

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT LODWAR
CRIMINAL CASE NO. E010 OF 2024

REPUBLIC.....

.....DPP

VERSUS

EKAI LOKOLE KIONG'A alias JOSEPH NAPESE ETOOT.....

.....ACCUSED

JUDGMENT

1. The accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 21st day of June 2024, at Nachuchukaet village in Lokichogio in Turkana West Sub County within Turkana County, the accused murdered ABDI TOPOSI alias TUURU.
2. The accused person pleaded not guilty to the charge. Mr. Kosgei, learned counsel for the accused, informed the Court that the defence would rely on intoxication and self-defence.
3. In an effort to discharge the burden of proof under section 107(1) of the Evidence Act, the prosecution adduced evidence through five witnesses, who testified as follows:

The Evidence

4. PW1, Margaret Lomala, testified that she was a resident of Lokichogio and operated a small retail shop. She recalled that on 21.06.2024, she had just returned home after closing her shop when she heard a commotion involving people fighting at a neighbour's house. She proceeded to the scene and found the accused seated on the deceased's chest. The accused pleaded with her to separate him from the deceased. She then witnessed the accused hitting the deceased with his fists and banging the deceased's head on the ground. She pleaded with the accused to stop the fight, which he did, and he got up, leaving the deceased lying on the ground, immobilized. She then asked the deceased to get up, which he did with difficulty, and he supported himself on the gate. The deceased told her that he could not leave as he had no energy and asked to rest there. The accused later appeared, forcefully removed the deceased, and threw him outside the gate, where he fell to the ground. She pleaded with the deceased to go to hospital, but he declined, and she thereafter returned to her home. She later learnt that the deceased had been taken to hospital, where he died on the night of 23.06.2024. She clarified that the accused was her neighbour, whom she had known for many years.
5. On cross-examination, she stated that she was not aware that the accused and the deceased were cousins. She further stated

that she was not present when the fight began and could not tell whether either of them was drunk. She added that she did not know why the deceased was at the accused's home. It was her further testimony that she knew the deceased to be an employee of Lokichogio Travellers, while the accused was a mason.

6. PW2, Diraman Kisili, testified that he was a resident of Lokichogio and a former colleague of the deceased at Travellers SACCO, where he worked as a clerk. He recalled that on 21.06.2024, he was at work with the deceased during the day, and they worked until 6:00 PM. The deceased informed him that, since his wife had travelled, he would be visiting another lady's house to eat. The next morning, he was called by another colleague, Lokeni, who informed him that the deceased had been beaten by the accused and was in hospital with serious injuries. He went to the hospital and found the deceased in a poor state. The deceased told him that he had been attacked by the accused and asked him to report the matter at the police station, which he did. Upon returning, he found an ambulance ready to take the deceased to Lodwar Referral Hospital. The ambulance driver later informed him that the deceased had died on the way to the hospital.
7. On cross-examination, he stated that he did not witness the fight between the deceased and the accused.

8. PW3, Mike Lokenya Etot, introduced himself as a tout at the bus stage and stated that he resided in Lokitera. He testified that on 21.02.2024, he was at work with the deceased, and they parted ways in the evening. The next day, on his way to work, he passed by the deceased's home, where he found many people at the homestead. He saw the deceased lying naked on a mattress, being fed but unable to eat. They then took the deceased to Lopiding Sub County Hospital, from where he was referred to Lodwar Referral Hospital. He recalled that while at the deceased's homestead, he was informed that the deceased had been beaten by one Napese, whom he later learned was a fellow villager. He added that when he saw the deceased, he had a swollen head, a bruised left shoulder, and his neck appeared loose.
9. On cross-examination, he stated that he knew the deceased as well as the mother of the accused.
10. PW4, Dr. Ekiru James Kidaluo, introduced himself as the Director of Medical Services, Turkana County, and a graduate of Moi University. He stated that an autopsy was conducted on the body of the deceased on 25.06.2024, at which time rigor mortis and algor mortis had set in. He explained that, externally, the body had lacerations on the right shoulder and on both arms. There was also a laceration on the right vertebral column and the

left shoulder region. Additionally, there was a cut wound on the left index finger, and the left wrist joint was swollen. Internally, there were no remarkable observations, except that the head had a massive left-sided subdural haematoma covering the frontal, parietal, and occipital lobes. He therefore formed the opinion that the cause of death was traumatic brain injury with a massive left-sided subdural haematoma. He produced the autopsy report, which was admitted as PEXH 1.

11. On cross-examination, he stated that ideally a pathologist conducts post-mortems. He explained that a haematoma is clotted blood, which could be caused by alcohol or even age, although he neither determined the age of the deceased nor obtained a toxicology report.
12. On re-examination, he stated that he was qualified to conduct an autopsy by virtue of being a qualified medical doctor. He added that toxicology was not carried out because it had not been requested.
13. On being questioned by the court, he stated that there were no external injuries to the head or ruptured vessels visible. He further added that the hospital did not have a pathologist.
14. PW5, No. 105456 PC Steven Bekerenge, testified that he was attached to the DCI, Turkana West, performing investigative duties. He stated that he had taken over the file from PC

Harrison Sese in July 2024 and had familiarized himself with the facts of the case. He testified that on 23.06.2024, they received information from Lokichogio Police Station alleging that the deceased had been murdered by the accused. Investigations were conducted into the matter, which had initially been reported as assault. It was determined that the deceased had been taken to Lokidong Medical Centre before being transferred to Lodwar, and that he died at Lokichar on the way to Moi Teaching and Referral Hospital, Eldoret. He produced the statement of Loro Lokale, recorded on 07.07.2024, as PEXH 2, which indicated that on 21.06.2024, Loro was heading home from visiting his sister and, upon reaching PAG Church in Lokichogio, he found the accused fighting with the deceased. According to Loro, the accused struck the deceased, including hitting him on an electric pole. Loro attempted to separate them but was hit by the deceased and subsequently left the scene. The following day, Loro went to the deceased's home and found him lying in bed with serious injuries. Loro added that he knew the accused well and that the place of the fight was well-lit with electric lights. He further stated that the accused was arrested by members of the public and taken to the police station.

15. On cross-examination, he stated that the first investigating officer who visited the scene recorded that the scene was 50 meters from the victim's home, at the gate of the accused.
16. The evidence of PW5 marked the close of the prosecution's case. The court ruled that a prima facie case had been established against the accused, who was therefore called upon to enter his defence.
17. Ekai Lokole Kiong'a was the only defence witness and gave a sworn testimony. He stated that he resided at Lokichogio with his wife and eight children and that he had worked as a builder prior to his arrest. He recounted that on 22.06.2024, he had been paid wages for five days at his place of work in Lomidate and headed home to Lokichogio, arriving at about 5:30 PM, where he found his children. They informed him that their mother, who is now deceased, had been taken to hospital due to complications from ulcers. He prepared a meal for the children and, at about 11:00 PM, decided to rest outside because of the high temperatures. While lying down, he saw someone who introduced himself as Turkwel, whom he recognized as the son of his uncle's son, enter his compound demanding money to drink. When he said he did not have any money, the person turned violent and attacked him. He defended himself and overpowered the attacker. He shouted for help in vain and decided to escape, but before he

could reach the gate, the deceased caught up with him and they continued fighting. PW1 happened to pass by and separated them. She then returned to the compound to sleep. A few days later, while at the home of his cousin having tea, he was arrested for killing the deceased, a crime he denies having committed.

18. On cross-examination, he stated that when PW1 arrived at the scene, she did not find him lying on top of the deceased; instead, she found them fighting, and when she asked them to stop, they complied. He added that he was arrested two days after the incident.

19. His evidence marked the close of the defence case.

Accused Person's Submissions

20. The accused submits that the prosecution has failed to discharge its burden of proof and that, under Section 210 of the Criminal Procedure Code, the accused ought to be acquitted. The accused argues that it is undisputed that the fatal altercation occurred at the deceased's home, suggesting that the deceased was the initiator of the confrontation. This, the accused contends, indicates that he was not the aggressor but was instead placed in a vulnerable and defensive position.

21. The accused further contends that the medical evidence is inconclusive and contradictory. It was the evidence of PW4 that the deceased died of a subdural haematoma, yet there were no

external injuries or trauma to the head, which would typically accompany such a condition if caused by blunt force. The accused raises the possibility that the deceased may have died due to unrelated medical conditions, as PW4 confirmed that several other factors including over-bleeding, stroke, infection, and the absence of a toxicology report or histological examination of the brain could have indicated the likely cause of death. He submits that it is highly possible that PW4 relied on information provided by the person who brought the deceased, namely that he had been in an altercation, and thus interpreted the findings in a manner that supported the assault theory.

22. The accused argues that, given the deceased passed away 24 hours after the incident while being transported to hospital, it is impossible to rule out intervening causes or events that may have contributed to death.

23. The accused further asserts that the element of malice aforethought has not been established. The circumstances of the fight, he contends, point to self-defence, rather than premeditated intent, and there is also the possibility of intoxication of both the deceased and the accused.

Submissions By The Prosecution

24. The prosecution refuted the accused's suggestion that the deceased was the aggressor, arguing that the witnesses'

recollections depict the deceased as a helpless person being attacked.

25. Regarding the medical report, the prosecution contends that, far from being inconclusive or contradictory, it corroborates the evidence of the eyewitnesses.
26. On the issue of the delay in death, the prosecution submits that the deceased died within 24 hours of the assault, and that a person can be charged with murder if death occurs within one year of the causative act.
27. The prosecution therefore urges the court to find the accused culpable for the murder of the deceased.

Analysis and Determination

28. The accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The prosecution therefore bears the burden of proving, beyond reasonable doubt, the following elements:
 - a) the fact and cause of death of the deceased;
 - b) that the death was caused by an unlawful act or omission of the accused; and
 - c) that the accused acted with malice aforethought as defined under section 206 of the Penal Code.

Proof Of Death And Cause Of Death

29. There is no dispute as to the fact of death. The evidence of PW2 and PW3 confirmed that the deceased was admitted to hospital following the assault and later succumbed while being transferred for further medical care. This fact was further corroborated by the post-mortem report produced by PW4.
30. As regards the cause of death, PW4 formed the opinion that the deceased died as a result of traumatic brain injury with a massive left-sided subdural haematoma. Although the defence challenged the absence of external head injuries and the lack of toxicology analysis, the court notes that medical evidence need not be perfect to be credible. PW4 explained that subdural haematomas may arise from blunt force trauma and may not always be accompanied by visible external injuries.
31. The court is satisfied that the prosecution proved, beyond reasonable doubt, the fact and medical cause of the deceased's death.

Whether The Accused Caused The Death Of The Deceased

32. The next issue for determination is whether the unlawful act that caused the death is attributable to the accused. PW1 gave direct eyewitness testimony placing the accused at the scene actively assaulting the deceased. She testified that the accused was seated on the deceased's chest, hit him with fists, and banged his head on the ground. Even after the deceased

appeared weak and immobilized, the accused forcefully removed him from the compound and threw him outside the gate.

33. Although PW1 did not witness the initiation of the altercation, her evidence clearly captured the nature and intensity of the assault. Her testimony was not shaken on cross-examination and the court finds her to be a credible and truthful witness.

34. The evidence of PW2 and PW3, while not eyewitness accounts of the assault, corroborated the aftermath by confirming that the deceased suffered severe injuries immediately after the incident and consistently attributed those injuries to the accused. PW5 further produced a statement from an independent witness who placed the accused at the scene assaulting the deceased using blows and hitting him against an electric pole.

35. The defence suggested that the delay between the assault and the death raises the possibility of intervening causes. However, the evidence demonstrates an unbroken chain of events from the time of the assault to the deceased's hospitalization and eventual death. The law is settled that where death results from injuries inflicted by an accused person, the lapse of time alone does not break the chain of causation.

36. The court therefore finds that the prosecution proved that the accused's unlawful acts directly led to the injuries that caused the death of the deceased.

Whether The Accused Acted With Malice Aforethought

37. The presence or absence of malice aforethought is a matter of inference drawn from the surrounding circumstances. In the classic case of **R v Tubere s/o Ochen [1945] 12 EACA 63**, the court set out the factors to be considered, including the nature of the weapon used, the manner of its use, the part of the body targeted, and the conduct of the accused before, during and after the incident.
38. In the present case, no weapon was used. The altercation arose suddenly and at night, and there was no evidence of premeditation or prior hostility. Importantly, the evidence reveals that it was the deceased who went to the home of the accused at night, demanding money and instigating the confrontation.
39. The court finds this circumstance significant. In **Nzuki v Republic [1993] KECA 83 (KLR)**, the Court of Appeal held that malice aforethought is not to be inferred lightly and that where an act is committed in the heat of the moment without a clear intention to kill or cause grievous harm, a conviction for murder is unsafe.
40. The accused's conduct, though unlawful and excessive, occurred in response to provocation within the sanctity of his home. The absence of evidence showing a settled intention to

kill, coupled with the spontaneous nature of the altercation, militates against a finding of malice aforethought.

41. Further, the fact that the deceased did not die instantly but succumbed to injuries after medical intervention, and the medical evidence did not conclusively demonstrate deliberate targeting of a vulnerable part of the body, reinforces the conclusion that the accused lacked the requisite *mens rea* for murder.

42. The court also notes that the accused raised the defence of self-defence. While the force used exceeded what was reasonably necessary and therefore negates a full defence under section 17 of the Penal Code, the circumstances nonetheless support the conclusion that the accused did not act with malice aforethought.

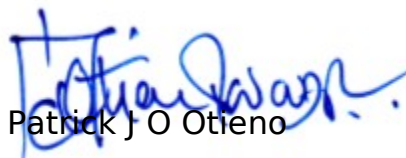
43. In **Mungai v Republic [1984] KECA 27 (KLR)**, the Court of Appeal emphasized that where doubt exists as to the presence of malice aforethought, such doubt must be resolved in favour of the accused.

44. Accordingly, the court finds that malice aforethought under section 206 of the Penal Code was not proved beyond reasonable doubt.

Whether The Evidence Discloses A Lesser Offence

45. The evidence clearly establishes that the accused unlawfully assaulted the deceased, leading to injuries that caused death. This conduct satisfies the definition of manslaughter under section 202(1) of the Penal Code.
46. Pursuant to section 179(2) of the Criminal Procedure Code, this court is entitled to convict the accused of the lesser offence of manslaughter where the evidence does not support the charge of murder.
47. In light of the foregoing, the accused person is hereby acquitted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
48. The accused is instead convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

Dated, signed and delivered at Lodwar this 23rd day of January, 2026



Patrick J O Otieno

Judge

ORIGINAL