle and that accused had gone to her house twice before, during the night, over the said motorcycle.

**PW2, Joseph Longoriatum Yapaa** recalled that on 13/8/2023 about 8.00a.m. one of his brothers called and informed him that his brother Loitereng had been killed at his house in Loki. He was not told who had killed the brother and went to report at Kacheliba police station. He proceeded to the scene with police and found the deceased had been cut on both hands, legs, head and neck and the body was near the fence. The scene was disturbed, the door to the house had been cut open. PW2 said that PW1 told him that the first person she saw enter the house was Lotolim (accused) because she had lit her solar light. PW2 said that on 13/8/2023 accused called him about 2.00 p.m. asking why he was investigating the matter yet it had ended and PW2 informed him that police were investigating the Murder; that on the date the accused's child was supposed to be buried on 8/8/2023, the deceased had called PW2 and asked how he could attend the burial yet there was a lot of animosity and PW2 advised the deceased not to attend the burial; that

the accused had alleged that the deceased bewitched his child; that accused called him again on 16/8/023 asking him why he was concerned about the deceased's body and if he knew that he too could be killed.

PW2 attended the post mortem on deceased's body and the Doctor found that the cause of death was the injury to the neck. PW2 further told the court that the accused and deceased had a dispute over land and they had once fought with bows and arrows and were taken to police station but were released to go and resolve the issue at home; that deceased went home and damaged Accused's motor cycle.

**PW3 PC Daniel Wangai** is the Investigating Officer in this case. On 13/3/2023, he visited the scene of murder at Loki with other police officers and PW2. They took photographs of the deceased's body which had sustained cuts wounds on both hands, legs, head and neck. He interrogated PW1 and other witnesses next day and PW1 stated that the accused in company of other people entered her house, pulled the deceased out of the house and started to assault him and that she had lit a light when accused entered; that PW1 was aware that there was a land dispute between accused and deceased,

and allegation of witchcraft all which had been reported to the police. PW3 attended a post mortem conducted by Dr. Luke where the family identified the deceased's body. By consent of the parties, the post mortem report was produced in evidence (P.Exh.1) where the doctor found that the cause of death was exsanguination secondary to assault with sharp object(s) injuring major neck vessels.

PW3 said that he started to look for accused who was found on 8/11/2023 at Kacheliba market and arrested him.

**Defence Case: -**

The accused testified on oath and denied the offence (DW1). He stated that on 13/8/2023, he was at home mourning his child who had died; that he lives far from the deceased and that PW1 lied to the court. He denied having gone anywhere and that he even attended the deceased's funeral. He admitted that the family had land in Loki which was shared and the dispute between him and deceased was resolved by elders and he gave some land to the school. He admitted not following up about the deceased's death with investigations and that he feared going to Loki; He denied having any dispute with the deceased or the wife.

**DW2 Christine Cheposerkor** is Accused's first wife. She recalled that on 13/8/2023, she was at her home in Kalemrekai with her neighbours and they were still mourning her child who had died. She said that she attended deceased's funeral and so did accused. She denied that there existed any kind of dispute between the accused and the deceased; that when deceased died, she was at home with accused the whole night with neighbours. She said that infact, the Accused's second wife who lives at Loki was with them at her home at Kalemrekai.

**DW3 Tepareng Lomunga** a village elder at Kalemrekai knew accused as a neighbour for thirty (30) years. He knew that accused has two wives but does not know where the second one lives. He also knew the deceased. He said that he was with the Accused on 13/8/2023 morning when Accused's brother came to report about the death of the deceased. He denied that the accused ever left his home after death of the deceased. He was not aware of any land dispute between accused and deceased. He admitted that the deceased had not attended the funeral of accused's child.

**DW4 Gladys Lotolim** is the accused's second wife who resides at Loki. She testified that on 13/8/2023, she was at Kalemrekai for a funeral of the co-wife's child. She denied the existence of any dispute between accused and deceased or with PW1.

**DW5 Joseph Lomem Loitareng** is a brother to both accused and deceased. He testified that on 13/8/2023, the accused was at Kalemrekai, the home of his first wife where a child had died and that all of them received the news of deceased's death while at Kalemrekai; that it is Joseph Longuritung (PW2) who called him

with the information of the death of deceased at 9.00a.m. He proceeded to Loki and found the police already at the scene. He denied that there had been a dispute between accused and deceased over land.

**Determination: -**

The accused faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The onus rests on the prosecution to prove its case beyond reasonable doubt. The standard of proof was discussed in the **Locus Classicus**

**Case of Woolmington -V- DPP 1935 UKHL1,** Where the court stated thus; **“Throughout the web of the English Law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner’s guilt..... if, at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained”**

**Lord Denning in Miller -V- Ministry of Pensions (1947) ALL ER 372** defined what ‘beyond reasonable doubt’ means, and said

**“The degree is settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would fail to protect the community if it admitted fanciful possibilities to defeat**

**the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice”.**

Guided by the above decision, the prosecution has the duty to prove beyond reasonable doubt, the following ingredients.

- (1) The death of the deceased;**
- (2) That the accused caused the death through an unlawful act or omission;**
- (3) That the accused possessed malice aforethought.**

**Death of the deceased: -**

PW1, 2,3 and DW5 saw the deceased's body at scene of crime with cut wounds on the hands, legs neck and head. PW2 attended the post mortem performed by Dr. Luke Ambuka. The Doctor found inter alia that there were deep cuts on the right neck with all major blood vessels severed and fractured cervical bones, apart from the other injures on the rest of the

body. The Doctor found that the cause of death was exsanguination secondary to assault with sharp object which injured the major neck vessels. There is no doubt that the deceased met his death, not of natural cause, but by somebody or people inflicting serious injuries all over his body. Accused's death is not in dispute.

**Whether accused caused the death: -**

The attack on the deceased occurred deep in the night, at midnight. The only witness to the attack is PW1. When the case entirely turns on evidence of identification or recognition, the trial court has to warn itself of the dangers of relying on such evidence because of possibility of error.

**In Wamunga -V- Republic (1989) KLR 422, the Court of Appeal said inter alia “where the only evidence against a defendant is evidence of identification, or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can make it a basis of a conviction”.**

Again .....**”if a case depends entirely on evidence of identification, the court must warn itself of the dangers of such evidence because of possible errors that can be made and lead to injustice”.**

**In Anjoni -V- Republic (1980) eKLR 59, the Court of Appeal said “This was a case of recognition, not identification of assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on personal knowledge of the assailants in some form or other”.**

In this case, PW1 is a sister-in-law to the accused and had known the accused for seven (7) years, the time she had been married to the deceased. She said that once the door was hit, she lit the solar light (D-light). Although she did not describe the clothing, she said that night, accused wore the same clothes he had worn during the day.

PW1 reported to PW2 and PW3 when she made the report that she had lit the solar lamp and was able to see the accused amongst the assailants who attacked the deceased. PW1 was consistent in her first report to PW2 and PW3 or the police. The

importance of a first report was emphasized in the case of **Kioko Kilonzo & others -V- Republic CRA.82-85 /2011** the Court of Appeal considered the case of **Terekali -V- Republic (1952) EACA** while the Eastern Court of Appeal stated this **“Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and an accuracy of subsequent statements may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when the recollection is very fresh and there has been no time for consultation with others....”**

According to PW1, the accused had come to their house at such time twice before and they quarreled with the deceased about the accused’s motor cycle which the deceased had spoilt; that they also had a land dispute. This testimony of PW1 was never challenged.

PW2 corroborated PW1’s testimony that indeed there was bad blood between accused and deceased and in addition, the accused had even accused the deceased of bewitching his child who had just been buried. PW2 told the court that that is the

reason that the deceased did not attend the burial of the said child. DW4 confirmed that the deceased did not attend the child's burial. PW2 went in detail to explain that at one time Accused and deceased had fought with bows and arrows and the matter was reported to the police, but the police told them to go and resolve it at home.

The Investigating Officer (PW3) also confirmed that the dispute between accused and the deceased had even been escalated to the police station and they had been advised to resolve the matter at home. In fact, PW2's testimony was never challenged in cross examination at all. The defence evidence that there was no dispute between accused and deceased was not true. Accused, DW2-5 were not truthful. I believe the prosecution. Infact, at first the accused seemed to accept that there was some land dispute which was resolved but in further cross examination, denied that there was ever such dispute. One therefore wonders why the accused would deny existence of a dispute between him and the deceased brother.

To further demonstrate the bad blood between accused and deceased, DW5 told the court that on 13/8/2023, he received a call about the deceased's death while at Accused's home, but

the accused never went to deceased's home to establish what had happened. A brother would not have acted like the Accused did unless they had issues between them as I believe was the case. PW2 also told the court that the accused had called him on 16/8/2023 to ask why he was insisting on investigating the deceased's murder when the matter had ended.

Having weighed the evidence of the prosecution witnesses against the defence this court is inclined to believe the prosecution evidence, and this court is satisfied that the prosecution witnesses were truthful. The defence witnesses were there to save the accused from the serious charge he faces. I am satisfied that PW1 recognized the accused on the night of the attack

The accused raised an alibi defence by claiming that he was not at deceased's home on the night 12<sup>th</sup> and 13<sup>th</sup> August, 2023. There is no burden placed on an accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of doubt. In the case of **Kiarie -V- Republic (1984) KLR**, the court stated

**“An alibi raises a specific defence and an accused person who puts forward an**

**alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that it not unreasonable.”**

**In Victor Mwendwa Mulinge -V- Republic (2014) eKLR the court rendered itself thus “it is trite that the burden of proving the falsity if at all of an accused’s defence of alibi lies on the prosecution”.**

**In Patrick Muriuki Kinyua & Another -V- Republic (2015) KECA 1000 it was held that “an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged”**

The accused and all the four (4) defence witnesses testified to accused being at Kalemrekai on 13/8/2023.

The appellant did not raise this alibi defence when the prosecution witnesses were giving evidence. It must be noted

that the defence case starts during the cross examination of the prosecution witnesses when the defence case is expected to put to these witnesses so that by the time the accused testifies, his evidence does not come out as an afterthought. **R . V. Sukha Singh S/O Wazir Singh & Others (1939) 6 EACA 145**, the former Court of Appeal for Eastern Africa upheld the decision of the High Court in which it was stated:

***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".***

In **Wang'ombe v the Republic [1980] KLR 149**, this Court of Appeal (Madan, Miller and Potter, JJA) held that: **"...in Ssentale vs. Uganda [1968] EA 365, 368 [Sir Udo Udoma CJ]...said that a prisoner who puts forwards an alibi as**

**an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion...The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it. ....The alibi was considered by both courts below, the High Court saying (as we have already set out) that it needed to be weighed with the evidence of the prosecution,**

**particularly that of the complainant and his wife, and the fact that the appellant denied knowing Lucy, and particularly with Lucy's evidence. To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers. They do not have to pedantize. What other approach is there? Judicial officers are not clairvoyant!"**

Taking cue from the above decision, this court has to weigh both evidence of the Prosecution and defence to determine its value and veracity.

The alibi was pleaded for the first time in the defence hearing. Accused was arrested way back in 2023 and it was not until two years later in 2025 that he purported to raise the alibi defence. Besides, the defence witnesses apart from generally saying that accused was at his Kalamrekai home, on 13/8/2023, none of them told the court where he was at midnight of that day. Raising of the alibi late in the day is an afterthought and

weakens the credibility of the defence witnesses. The alibi defence, weighed against the prosecution evidence did not dislodge the prosecution evidence. I also noted earlier that the defence witnesses did not impress the court as truthful witnesses.

Under section 143 of the Evidence Act, a fact can be proved by the testimony of one witness. The section provides as follows: -

**143.**

**No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.**

In this case, the only witness called was PW1. The accused questioned why the children were not called as witnesses. PW1 told the court that she has five (5) children who were in the same house at the time of attack.

The court observed that PW1 is a very young mother and had been married for only seven (7) years. Even if she had children, they cannot be over seven (7) years of age. In any event it is the duty of the prosecution to avail witnesses that will assist the court arrive at a just decision. The incident

occurred deep in the night about midnight. PW1 said that they were already in bed. Children of tender age may not have been of any value to the court. In **Keter -V- Republic (2007) 1EA 135**, the court held inter alia **“Prosecution is not obliged to call a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond any reasonable doubt”**

In the circumstances, the police must have found PW1 to be the only relevant witness but not the children.

PW3 testified that accused disappeared after the murder till his arrest on 8/11/2023, about three (3) months later. Although the defence witnesses stated that accused never left his home, this court has already found the defence witnesses to be untruthful and I prefer the testimony of PW3. If the accused had attended the deceased’s funeral, nothing would have prevented PW3 from arresting him because they already had PW1’s statement as to whom she saw on the night of the murder. The accused’s conduct of disappearing after the brother’s murder goes to corroborate PW1’s testimony that he was one of the assailants.

**Whether Accused possessed malice aforethought : -**

Malice aforethought is defined in section 206 of the Penal Code as **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.**

In **Hyam -V- DPP (1974) AC** the court held inter alia **“malice aforethought in the crime of murder is**

**established by proof beyond reasonable doubt when during the act which led to the death of another, the accused knew that it was highly probable that that act would result in death or serious**

Malice aforethought can also be inferred from the acts of the accused person as was stated in **Ernest Asami Bwire Abang'a alias Onyango -V- Republic CRA.32/1990**, where the court held; **“the question of intention can be informed from the true consequences of the unlawful acts or omission of the brutal killing which was well planned and calculated to kill or do grievous harm upon the deceased”**.

**In R.V Tubere s/o Ochen 12 EACA 63** the court said, **“In determining the existence or nonexistence of malice, one has to look at the facts proving the weapon used, the manner in which it was used and the part of the body injured”**

I draw guidance from the above decisions. In this case, malice flows from the kind of injuries that were inflicted on the deceased. Whoever inflicted them wanted the deceased dead by all means. The Doctor found as follows: - the deceased had

sustained multiple wounds across the entire body; right hand on the palm, left wrist with deep cut wound, fracture and cut tendons; deep cut on the left arm; deep cut wound on the right posterior leg, deep cut wounds on the head; 2 on the left and 3 on the right and occipital, with skull exposed; deep cut wounds on the right neck with major blood vessels severed and fractured cervical bones. All were inflicted by a sharp object. It was a vicious and savage attack. This is more than enough evidence to prove that accused possessed malice aforethought.

In conclusion, I find that the prosecution have proved beyond reasonable doubt that the accused, with malice aforethought attacked and inflicted very serious injuries on his own brother, the deceased. I find him guilty as charged under section 203 as read with section 204 of the Penal Code and convict him accordingly.

**Delivered, Dated and Signed** at Kapenguria this **12<sup>th</sup>** day of **November, 2025**

**R. WENDOH  
JUDGE**

**Judgment delivered in the presence of:-**

Mr. Mokaya for the State/ Prosecution Counsel

Mr. Lowasikou for accused

Accused – Present (virtually)

Juma/Hellen – Court Assistants