



**Republic v Lokai (Criminal Case E009 of 2023)
[2025] KEHC 5151 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E009 OF 2023
RN NYAKUNDI, J
APRIL 29, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

NATOO LOBE LOKAI ACCUSED

JUDGMENT

1. The accused person 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 are that on 17th March, 2023 at Natete village in Kokuro location within Kibish Sub-County in Turkana County murdered Dominic Modo.
2. The accused person pleaded not guilty to the offence as stipulated under section 203 of the *Penal Code*. The lead prosecution counsel in these proceedings was Mr. Kakoi for the state whereas the Accused person was under the retainer of Learned counsel Mr. Karanja.
3. The prosecution marshalled 4 witnesses who gave evidence to establish the ingredients of the offence of murder contrary to section 203 as read with section 204 of the Penal code.

Summary for the Prosecution case.

4. PW1 Naurien Lotengan, a minor aged 10 years after this court conducted a voire dire examination was satisfied that she understood the duty of being a witness before a court of law and this was through the answers given to test her knowledge and intelligence which are key criteria to admit her as a witness in court. She was therefore affirmed before giving her testimony. She gave evidence to the effect that on the 17th of March 2023 she was taking care of their sheep while in company of the accused, the deceased and Emorine. According to PW1, they finished taking the evening meal and went to sleep. That is when she saw the accused wake up from sleep, removed a panga, which he used to cut the deceased. she confirmed that at the time they went to sleep, she had not fully fallen asleep and was



able to appreciate the surrounding circumstances as this same panga was initially in possession of the deceased. This prompted her to wake up and take steps to disarm the accused by holding him around the pelvic region. This triggered resistance from the accused person who hit her with his elbow and this prompted Emuria to wake up from sleep. The accused realizing that Emuria had woken up, he asked him to look for a rope which can be used to tie her as an act of disempowering her from taking steps to disarm him of the panga. However, by this time, the deceased had suffered serious injuries and they all agreed that they place him inside the Manyatta. As this scene of the crime was not their usual homestead, they had migrated there in search of pasture for their livestock. It was the evidence by PW1 that they moved out of the scene where the deceased had been assaulted driving the livestock to another location. It was during that migration that the accused further took the panga, slaughtered one of the goats, which was turned into a meal to be taken with the deceased and Emorine. The conflict apparently did not stop there as the accused continued to escalate it within the other members of the group including securing a match box to lit the fire which was to consume the body of the deceased but apparently they also put it off. The witness was further shown recovered exhibits like sufuria, the checked shirt, mobile phone, which were all positively identified as property of the deceased

5. PW2 Emuria Kabisa on oath told the court that on the material day he was among the livestock keepers. That after grazing the livestock, each one of them retired to sleep at the same manyatta only to see the accused wake up, taking a panga from the deceased which he used to inflict physical bodily harm. That the accused also went a step further to cut one of the sheep into pieces, had it roasted and carried away the premium parts, leaving the residue for the rest of the team. PW2 then saw the accused drive away the herd of goats to another homestead and when they followed him up, he issued threats of dire consequences. In the evidence of PW2, this made them to part ways with the accused person only after he had taken the panga in possession of the deceased and using it to inflict fatal injuries.
6. PW3 Peter Lotiang also identified himself as a livestock keeper and the deceased as his biological son. His evidence was to the effect that on 17th March, 2023 he received information that the deceased had migrated with goats in search of green pastures but before the end of the day, he was further informed through a telephone call from PW1 that the deceased had been killed. The incident was reported to the area chief and thereafter the police initiated investigations which culminated into the arrest and prosecution of the accused person.
7. Finally, the prosecution placed reliance in the testimony of Police detective, Corporal Siranga who testified as PW4. The highlights of his evidence was to the effect on the 6th of April, 2023 he took over the investigations of a murder incident involving the deceased and the accused person as the primary suspect. He recorded statements from the witnesses, recovered the necessary exhibits which from the inventory comprised of the following: Sufuria, grey shirt, techno phone and the post mortem report dated 20th April, 2023.
8. Given the strength of the evidence collected at the scene and the statements from witnesses, he formed the opinion that this was a case of murder to recommend to the Director of Public Prosecutions for an indictment of the accused person under section 203 of the [Penal Code](#).
9. On the other hand, at the close of the prosecution's case pursuant to section 306 of the [Criminal Procedure Code](#), this court found as a fact and in law that a prima facie case has been established by the prosecution for the accused to be called upon to give evidence in rebuttal or on the perspectives of his typology with regard to this offence. It was the defence by the accused who elected to give unsworn statement in which he denied ever killing the deceased as alleged by the witnesses for the prosecution. It was his defence that he remembers nothing as all that being alleged is a fabrication.



Determination.

10. The crucial issue to be determined by this court is whether the prosecution has established the following elements deducible from section 203 of the *Penal Code* beyond reasonable doubt:
 - i. The fact of death
 - ii. The fact that the deceased's death was caused by an unlawful act or omission.
 - iii. That the accused committed the unlawful act which caused the death of the deceased; and
 - iv. That the accused had malice aforethought. (See Anthony Ndegwa Ngari v Republic (2014) eKLR)
11. The learned author Sarkar in his book Law of Evidence 18th edition expertly stated as follows:

“The burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for negative is usually incapable of proof. It is an ancient rule founded on consideration of good sense and should not be departed from without strong compelling evidence.”
12. In any criminal charge or indictment, it is the duty of the trial court to examine whether the burden vested with the prosecution as a constitutional organ under Art. 157 of *the Constitution* has discharged the burden of proving all elements of the offence upon taking a decision to charge and prosecute a suspect within the provisions of sub-section (6) & (7) of the same Art. In the persuasive case of Joseph John Makune vs. Republic (1986) TLR 44, it was held:

“The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is cast on the accused to prove his innocence. There are very few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities.”
13. The mighty significance of this principle does not only apply to the Tanzanian case cited above but also in our own jurisdiction. The same principle is restated in the cases of Republic v. Nyambura and four others (2001) KLR, Mbugua Kariuki v. The Republic (1976-80) and Longinus Komba v Republic (1973) LRT 127.
14. The principles on the doctrine of beyond reasonable doubt are discussed in the case of Woolmington VDPPC (1935) AC 462 where it was stated:

“But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

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 prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception 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 It is not the Law of England to say as was said in the summing up in the present case: 'if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given



from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident....”

15. Similarly, in *Miller –v- Ministry of pensions* (1947) 2 ALL ER 372 at 373 the court stated:

“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 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.”
16. This is the test which the prosecution must pass if this court is to secure judgment in its favour against the accused. This being a murder charge, the prosecution’s immense duty and task within our legislative framework is to prove not only that the accused unlawfully caused the death of the deceased but also he did so with malice aforethought which is defined under section 206 of the [Penal Code](#). It is incontestable from the facts and evidence adduced at the trial against the accused person that his case is centred on direct evidence of the star witnesses summoned by the prosecution. This evidence together with the circumstantial evidence nails the case against the accused person beyond reasonable doubt.
17. Applying the above case law, it is now my singular duty to re-examine whether the four elements cited above have been discharged by the prosecution beyond reasonable doubt.
18. In the first instance, the death of the deceased is not disputed and can be certainly affirmed from the post mortem report admitted in evidence as an exhibit and also the direct testimonies of PW1 and PW2. The rest of the witnesses provided the basic structure of evidence which falls within the definitional terms of circumstantial evidence. (See *Kabiru v. Republic* (2007) 1 EA 107, *Simoni Musoke versus R* (1958) E.A 715 and *R v Hillier* (2007) 233 A.L.R. 63, *Shepherd v R* (1991) LRC CRM 332).
19. The second element of causation; as to whether the death of the deceased was unlawfully caused. The focus of causation issues constitutes the definitions provided for under section 213 of the [Penal Code](#). The cardinal principle is that all homicides are unlawful unless otherwise they fall under the exceptional circumstances provided for under the law as stipulated in Art. 26(3) of [the Constitution](#) as read with section 17 of the [Penal Code](#) on self-defence or property and section 207 and 208 of the same code on provocation. The unlawfulness of the element constitutes the act or omissions proven by the prosecution against the accused person in causing the death of his/her victim. Causation is a central issue in the definition of murder under section 203 of the penal code for there must be a connecting factor between the cause and the result of death as framed in the charge sheet. Therefore, it is essential for the prosecution to establish the cause of the deceased’s death before any finding on guilt and conviction can be made by the trial court. It is usually proven by medical evidence more specifically by the autopsy report from the pathologist. However, it can also be proven by dint of circumstantial evidence. From the evidence of PW1 and PW2, this was a death caused unlawfully by the acts of assault initiated by the accused person when he withdrew the panga in possession of the deceased and used it to inflict fatal injuries against his victim. The result of it is well documented by the pathologist in the post mortem report which established that he suffered a fracture to the head, left mandible and temporal bones were all crushed. As a result of the medical examination, the pathologist formed the opinion that the cause of death was severe head injuries due to machete cuts, occasioning a fracture of the left mandible. The injuries inflicted by the accused upon the deceased do not fall within any of the exceptions is stipulated in the law for the court to find the death to be excusable within the parameters



of the case of R v Gusambisi s/o Wesonga (1948)15 EACA 65. As for me, this was an unlawful death proven beyond reasonable doubt by the prosecution.

20. The third element of significance is that of malice aforethought defined under Section 206 of the [Penal Code](#) which provides as follows:

“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; or 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.

21. This provision has been delved into by various superior court’s decisions as herein exemplified in NMW v Republic (2018) eKLR the Court of Appeal, citing with approval the case of Bonaya Tutu Ipu & Another v. Republic (2015) eKLR stated that:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasiveness decision of Chesakit v. Uganda, Cr. App No. 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

22. In Daniel Muthee v Republic (2007) eKLR, the Court of Appeal while addressing the issue of whether malice aforethought had been proved stated:

“When the appellant set upon the deceased and cut her with a Panga several times and proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the [Penal Code](#).”

23. Malice aforethought being a key element in murder cases is a mental state of the accused person which must be established through direct or circumstantial evidence of the witnesses summoned by the prosecution. It does not mean hatred or ill will on the part of the perpetrator but rather that intention formed before, during and after inflicting serious bodily harm against the victim of the offence. (see the guidelines in R vs. Tubere S/o Ochen (1945) 1 E.A.C.A. 63.). Malice aforethought can also be express or implied on the part of the accused person underpinned in the specific facts of the case before the trial court. In the instant case, there is direct evidence from PW1 and PW2 that the unlawful act of assaulting and fatally killing the deceased by the accused person did manifest express malice



aforethought. The entire spectrum of the evidence satisfies the criteria set out in the above cited cases which demonstrate what it means for a charge of murder to manifest malice aforethought. As if that is not enough, the direct and circumstantial evidence does show a kind of premeditation on the part of the accused person when he waited for the rest of his team to retire to bed out of the daily chores of looking after their livestock and made a move of taking the murder weapon which was in possession of the deceased and used that very same weapon to target vulnerable parts of his being and fatally caused his death. It was just by good luck that PW1 and PW2 had not fully fallen asleep as not to conceive, perceive and appreciate the unlawful acts of aggravated assault committed by the accused against his very own colleague who they had migrated together to seek green pastures for their livestock. There are no mitigating factors for any finding to be made by this court to reduce this heinous crime of murder to a lesser offence of manslaughter. The specifics of this case weighted against the element of malice aforethought has only one conclusion; a crime of murder committed with malice aforethought proven by the prosecution beyond reasonable doubt.

24. Having carefully evaluated all the evidence presented before this court, I find that the prosecution has established beyond reasonable doubt that the accused, Nattoo Lobe Lokai, unlawfully caused the death of Dominic Modo with malice aforethought. The direct testimony of witnesses, corroborated by medical evidence, conclusively proves that the accused committed this heinous act. Therefore, I find the accused guilty of the offence of murder contrary to section 203 as read with section 204 of the [*Penal Code*](#) and accordingly convict him.
25. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 29TH DAY OF APRIL, 2025

R. NYAKUNDI

JUDGE

