



**Republic v Lopombogi (Criminal Case E002 of 2021)
[2024] KEHC 255 (KLR) (25 January 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE E002 OF 2021
CM KARIUKI, J
JANUARY 25, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

MUYU LOPOMBOGI ACCUSED

JUDGMENT

1. The Accused person herein, Muyu Lopombogi was charged with the offence of murder contrary to Section 203 as read with Section 204 of Penal Code (Chapter 63 of the Laws of Kenya). The particulars of the offence were that on the 30th day of January 2021 at Naibor Location in Laikipia West Sub-County within Laikipia County, the Accused murdered Ekiru Nakaporo, the victim/Deceased person herein.
2. He pleaded not guilty to the charge and the matter proceeded to trial with the prosecution calling a total of five (5) witnesses to prove its case against the Accused.

Prosecution’s Case

3. ...
4. PW1 Nakapono Lukwawi, stated that he was called on 1/2/2021 at 9p.m. and was informed that his son was beaten at Naibor. He went to Naibor on the next day but was told that he was taken to Rumuruti then to the mortuary in Nyahururu. He then went to identify the Deceased’s body and confirmed it was him when the post-mortem was conducted. He testified that he had head injuries. He stated that Lompombogi had killed his son.
5. PW2 Josphat Ekilela, gave sworn testimony that on 30/1/2021 at 11. 30p.m, he was asleep when he heard noises outside in form of fighting people. He then heard a voice stating that “Huyo mtu mfanyi kazi wa kaparo sijui kama ataamka tena kesho”. The voice was of Lompombogi who was his neighbour.



6. He went back to sleep and, in the morning, he went to the fence and found mtu wa Kaparo lying down. He was vomiting and bleeding then he called neighbours. The police came and arrested the Accused and took the victim to hospital. He was arrested near his place as police were told by people that he was the person who attacked victim. He identified Lompombogi in court and asserted that he did not know victim. That he knew Lompombogi's voice as they had stayed together as neighbours for long.
7. On cross examination, PW2 stated that he did not witness the incident but only heard noise. He did not know what was happening. That he never talked with the victim. He asserted that the victim was Kaparo's herder from a place about 1km from his place. That nobody told him that the Accused hit victim but people said that the 2 were fighting.
8. PW3 No. 118784, the arresting officer based at Naibor Police Post, stated that on 31/1/2021 at 11.30a.m, he was on duty at the police post when he received call from Naibor informing him that there was a body lying on the fence. He went to the scene accompanied by PW2 and other officers and found the Deceased vomiting and with injuries on the head. He enquired from the people around and they told him that the Accused beat the victim. He arrested the suspect and took him to police station.
9. On cross examination, the arresting officer submitted that he visited the scene and gathered information connecting the Accused to the incident. He confirmed that no forensic investigation was done and nobody told him that they witnessed the incident. Two people stated that the Accused is one who beat the victim. That the victim was at the Josephat's fence. Josephat did not explain how victim got to his compound.
10. On re-examination, PW3 stated that the suspect was arrested with a Maasai rungu. That the Deceased appeared to have been injured by a rungu. The rungu was tacked in his clothing and it had no blood.
11. PW4 Dr. Miringo, produced the Deceased's post mortem report as P. Exhibit 2. He stated that the Deceased was African and that upon examination on his body, he saw the injuries noted on the post mortem report. External examination revealed erected deep cut on skull subdural haematoma. There were blood clots on brains. His opinion was that the cause of death was subdural haematoma bleeding in the brain. On cross examination he stated that the object which could have inflicted the injuries was a blunt one.
12. PW5 No. 78695 PC Henry Chirchir, the investigating officer stated that on 2/2/2021 at 11.00a.m, he took over case of murder on instructions. That the murder had taken place where Accused had hit Deceased on the head. The victim was rushed to Nyahuru Hospital and he died while undergoing treatment. The Accused was arrested and taken to police station and club he used to hit victim was recovered and kept as an exhibit. He also recorded statements from the witnesses. Post mortem was conducted and post mortem report was filed. The relatives of Deceased identified the body. He visited the scene later and never recovered anything at the scene. According to the witnesses, the Accused was asleep when he heard somebody walk out and thought he was a thief on mission to steal sheep. The suspect was not armed. There was way near sheep's boma. The suspect was passing by but he was suspected to be a thief. The Accused hit him. There were no eye witnesses. The club used as murder weapon was produced as P Exhibit 1, it was recovered by the arresting officer and it was not blood stained.
13. On cross examination, the investigation officer testified that no parade was conducted over the voice heard at night. That the club was not examined for any forensic evidence. There were no eye witnesses and he did not establish whether there was a grudge. It was stated that the weapon used was a stick. Upon re-examination he stated that there was a witness who heard when Accused hit victim and said "si thani kama huyu ataamka". The witness is Josephat, a neighbour who heard the voice.



Defence Case

14. ...
15. Placed on his defence, DW1 Muyu Lompombogi, the Accused person gave sworn testimony that he did not know anything from 30/1/2021. That he woke up on 31/1/2021 and opened for the goats. Then he prepared to go to church when a neighbour called Josphat accompanied by police officers arrested him. He inquired why he was being arrested and was told he will know ahead. The neighbour refused to tell him what he did. He was taken to the police station and locked up then he was taken then to Rumuruti Police Station.
16. He stated that the OCS Rumuruti called him the next day and asked him why he was arrested but he said he did not know. The OCS said he killed somebody. He was then brought to court and was charged with murder. It was his testimony that while at Rumuruti Police Station after court DCI officers came to question him and asked him to sign papers. He asked them to read them for him but they refused but told him to sign. That they started beating him.
17. He asserted that he was forced to sign without anybody then he was taken to prison. He was also I was also taken to hospital for blood transfusion.
18. The Accused reiterated that on the night of 30-31/1/2021, he was in his house, where he has animals and he slept and woke up well. He stated that he never heard any noises.
19. He stated that he knew PW2's wife and that there were other were neighbours together with him who had a grudge with PW2 because of his goats going to his home. He stated that he did not know of the alleged killing of victim herein. That he has heard allegations that the victim was beaten at his place and those who say they heard noises, did not say where it was from and in which language. He stated that Samburus graze with fimbo (club) and his was left in the house once he was going to church. He stated that the one in court was not his and that his place was not searched and examined for blood or exhibit.
20. On cross examination, the Accused reiterated that he does not know the victim and that PW2 suspected that he was cheating with his wife. He denied that the rungu produced was his and stated that the arresting officer said he arrested him while in possession of a rungu but there was no picture showing he has it. That he recorded a statement at the police station and he never recorded a statement saying that somebody came to his house at night and he went away. He denied the contents the statement.

Prosecution's Written Submissions

21. ...
22. On proof of the fact of the death of the Deceased, the prosecution stated that the cannot be any doubt as the information stated that the Deceased had been murdered on the 30th day of January 2021. The post mortem was also done on the Deceased as proof that he was dead. The Deceased was also identified by relatives who knew him and who confirmed of the fact that he was indeed dead.
23. On the cause of death of the Deceased, it was states that the doctor who conducted the post-mortem confirmed that the cause pf death of the Deceased was sub-dural haematoma following several blunt force trauma to the head. That this was expert evidence regarding the cause of death and was neither challenging nor controverted in any way by the defence.
24. On whether the said death was caused by unlawful act or omission on the part of the Accused person, the prosecution asserted that the voice recognition by PW2 clearly placed the Accused at the scene hence he was culpable for commission of the offence and that it his him who unlawfully caused the



- death of the Deceased. Further, it was stated that the investigation officer testified and produced a stick as exhibit 1 which stick was used by the Accused to assault the Deceased. He indicated that while the Deceased was passing near the Accused's compound, the Accused thought it was a thief and thus used the said stick to assault him occasioning him injuries on the head eventually lead to his death.
25. On proof that the said unlawful act or omission was committed with malice aforethought, the prosecution contended that the Deceased possessed sufficient mens reus to murder the Deceased. That from the testimony of PW2 and PW3, it was clear that the Accused was armed with a stick while beating the Deceased on the head knowing very well that the injuries so inflicted with the stick could either cause grievous harm or death. It was submitted that his intention was clear and evident to murder.
 26. The prosecution submitted that when placed on his defence, the Accused merely denied the offence and claimed that they usually have disputed with PW2 for his goats usually graze in PW2's land who is his neighbour, he also claimed that PW2 claimed that he was having an affair with his wife. Hence, he claims he was framed. But it is noteworthy that PW2 is not the complainant herein but the state and the evidence as against the Accused is overwhelming to warrant a conviction.
 27. In the premises, the prosecution urged the court to find that the Accused defence is mere denial and hence to proceed and convict him for the offence of murder.

Accused Person's Written Submissions

28. ...
29. The Accused framed the following issues for determination: -
30. Whether the Accused has offered an explanation to the charge of murder
31. Whether the prosecution has proved the offence of murder against the Accused person beyond reasonable doubt
32. On the first issue, recounted the Accused's testimony and stated that the Accused person offered an explanation to the charge of murder in that he was not in any way involved or connected to the alleged act which caused the death of the Deceased.
33. On the second issue, the Accused submitted that the Deceased death was undisputable. On what caused the Deceased's death, the Accused stated that from the post mortem report, it was indicated that the Deceased died as a result of incurring serious injuries after being beaten by a person well known to him. That during his testimony, the Accused testified that the Deceased was a stranger to him and that they had never met or engaged before.
34. It was argued that no witness testified that they ever saw the Accused beating or hitting the Deceased and apart from PW2 who testified to have heard the Accused's voice during the alleged night of the murder, no other witness corroborated this evidence. That no further investigations were carried out to confirm the alleged voice or an alternative. No other neighbour was said to have heard noises on the alleged night. The Accused person submitted that the investigating officer did not discharge his duty and if he indeed carried out any investigations in connection to the death of the Deceased, the same were shoddy, incompetent and incomplete thus the prosecution has not established that it is the unlawful act or omission of the Accused person which caused the death of the Deceased.
35. The Accused person asserted that this is a case of suspicion and circumstantial evidence and that to convict on this evidence or testimonies, the court, must be extremely careful. Reliance was placed on Republic v Moses Ojala Digolo [2018] eKLR.



36. It was stated that in the instant case, apart from hearsay evidence propagated by PW2 who alleges to have heard the Accused's voice on the fateful night, no further or proper investigations were carried out to confirm the suspicion that the voice came from the Accused person and who had actually assaulted the Deceased during the night. Reliance was placed on *Rev vs. Kipkerring Arap Koske & 2 Others [1949] EACA 135*, *Republic v Richard Itweka Wahiti [2020] eKLR*
37. Having considered the evidence tendered before this court both by the prosecution and the defense and the rival written submissions, the main issue for determination is whether the Accused herein committed the offence of murder as charged contrary to Section 203 as read with Section 204 of the Penal Code.
38. In the foregoing, the Accused person submitted that the circumstances of this instant case do not establish that there was malice aforethought on his part and further the incomplete investigations did not confirm cogently and beyond any reasonable doubt that the alleged voice heard by PW2 came from the Accused person.

Analysis And Determination

40. Section 203 of the Penal Code (Chapter 63 of the Laws of Kenya) defines the offence of murder and requires proof of the following ingredients if a conviction on the charge of murder is to be secured: Proof of the death of the Deceased and establishment of the cause of the death, Evidence of an unlawful act or omission on the part of the Accused resulting in the death of the Deceased, and Proof of malice aforethought on the part of the Accused.
41. Guided by the above provision, it follows that the main issues for determination by this honourable court in this case are: Whether there is proof of the fact and cause of death of the Deceased; Whether the Accused caused the death of the Deceased, and if so, Whether the Accused had malice aforethought.
42. As was held in *Anthony Ndegwa Ngari v Republic [2014] eKLR*, for the Prosecution to secure a conviction on the charge of murder, it has to prove four main elements against an Accused person listed as follows:
 - a. that the death of the Deceased occurred;
 - b. that the death was due to an unlawful act or omission;
 - c. that it was the Accused who committed the unlawful act or omission which caused the death of the Deceased; and
 - d. that the Accused had malice aforethought.
43. As for the proof of the death of the Deceased and the cause of the death, the same were undisputed. PW1 identified the Deceased body as his son when the post mortem was carried out. As to the cause of the Deceased death, PW4 Dr. Miringo who produced the Deceased's post mortem report as P. Exhibit 2 testified that the cause of the Deceased's death was as a result of a subdural haematoma following severe blunt force trauma to the head.
44. On whether the death of the Deceased was caused by an unlawful act or omission, right to life is protected by Article 26 of *the Constitution* which is clear that every person has the right to life and that a person shall not be deprived of life intentionally except as authorized by the law. As stated above, there is no doubt that the Deceased's injuries were caused by injuries sustained on the head suspected to have been caused by a blunt object. There is no evidence to prove that the aforesaid injuries were self-inflicted or that the injuries were in any way sanctioned by the law. Further evidence presented before



- court by the prosecution irresistibly points to an unlawful act that led to the death of the Deceased following an assault. Accordingly, I find and hold that the death of the Deceased was caused by an unlawful act.
45. Accordingly, this then begs the question as to who caused the unlawful act that led to the demise of the Deceased?
 46. From the evidence on record, it is only PW2's evidence that allegedly linked the Accused to the Deceased's murder. He stated that that on 30/1/2021 at 11.30p.m, he was asleep when he heard noises outside in form of fighting people. Then he heard voice saying that "Huyo mtu mfanyi kazi wa Kaparo sijui kama ataamka tena kesho". He stated that the voice was of Lompombogi who was his neighbour. He went back to sleep and, in the morning, he went to the fence and found mtu wa Kaparo lying down, vomiting and bleeding then he called neighbours. The police then came and took the victim and the Accused was arrested.
 47. PW3, the arresting officer testified that on 31/1/2021 at 11. 30a.m, he received a call from Naibor stating that there was a body lying on the fence. He went to the scene accompanied by PW2 and other officers and found the Deceased vomiting with injuries on the head. He enquired from people around and they told him what happened. He took two of them to give information and they told him that the Accused beat the victim. He arrested the suspect and took him to police station. The officer also stated that the suspect was arrested with a Maasai rungu which was alleged to be the murder weapon. It was tacked in his clothing and it had no blood.
 48. PW5, the investigating officer gave sworn testimony that according to the witnesses, the Accused was asleep when he heard somebody walk out and thought he was a thief on mission to steal sheep. The suspect was not armed. There was way near sheep's boma. The suspect was passing by but he was suspected to be a thief. The Accused hit him. There were no eye witnesses. The club used as murder weapon was produced as P Exhibit 1, it was recovered by the arresting officer and it was not blood stained. He also confirmed that no parade was conducted over the voice heard at night and that the club was not examined for any forensic evidence. There were no eye witnesses and he did not establish whether there was a grudge. It was stated that the weapon used was a stick. Upon re-examination he stated that there was a witness who heard when Accused hit victim and said "si thani kama huyu ataamka". The witness is Josphat, a neighbour who heard the voice.
 49. On his part, the Accused denied knowing anything about the Deceased's murder. He stated on the material night he slept well in his house and that he was arrested on 31/1/2021 and was forced to sign a statement while at the police station. He stated that Samburus graze with fimbo (club) and his was left in the house once he was going to church. He stated that the one in court was not his and that his place was not searched and examined for blood or exhibit. He also asserted that there was a grudge between him and PW2 because of goats grazing at PW2's home and that PW2 also suspected that he was cheating with his wife.
 50. From the evidence, there were no witnesses to the Deceased's murder save for the fact that PW2 testified that he has noises of people fighting on the fateful night then he heard a voice he recognized as his neighbour's, the Accused herein saying that; "Huyo mtu mfanyi kazi wa Kaparo sijui kama ataamka tena kesho." In the premises, the prosecution relied on PW2's identification of the Accused as the Deceased's attacker by voice recognition.



51. Accordingly, voice identification is just as good as visual identification as was stated in In Karani vs. R [1985] KLR 290 where the Court of Appeal rendered itself as follows:-

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognised it and that there were conditions in existence favouring safe identification.”

52. Further, in Choge vs. R[1985] KLR 1, it was stated thus:-

“.....There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather than at first sight. In Rosemary Njeri v Republic [1977] Criminal App. No. 27, a victim of the offence of grievous harm testified she heard the appellant say “break her legs?” The reception of this evidence was upheld in the High Court on the first appeal and also on the second appeal....”

53. Notwithstanding, just like visual identification, care has to be taken to ensure that the voice was that of the Accused; that the person testifying as to the voice recognition was familiar with the voice and recognized it; that the conditions prevailing at the time of the recognition were favourable and it should also be borne in mind that voices may at times resemble.

54. In Simon Kiptum arap Choge & 3 others vs. Republic [1985]eKLR, the Court of Appeal set out the conditions for voice identification when it stated as follows:

“In relation to the identification by voice, care would obviously be necessary to ensure:

- a. that it was the Accused person’s voice
- b. that the witness was familiar with it and recognised it and
- c. that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

55. Similarly, in Vuva Mwachumbi Vs Republic [2016] eKLR, the Court of Appeal stated:-

“Of course, in testing voice recognition in addition to considering the length of time the witness has not known the person and circumstances of their acquaintance one has to consider the words heard by the witness in order to determine whether they were sufficient to enable him correctly recognize his voice.”

56. Having weighed PW2’s testimony and the circumstances of the Deceased’s death, it appears that the Deceased was beaten by a blunt object on his head leading to severe blunt force trauma to the head. It appears that he was attacked on the night of 30th January 2021 which is when PW2 allegedly heard fighting noises and a voice he recognized as his neighbour saying he is not sure whether Kaparo’s worker will wake up tomorrow. The Deceased then died in hospital as a result of the attack.

57. In my considered view, while PW2 did not see how the Deceased met his death, his identification of the attacked as the voice he heard at night and the eventual circumstances of this case point to the culpability of the Accused. The fact that the Deceased was found along PW2’s fence does not exonerate the Accused in any way as in any case, the Accused was PW2’s neighbour and he could so the fence was certainly close to the Accused’s residence.



58. It is my considered opinion, that the identification of the Accused by PW2 through his voice was sufficient to place him at the scene of crime, not forgetting that he also heard noises from people who appeared to have been fighting indicating that the Accused and the Deceased certainly had an altercation. PW2 and the Accused were neighbours and PW2 stated that they had been neighbours for long so it is believable that PW2 knew and could recognize the Accused's voice. It is my holding that PW2 was familiar with the Accused voice and thus he positively recognized it on the material night. I find that the fact that PW2 heard the Accused's statements the night before concerning the Accused not waking up tomorrow and then the Deceased was found lying on PW2's fence vomiting and bleeding the next day is consistent and reliable evidence that the Accused caused the Deceased's death and that it is safe to act upon his testimony.
59. Having evaluated the Accused's defence, he stated that he slept well on the fateful night and he did not hear any noises. He did not offer any explanations on why PW2 heard him talking about the Deceased not waking up the following day. He also stated that he was forced to sign a statement that was prepared at the police station when he was arrested, but I will not dwell on the same as it is not part of the prosecution's evidence. I find that the Accused's defence was mere denial and he did not deny or challenge PW2's identification by voice.
60. Considering the evidence adduced and circumstances of the case in totality, it is my view that the prosecution adduced sufficient direct evidence of voice recognition which pointed to the Accused's guilt.
61. On whether there was a malice aforethought? The prosecution had a duty to prove malice aforethought on any of the circumstances stated under Section 206 of the Penal Code which defines malice aforethought as follows:

“206. 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.

61. The prosecution stated that the Accused's intention to murder the Accused was clear and evident. That PW1 and PW3 confirmed having seen the Deceased bleeding heavily from the head possibly out of the injuries sustained on the head by use of the stick. That this clearly confirms that the Accused was armed with a stick while beating the Deceased on the head knowing very well that the injuries so inflicted could either cause previous harm or death.



- 62. Reviewing the available evidence on the proof of malice aforethought, I find that the Accused’s own statement that he was unsure whether the Deceased will wake up again the following day shows that he had the intention to murder the Deceased. Evidently, the Accused person struck the Deceased on his head with a blunt object, most likely a maasai rungu and it is my considered finding that the Accused’s actions and statements that fateful night proved that he had 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 as set out under Section 206 (a) of the Penal Code. Consequently, I find that the Accused’s intention to cause death or grievous harm was proved and therefore I am satisfied that the prosecution has proved malice aforethought against the Accused within the meaning of Section 206(a) of the Penal Code.
- 63. From the foregoing, it is my finding that prosecution proved its case against the Accused beyond any reasonable doubt. Consequently, I find the Accused person herein guilty of the offence of murder and convict him accordingly.

DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 25TH DAY OF JANUARY 2024

.....

C KARIUKI
JUDGE