

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA.
HC. CRIMINAL CASE NO. E004 OF 2024

STATE.....
PROSECUTOR

- V E R S U S -

DAVID LOTIOLE
ACCUSED

J U D G E M E N T.

By the information dated 23/7/2024, the accused, **David Lotiole** was charged with the offence of **Murder contrary to section 203 as read with section 204 of the Penal Code.**

The particulars of the charge are that on 13/4/2024, at Chemalel Nyaripotwa sub location, Pokot Central, murdered Hassan Pkisang. The accused denied committing the offence. The case proceeded to full trial with the prosecution calling a total of five (5) witnesses. After the close of the prosecution case, the accused testified on oath and did not call any witness.

The prosecution was led by Mr. Majale. Senior Principle Prosecution Counsel

While the defence Counsel was Ms. Opondo.

PW1 Joylin Nacholia recalled that on 13/4/2024, about 6.30p.m. she was coming from the Posho mill going home, when she saw her brother-in-law, the accused cutting her husband, who was walking ahead of the Accused; that accused used a panga to cut the deceased on the neck, through to the jaw. She did not hear them talk; that she screamed and accused ran away and deceased was left at the scene. The police came to the scene, and the body was taken to the deceased's home which was about forty (40) metres from the scene; police took pictures of the scene before the body was taken home; PW1 testified that the accused left the panga and ran.

PW1 identified the panga that was blood stained. PW1 said that she had known the Accused for fifteen (15) years and she had never disagreed with Accused, nor did deceased have any dispute with accused. According to PW1 the Accused is known as Komolingiro.

In cross examination PW1 admitted that in her statement to the police, she recorded that she saw the accused running but not

that she saw accused cutting the deceased. She further explained that accused and the deceased used to go to work together and come back home together; that they had gone to work together on the said date.

PW2 Felix Kura testified that on 13/4/2024, about 6.30p.m. he left Chemalel Centre to go home he was alone and David Lotiole (Accused) was ahead of him with Hassan; that suddenly, he saw Accused cut Hassan. He ran there and accused threw the panga and ran. Later he saw the blood stained panga at the police. PW2 said Accused and deceased had a dispute over distribution of land. PW2 said there was nobody else on the road and that PW1 was at her home when the incident occurred and that she came to the scene after the incident had occurred.

PW3, Veronica Limereng, recalled that on 13/4/2024 about 6.40p.m. she was at her home which is on a hill while others live on lower area. She heard screams, ran to the direction of the screams emanated from. She found children at the scene who told her that accused cut the deceased and ran. PW3 also found, Joylin, Joel, and Dominic with other people. PW3 said that she knew the two, accused and deceased were her

brothers and had a land dispute; that accused used to claim that he was given bad land.

PW4 PC Kipyegon Cheruiyot testified that he went to a murder scene at Chemalel. They found the body of Hassan Pkisang with a cut on the back of the neck and right jaw. He took photographs of the scene and drew a sketch plan. When still at the scene, PW4 got information that Accused had surrendered at Lomut police station while carrying a blood stained panga (P.Exh.2). They took the body to the mortuary and recorded witness statements. PW4 collected Accused from Lomut police station.

DW5 Dr. Fredrick Tulel Losiamoi conducted post mortem on the deceased on 19/4/2024. He found that the body had rigamortis; that there was a cut wound on the neck which fracture the cervical spinal code and had cut both the carotid and jugular arteries. He formed the opinion that the cause of death was transection of the spinal code.

When called upon to defend himself, accused testified on oath (DW). He testified that on 13/4/2024, he went for a contract at Lomut. He denied killing the brother; that he was informed by

a friend that there were rumours that he had killed his brother and he decided to go to the police station for security because his brothers were going to kill him; that there is a land dispute at home between his father and deceased's father but he had no dispute with deceased. In cross examination, he said that he shares a father and mother with the deceased. He denied that they ever used to go to work with deceased and that when going to work he used to carry his tools for making bricks not a panga.

Ms. Opondo, the defence Counsel filed submissions in which she argued that the accused raised an alibi defence and that the onus rests on the prosecution to disprove the alibi; that the accused has no duty to prove the falsity or otherwise of the alibi; that it is sufficient if an alibi raises a doubt in the Prosecution case, then the prosecution has not proved its case. Counsel relied on the decision of **Kiarie -V- Republic (1984) KLR 739; Wangombe -V- Republic (1976-1984) KLR 1368 and Alice -V- Republic CRA. E018/2023**. Counsel further submitted that the evidence against the accused is all hearsay and there is neither direct nor circumstantial evidence against the accused upon which a conviction can be founded.

The court has considered the evidence tendered herein, the submissions by the defence Counsel. This being a Criminal case, the standard of proof is one of beyond reasonable doubt. The onus of proof rests on the prosecution to prove its case beyond reasonable doubt. The said standard of proof was discussed in the celebrated case of **Woolmington -V- DPP (1935) U KHL 1** where the court stated thus:-

“Throughout the web of the English Criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners’ guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), 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.”

The Court of Appeal in Moses Nato -V- Republic 2015 eKLR considered what is reasonable doubt and expressed itself thus; **“what amounts to reasonable doubt?** This issue was addressed by **Lord Denning in Miller -vs- Ministry of Pensions [1947] 2 All ER 272** where he said **“That degree is well 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 deflect 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”.**

Under Section 203 of the Penal Code, the prosecution has 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.

Of Death

There is no dispute that Hassan Pkisang died on 13/4/2024. PW1, deceased's wife, PW2 and 3 the deceased's siblings saw the deceased's body soon after he met his death. PW5 Dr. Tulel who conducted the post mortem on the deceased confirmed that the body was identified to him by PW1 and one Dominic before he performed post mortem. He found that the deceased had sustained a cut on the neck region which cut through the cervical spinal cord bones behind the neck, the carotid arteries and jugular veins. Another cut wound was on the mandibular region around the chin, complete amputation of the right-hand mid region. He found the cause of death to be complete transection of the spinal cord. The deceased's death was not from natural causes but caused by somebody.

Whether accused caused the unlawful act or omission: -

There is no doubt that the deceased was a brother to Accused

PW2, and 3 and husband to PW1. PW3 is clear, she arrived at the scene where the deceased was injured after the deceased had been killed.

What the court has failed to reconcile is the testimonies of PW1 and 2.

According to PW1, she was coming from the posho mill and following accused who was walking with the deceased when accused suddenly turned on the deceased cutting him on the neck, as a result of which he died. She said she was the first person at the scene.

PW2 also claimed to have been following accused and the deceased who were walking home ahead of him when accused turned on deceased and cut him on the neck killing him instantly. He was specific, that PW1 found him at the scene, meaning PW1 did not witness the incident. The question is, between PW1 and 2, who witnessed the murder or did they only hear of it.

Of interest is PW3's testimony that when she heard screams and went to the scene, she enquired from the children what had happened. This is despite the fact that PW1 and 2 were at

the scene before her. They did not tell her how the deceased died. Because of the contradictory accounts of the events of the day by

PW1 and 2, this court doubts whether either of them witnessed the murder of the deceased. Had they been telling the truth, they would have seen each other when the attack on the deceased allegedly took place.

Both PW1 and 2 testified that after the accused assaulted the deceased, he threw away the panga and ran. However, PW4, the

Investigating Officer testified that the Accused surrendered at Lomut Police Station with a blood-stained panga. In my view, the officer who arrested accused at Lomut police station should have been called as a witness to tell court exactly what report accused made and to confirm if accused had the panga produced in court. In addition, the panga was never taken to Government Analyst to establish whether there was indeed human blood on the panga and whether the blood was the deceased's.

In the end, this court finds that there is doubt in the prosecution case as to whether PW1 and 2 witnessed the attack on the deceased. There is therefore neither direct nor circumstantial evidence linking accused to the offence. All that is left is suspicion as to why accused surrendered to Lomut police station but as pointed out earlier, the arresting officer was not called to confirm under what circumstances accused was arrested.

For the above reasons, the doubt in the prosecution must be resolved in favour of the accused. He is hereby acquitted of the charge of murder and is set at liberty forthwith unless lawfully held.

Delivered, Dated and signed at Kapenguria this 27th day of November, 2025

**R. WENDOH.
JUDGE.**

Judgment delivered in open court in the presence of:

Mr. Mokaya for State

Ms. Opondo for accused

Accused - Present

Juma/ Hellen - Court Assistant.