Republic v Esekon (Criminal Case E007 of 2023)
[2025] KEHC 11960 (KLR) (15 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11960 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL CASE E007 OF 2023

RN NYAKUNDI, J

AUGUST 15, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

GEOFREY LOROGOT ESEKON ..... ACCUSED

JUDGMENT

1. Before this court, the accused was arraigned and charged with the offence of murder contrary to section 203 of the Penal Code. As the particulars discloses on 21st day of March 2023 at Kisumu Youth Polytechnic in Turkana County murdered Paul Emunyen Kariwo. The accused pleaded not guilty to the charge. He was represented by learned counsel M/s Kariuki whilst Mr. Kakoi Assistant Director Prosecution Counsel appeared for the State.

2. The accused pleaded not guilty on the preferred charges of committing murder contrary to Section 203 of the Penal Code. The task and burden of establishing the guilty of an accused person is always vested with the State and at no time it does shift to the accused. This is in consonant with the Article 50(2)(A) of *the Constitution* on the right to presumption of innocence until the contrary is proved beyond reasonable doubt.

3. It is trite law that under Section 203 of the Penal Code, the following elements of murder must be established by the prosecution as a constitution organ under Article 157 with the mandate to initiate any criminal charge against an accused person. Thus:

    a. The death of the deceased

    b. That her death was through unlawful acts or omission of the accused

    c. That the accused had malice aforethought

    d. As such the quantity of the evidence placed the accused person at the scene of the murder.

4. Who is to discharge the evidential burden impacting on the above elements. Before this court are the following witnesses:

Prosecution Case Summary

5. PW1 Lowoi Kono told the court that he is based on the MKU area and on 21st March 2023 he was working with deceased on the same site, whereas the accused was also on another construction site. The accused in a little while emerged as they were going on with their construction work. The accused summon the deceased questioning him on many issues and it did not take long before he pushed the deceased inside the kitchen dragging him on the ground and later abandon him on the floor. That is when the owner of the house held the PW1 shirt and demanded that they take away the deceased from the construction site apparently to PW1 the sister to the accused and proceed to serve the deceased. Simultaneously, PW1 explained that the accused continued demanding construction of the yeast which was not forthcoming. The matter was escalated by the owner of the construction site who called a motorcycle rider to take the deceased to the hospital. It was at the emergency door of the facility where the doctors examined the deceased and opined that he is dead. The mortuary attendant the court was told called the police station for advisory opinion on how to handle the incident.

6. Next in line was PW2 Lydia Akai who told the court on 21st March 2023 she was doing some cleaning and washing some clothes when she witnessed the accused assaulting the deceased severally. In PW2 testimony the reason for the assault was the demand made to the deceased to produce the yeast a fermentation agent in regulating the making of food items like bread and aromatic development. This forced the accused to push him into the house and the guides being shown where this item is kept. In further evidence from Pw2 she witnessed the accused punching the deceased dragging him through the door of the house and later threw him out of the house. In a sense of panic PW2 saw the accused mixing milk with sugar and flour and gave the deceased the concoction to drink. It was at that time the owner of the house that the deceased be taken out of the compound has he had called in the police to the scene.

7. Next witness was PW3 Dr. Ekiru a qualified medical doctor who conducted a postmortem on the body of the deceased in which the following findings were made:

    a. The external appearance of the body and the condition of body, nature and dimension of all external injuries as: bloody fluid draining form mouth and Nostrils

    b. Laceratian on the orbit of the left eye

    c. Bilateral Haemothorax, bilateral Pulmonary Oedema

    d. Frontal scalp Haemotoma, massive right sided extradural Haemotoma

    e. As a result of the examination he had the opinion that the cause of the death was severe head injury with massive extradural Haemotoma and Haemothorax with Pulmonary Oedema

The post mortem was produced as evidence as exhibit 1.

8. Thereafter, a prima facie case was established in favour of the prosecution, necessitating that the accused person be placed on his defence as provided under Section 306 as read with Section 307 of the Criminal Procedure Code.

Defence Case Summary

9. The accused elected to give unsworn statement of defense which comprised of a mixed grill of the chronology of events touching on the material day when he was alleged to have fatally assaulted the deceased. Basically he denied causing the death of the deceased as alleged by the prosecution witnesses.

10. This is the evidence in its totally in which the threshold issue of the crime of murder facing the accused person must be examined, tested and findings made on the guilty or not guilty.

11. In the body of this judgment, I have set out the legitimate expectation to be met by the prosecution in discharging their mandate under Article 157 of *the constitution*. The standard of proof required to guide me to make a just decision is well set out in Miller vs. Minister of Pensions [1947] 2 All E.R. 372 at page 373 to page 374, Lord Denning stated quite succinctly that: -

> " The degree of beyond reasonable doubt 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 evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a 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."

12. Also in Andrea Obonyo & Ors. V. R. [1962] E.A. 542, the Court stated at p. 550 as follows:

> " As to the standard of proof required in criminal cases DENNING, L.J. (as he then was), had this to say in Bater v. Bater [1950] 2 All E.R. 458 at 459: 'It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear."

13. That passage was approved in Hornal v. Neuberger Products Ltd. [1956] 3 All E.R. 970, and in Henry H. Ilanga v. M. Manyoka [1961] E.A. 705 (C.A.). In Hornal v. Neuberger Products Ltd., Hodson, L.J., cited with approval the following passage from KEnny's Outlines Of Criminal Law (16th Edn.), at p. 416:

> 'A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature.... in criminal cases the burden rests upon the prosecution to prove that the accused is guilty 'beyond reasonable doubt'. When therefore the case for the prosecution is closed after sufficient evidence has been adduced to necessitate an answer from the defence, the defence need do no more than show that there is reasonable doubt as to the guilt of the accused. See R. v. Stoddart (1909) 2 Cr. App. Rep. 217 at p. 242.
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> .... [I]n criminal cases the presumption of innocence is still stronger, and accordingly a still higher minimum of evidence is required; and the more heinous the crime the higher will be this minimum of necessary proof.
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> Where, on the evidence adduced before Court, there exists only a remote possibility of the innocence of an Accused person, it would mean the Prosecution has proved its case beyond reasonable doubt; hence, the Prosecution would have conclusively discharged the burden

that lay on it to prove the guilt of the Accused. In Obar s/0 Nyarongo v. Reginam (1955) 22 E.A.C.A. 422, at p. 424 the Court held that:

"We think it apt here to cite a passage from the recent Privy Council case of Chan Kau v. The Queen (1952) W.L.R. 192. ... At p. 194 Lord Tucker said this:

'Since the decision of the House of Lords in Woolmington v. Director of Public Prosecutions (1935) A.C. 462; and Mancini v. Director of Public Prosecutions. 28 C.A.R 65; it is clear that the rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions save only in the case of insanity, which is not strictly a defence."

14. It is now my singular duty to analyze the evidence on each element with a view to establish whether the prosecution proved all elements of the offence beyond reasonable doubt:

15. In the instance criminal case, there is no dispute that Emunyen Kariwo Paul is dead. In making this determination I rely on the postmortem report admitted in evidence at his trial which was admitted under section 38 of the *Evidence Act*. The body was positively identified to the pathologist by Peter Lopawoi and Jenifer Emuria. There is also evidence on record from PW1 and PW2, who testified that the deceased is dead. This evidence has not been controverted by the accused person. Additionally, there is a death certificate No. 1629768, which proves the fact of death beyond reasonable doubt.

16. In Article 26 of *the Constitution*, the right to life is protected and guaranteed and in subsection (3) it provides as follows:

    (3) A person shall not be deprived of life intentionally, except to the extent authorized by this constitution or other written law.

17. It is now settled law that all homicides (an act of a person killing a human being) are presumed to be unlawfully caused unless caused by accident or an act of God or in defence of a person or property or are authorized by the law, See R. vs. Gusambuzi Wesonga (1948) 15 EACA 65. Causation of death may be established through direct or circumstantial evidence. How does an accused person come to be held in law as the proximate cause of the offence of murder contrary to section 203 of the Penal Code? The law on causation is articulated under section 213 of the Penal Code, which defines causing death to include acts that are not the immediate or sole cause under the following circumstances:

    (a) He inflicts bodily injury on another person, and as a consequence of that injury, the injured person undergoes surgery or treatment which causes his death;

    (b) He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment, or had taken proper precautions as to his mode of living;

    (c) He, by actual or threatened violence, causes such other person to perform an act which results in that person's death, such act being a means of avoiding such violence and appearing natural in the circumstances to the person whose death is so caused;

    (d) He, by any act, hastens the death of a person suffering from any disease or injury which, apart from such act or omission, would have caused death; and

    (e) His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of another person.

18. In Republic Vs Joseph Chege Njora 2007 eKLR, Anthony Njue Njeru v R CR Appeal No. 77 of 2006 the court held:

> " A killing of a person can only be justified and excusable where the accused's action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or part arising from a sudden and serious attack by his victim. It must also be shown the reasonable force was used to avert or forestall the attack."

19. From this analysis the death of the deceased was unlawfully caused. One has just to lay hands on the nature of the injuries and what the pathologist opined as cause of death. In the view of this court, the deceased murder was executed with malice aforethought as defined under section 206 of the penal code. The elements of it which the prosecution must prove beyond reasonable doubt include:

a. An intention to cause the death or grievous harm to another person

b. Knowledge that the Act it omission will cause death

c. An intention to commit a felony

d. An intention to facilitate the escape from custody of a person who has committed a felony

20. The structure and context in which a particular murder is committed have been defined in several cases. In Tubere s/o Ochen v R [1945] 12 EACA 63, the primary evidence of murder presented by the prosecution was that the accused used a dangerous weapon; the manner in which it was used involved a grave risk of death; and the violence or threats of violence were directed at vulnerable parts of the body. The appreciation of the facts indicated that causing grievous harm was foreseeable and imminent and the conduct of the accused before, during and after committing the offence provided prima facie evidence of malice aforethought in the killing.

21. In my considered view, the unlawful acts of the accused can be described as a direct intention to kill or to cause grievous bodily harm covered by section 206 (a) (b) of the penal code. This was an accident or act of negligence if one has to assess the conduct of the accused before, during and after the committing the offence. This is a man who had premeditated that his mission on the material day was to create an excuse by demanding some yeast, an agent of fermentation to trigger a conflict. He then proceeded to inflict bodily injuries and did not stop there; he dragged the body of another human being until he confirmed that his mission was fait accompli. The deceased died at the scene of the crime.

22. Murder as defined in our Penal Code may take the following scenarios: Murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is a manifested deliberate intention unlawfully to take away the life of a fellow human being. It is implied when no considerable provocation appears. As to degrees of murder, all murder perpetrated by means of poison, lying in wait, torture or by any other kind of willful, deliberate and premeditated killing is murder of the first degree while all other kinds of murder are of the second degree.

23. This examination of the elements of malice aforethought being the fundamental element to be proven by the prosecution on behalf of the State in my view is never complete without quoting the statement of the Former Chief Justice of Connecticut where it was held;

> " In common speech malice usually means hatred, ill-will, malevolence or animosity existing in the mind of the accused, but in the law of homicide its meaning is much wider. Malice, as

the word is used in an indictment for murder, not only includes cases where the homicide proceeds from or is accompanied by a feeling of hatred, ill-will or revenge existing in the mind of the slayer towards the person slain, but also cases of unlawful homicide which don't proceed from and are not accompanied by any such feeling. In the law of homicide, if a man intends unlawfully to kill another or do him some grievous bodily harm, such intention, whether accompanied or not accompanied by a feeling of hatred, ill-will or animosity, constitutes malice. * * * Suppose A, intending to kill B, whom he hates, by mistake kills C, his friend, whom he loves; here he did not intend to kill his friend, and he did not hate him, but he loved him; and yet the law says he killed his friend with malice."

24. This element also from the evidence of PW1, PW2, PW3 has been established by the prosecution beyond reasonable doubt.

25. Who really committed this offence? In answering the question, I shall begin by reiterating the principles laid down in Abdula Nabulure & 2 others vs. Uganda, Supreme court Criminal Appeal No. 009 of 1978

> "A conviction based solely on visual identification evidence invariably causes a degree of uneasiness because such evidence can give rise to miscarriages of justice. There is always the possibility that witness though honest may be mistaken.
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> Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.
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> In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support to identification evidence; provided the court adequately warns itself of the special need for caution. If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered. When, however, in the judgment of the trial court, the quality of identification is poor, as for example, when it depends solely on a fleeting glance or on a long observation made in difficult conditions; if for instance the witness did not know the second accused before and saw him for the first time in the dark or badly lit room, the situation is very different. In such a case the court should look for 'other evidence' which goes to support the correctness of identification before convicting on that evidence alone. The 'other evidence' required may be corroboration in the legal sense; but it need not be so if the effect of the other evidence available is to make the trial court sure that there is no mistaken identification.

26. In Abdulla Nabulere (supra), the principles on identification evidence set out in earlier cases were endorsed and the Court observed that:

> " ...the courts have over the years evolved rules of practice to minimize the danger that innocent people may be wrongly convicted. The leading case in East Africa is the decision of the former Court of Appeal in Abdalla Bin Wendo and Another V. R. (1953), 20 EACA 166 cited with approval in Roria v. R. (1967) EA 583. The paragraph which has often been quoted from Wendo (supra) is at page 168. The ratio decidendi discernible from that case is that: -
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> a. The testimony of a single witness regarding identification must be tested with the greatest care.
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> b. The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.
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> c. Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.
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> d. Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone. The safe-guards laid down above are in our view adequate, if properly applied, to reduce the possibility of a miscarriage of justice occurring."

27. Further in Roria (supra) the following observation was made:

> " A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the House of Lord sin the course of a debate on s. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:
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> "There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten-if there are as many as ten - it is in a question of identity.
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> "That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.

28. Given the strength of the evidence and the governing principles, I am satisfied that the prosecution has discharged the standard and burden of proof beyond reasonable doubt on all elements of the offence of murder contrary to section 203 of the Penal Code. Accordingly, this court makes a finding of guilty and enters a conviction against the accused person as established by law.

Sentence

29. The starting point is the dicta in Francis Muruatetu & Anor vs The Republic [2017] eKLR which declared mandatory sentence for the offence of murder contrary to Section 203 of the Penal Code unconstitutional. What this meant is for the courts to individualize sentences to specific circumstances touching on the offence and the person set to be convicted. The apex court made it very clear that before

an offender is sentenced he or she must be accorded a fair hearing under Article 50 of *the Constitution*. There was emphasis by the court on this issue as follows:

> " We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in *the constitution* does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50(2) of *the Constitution* are not exhaustive"
>
> "We now lay to rest the quagmire that has plagues the court with regard to the mandatory nature of Section 204 of the Penal Code. We do thus by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial with the resulting sentence under Section 204 of the Penal Code unfair thereby conflicting with Articles 25(c), 28, 48 and 50(1) and (2) (g) of *the Constitution*.

30. As a consequence of this decision, besides the Sentencing Policy Guidelines a trial court should bear in mind the following factors:(a) age of the offender

    a. Being a first offender

    b. Whether the offender pleaded guilty

    c. Character and record of the offender

    d. Commission of the offence in response to gender-based violence

    e. Remorsefulness of the offender

    f. The possibility of reform and social re-adaptation of the offender

    g. Any other factor that the court considers relevant

31. In compliance with the decision of Muruatetu by the apex court that the trial courts conduct sentencing hearing to admit mitigation, aggravating factors and any such information which may assist in arriving at a fair and proportionate sentence for the offence and the accused, now convict. In this respect learned Counsel MaryAnne submitted on this issue about the convict as follows:

> " The accused is a first-time offender with no prior criminal history and has lived a law-abiding life up to that point. Moreover, the accused has apologized to the family of the deceased, to this honourable, court his family, and society at large. He is further remorseful of his actions and is praying that this court gives him a second chance to write his wrongs. The deceased was drunk and therefore provoked the accused. The accused was not ware of the legal or factual consequences/effects of his actions at the time. The accused is f young man who was barely 21 years old at the time of his arrest and was still in form three. He has a whole future ahead of him. The accused has been in prison since 2023. The accused was involved in a scuffle between himself and the deceased that led to the death of the deceased; the accused had no malice aforethought to cause the death of the deceased. In conclusion, your Lordship we humbly submit that you relook and reconsider the mitigating factors herein and be lenient on the sentence to impose on the accused person herein.

32. I tend to think that the aims of punishment particularly on serious economic crimes like corruption, embezzlement of public funds and to this other side those which deal with the rights to life under

Article 26 of *the Constitution* as read with Section 202, and 203 of the Penal Code is about retribution, prevention and deterrence. In essence, the first and foremost [consideration in sentencing] is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence passed in public serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that if the offender is caught and brought to justice the punishment will be negligible. Such a sentence may also deter the particular offender from committing a crime again or induce him to turn from criminal to honest living. (See also R v. Robert [1961-1963] 2 ALR Mal 291 (HC) 293.

33. A reasonable and a proper sentence is one that is appropriate to the offence and the circumstances under which the offence was committed. The only challenge we have at the moment is that the judicial discretion exercised across the country at various levels of courts there is so much disparity that the common man in the streets of Nairobi, Kisumu, Nakuru etc. is unable to comprehend as to the rationale of the disparities in sentence. Although deterrence is usually employed for prevalent, serious and violent crime such as robbery and murder there is need to bridge the gap on the serious disparities even in the absence of strong mitigating factors. A man or a woman who opts for and goes ahead to violate *the Constitution* under Article 26 and commit the crime of murder should factor in the possibility that if the long arm of the law catches up with him and accords him or her a custodial penalty, his or her family will suffer and that the courts are not encouraged to be moved by such pleas. The offenders should not put domestic matters in the equation when embarking in conducts society disapproves and enforces with criminal sanctions.

34. I have carefully considered mitigating factors as submitted by the convict and the prima facie evidence which presents itself in support of aggravating factors for this offence committed by the convict. I have always said in other words that death is avoidable, we can save lives of other citizens, or our wives, girlfriends and the drinking partners where we promote social capital. When that point is reached individual personal circumstances have to be weighed against public interest. I sometimes hold these legal thoughts that the way forward for this country maybe to attach a premium on the nature of custodial sentence to be imposed for those who terminate the right to life of the fellow citizens or residents of this country prematurely with malice aforethought to reflect the need to deter the upsurge of this crime.

35. As I pen off, having been involved in this trial and for now presided over the sentence hearing in which the legal team for the State and the defence have taken the liberty to make remarks on both aggravating and mitigating factors to aid me in exercising judicial discretion in the matter. In conclusion weighing this competing interest of both the public and the convict this homicide aggravating factors outweigh the mitigating factors by the convict. As a consequence of which I impose a custodial sentence of 25 years imprisonment with a rider that Section 333 (2) of the Criminal Procedure Code applies for the sentence commencement date be with effect from the 31st March 2023.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 15TH AUGUST 2025

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Otieno for ODPP

Mr. Karanja Adv. h/b for MaryAnne Advocate

The Accused