



**Lelenkeju v Republic (Criminal Case 13 of 2018)
[2024] KEHC 6338 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL CASE 13 OF 2018
AK NDUNG’U, J
JUNE 4, 2024**

BETWEEN

ALIKUWA LELENKEJU ACCUSED

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Accused, Alikuwa Lelenkeju was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on 19th May 2015 at Kimagundura area in Laikipia East Sub-County within Laikipia County murdered Wangecha Lenato. He entered a plea of not guilty.
2. PW1, Katuto Lemarai Kaparo, told the court that he was a retired public officer. He came to know the Accused in 1997 when he (PW1) was a village elder. The Accused had sought PW1’s consent to live in the area having come from Isiolo area. The accused proceeded and established his home 50 meters from PW1’s home. They became friends.
3. PW1 testified further that he knew the deceased in this case who also came to live in the area 3 years after the accused had settled in the area. The deceased had also come from Isiolo. The deceased established his home about 100 meters away from the home of the PW1. The deceased and the Accused said they were family but PW1 did not establish the degree of relationship.
4. PW1 recalled that on 19/5/2015 at around 6.00p.m, he had just returned from Nanyuki town and was at the local trading centre, Eldigri. He met the deceased and they took tea at a tea place (sic)
5. The two then proceeded to a site where one Anthony Ole Mong’i was building a kiosk for the Accused. The accused went to the site and found them there. he was riding a motor bike. The Accused questioned them asking whether there was any issue with his kiosk. The accused appeared angry. He rode away.



6. PW1 and the deceased set off for home. After a 5 minute walk they met the accused who was now walking. He was holding a panga on his right hand and a rungu on the left. He asked the two again whether they had any issue with his kiosk plot. Deceased answered in the negative.
7. PW1 continued walking towards his home leaving PW1 and the deceased standing. After 30 meters, PW1 heard screams coming from behind. He turned and looked at where he had left the accused and the deceased. He saw the deceased lying down. The Accused was standing over him. He saw the accused cut the deceased around the neck area and on the had about 3 times. He moved towards them but out of fear he stopped and shouted for help.
8. A young man called Teso Ole Sembi came. The accused ran away. PW1 and Teso tried to chase him but he disappeared. The deceased looked gloweley injured. They carried him to the trading centre about 100 meters away. In the company of Eunice (deceased's wife), Anthony, PW1 took the deceased to Nanyuki District Hospital in a motor vehicle. On examination, the deceased was pronounced dead while still in the vehicle.
9. The matter was reported to the police and investigations commenced. PW1 pointed out the scene to police officers who accompanied him. A report was made to the deceased's family. PW1 led the police to the home of the accused. There was no one but the motor cycle PW1 had seen the Accused riding was there. Accused riding was there. the police took it away. On 22/5/2015, PW1 and others identified the body to the pathologist who performed a post mortem examination.
10. PW1 explained that it was not dark when the attack occurred. It was around 6.00 p.m.
11. On cross examination PW1 denied that he was the one who attacked the deceased. He stated that he did not assist the deceased as he feared the accused would attack him and he was unarmed. He denied any business rivalry between him and the deceased.
12. PW2 was attracted to the scene by screams. She found the deceased injured and being assisted by people. She and others took him to hospital at Nanyuki where the doctor pronounced him dead.
13. PW4 produced a post mortem report filled upon his examination of the deceased's body. He concluded that the cause of death was cerebral hemorrhage due to multiple cut wounds on the skull secondary to blunt and penetrating forced trauma to the head.
14. PW5 was the government chemist who testified that the investigating officer forwarded a blue polo t-shirt and khaki pair of trousers belonging to the deceased and blood samples and teeth collected at the scene of crime. It was required to the expert to determine the presence and origin of any blood stains in the exhibits forwarded. After the analysis, the conclusion was that the DNA profile generated from the items matched that of the deceased. The analyst produced the Exhibit memo and he Government Analyst report as Exhibit 2 (a) 2 (b).
15. PW6 testified that in May 2015, he was stationed at DCIO's office Laikipia East Sub-County. The on 19/5/2015 at about 8.00 p.m. he was called on phone by the DCIO and instructed to proceed to the report office at Nanyuki Police Station and attend to a murder reportee.
16. Upon interviewing the report, he and PC Keter proceeded to the scene of crime arriving there at 9.30 p.m. There were signs of a struggle and a pool of blood. He also saw and collected 2 teeth and a blood sample.
17. He was then led to the home of the suspect, the Accused, only to find the house locked with no one present. There was a motor cycle Registration No. X- GKN 017, make Yamaha, red in colour. The same was recovered. He clarified that the motor cycle was not used as a weapon.



18. PW6 proceeded to recover a shirt and long trouser that the deceased was wearing during the attack. Both were blood stained. He prepared an exhibit memo form forwarding the trouser t-shirt, blood sample, 2 teeth, and blood sample collected from the deceased body. Aim was to establish if the blood sample collected from the scene of murder matched the known blood sample of the deceased.
19. PW7 pointed out by an informer. At time the Accused was herding cattle and sheep near a residence. The alleged offence was murder.
20. PW8 took over investigations in this matter from CPL Mugambi who had been transferred. He was informed of the arrest of the accused who had been taken to Nanyuki Police Station. The investigations had been completed. PW8 processed the suspect, the accused, for charging.
21. That was the totality of the prosecution's evidence and upon considering the same, the court made a finding that there was evidence that the accused had committed the offence charged and Section 306 (2) of the Criminal Procedure Code was complied with.
22. The accused in his defence gave sworn testimony and called one witness.
23. In his evidence, he stated that he is from Rumuruti. he was born at Suguta Marmar. He left Suguta Marmar for Rumuruti during El nino that occurred years ago. He has stayed at Rumuruti for 25 years. He has a home there. his children go to school there. he is a pastoralist.
24. The on 19/5/2015, he was at Rumuruti at his home grazing his cattle. He has no other home. He added that during drought, they move to Ndarapua and only return when it rains.
25. It is the accused's evidence that he does not know PW1. He denied ever living at Kimagandura area. He was arrested when with his children.
26. On cross examination, the Accused stated that on 19/5/2015 he was grazing alone. There were neighbours who saw him grazing. He admitted that he had no documents to shown that he lived at Rumuruti that time. He conceded that he was arrested and that 3 years the incident and that 3 years is enough to change residence. He denied owning a motor bike.
27. DW2 testified that the know the Accused who is a neighbour at Rumuruti. They have lived together since childhood. He is a neighbour. Initially they lived at Suguta Marmar. He added that the accused has one wife and a family.
28. It is DW2's testimony that he herds his animals in the area as there are water sources but normally they also look for pasture far from time to time. He added that the accused has animals too. He never goes away to look for pasture. He is an old man and he has children who would do that work. He concluded that he is not aware of any other place where the accused has lived.
29. On cross examination, DW2 acknowledged that he had not produced any document in proof that he lives at Rumuruti and that neither is he a chief to keep records of inhabitants. He stated that on 19/5/2015 the accused was home with his animals.
30. Both parties filed closing written submissions.
31. I have had occasion to consider the charge, the evidence and submissions on record.
32. The offence of murder is defined in Section 203 of the Penal Code:
"Any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder."



The court in Republic Vs Andrew Omwenga (2009) eKLR while outlining the ingredients necessary to be proven in a case of murder derived from the definition of the offence stated:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- a. The death of the deceased and the cause of that death;
- b. That the accused committed the unlawful act which caused the death of the deceased and
- c. That the Accused had the malice aforethought”.

Malice Aforethought is defined under Section 206 of the Penal Code 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;
- 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.”

33. I will proceed to deal with each of the ingredients.

The death and cause of death of the deceased

34. From the record the prosecution has proved that the deceased died on the 19/5/2015. There is the evidence of PW1 and PW2 who escorted the deceased to Nanyuki District Hospital where he was pronounced dead while still at the vehicle. The evidence of death is confirmed by PW4, the pathologist who performed the post mortem examination. In the post mortem report produced in evidence, the doctor confirms the death of the deceased herein and the cause of death was cerebral hemorrhage due to multiple cut wounds on the skull secondary to blunt and penetrating force trauma to the head. The fact of death and the cause is not in doubt.

Whether the Accused committed the unlawful act that caused the death of the deceased

35. The evidence on record that connects the accused in this case to the commission of the unlawful act resulting to the death of the deceased in that of PW1. PW1 narrated 2 incidences that evening when he met the Accused when PW1 was in company of the Deceased.

36. The first meeting was where PW1 and the deceased had gone to a site where a kiosk was being erected for the Accused. The evidence is that PW1 who looked angry approached the two and asked them if they had any issue with the kiosk. The Accused left.

37. The 2nd incidence is when PW1 and the deceased were walking home when they met the Accused now walking and having a panga on his right hand and a rungu on his left. He again questioned the two on



- whether they had a problem with the erection of the kiosk. the deceased replied they had none. It is then that PW1 walked towards home leaving the Accused and deceased standing. Shortly after walking for about 30 meters and on turning, PW1 saw the deceased lying down and the accused cutting him with the panga.
38. It was PW1's evidence that he feared to go to the scene as he was not armed. He screamed and the screams attracted one young man namely Teso Ole Sembi. The Accused ran away.
 39. The pertinent question is whether PW1 identified the Accused positively as the person who attacked the deceased.
 40. The flow of the evidence shows that PW1 knew the Accused well. It is his evidence that he came to know the Accused in 1997 when he was a village elder and the Accused had sought his consent to live in the area having come from Isiolo area. Indeed, PW1 added that Accused initially lived in PW1's boma before he established his own after 3 to 4 years. On that material evening, they met twice, at the site where accused's kiosk was being built and a long a path as PW1 and deceased walked home. They had a conversation. The Accused questioned them on whether they had an issue with the erecting of the kiosk at the site.
 41. PW1 gave a clear narrative of how the Accused and the deceased settled in the area. They were his neighbours living meters away. He knew them.
 42. The attack happened shortly after PW1 left the Accused and the deceased standing along the path. He heard screams when he was 30 meters away and he saw the deceased lying down being cut by the Accused. It was around 6pm. It was not dark.
 43. In those circumstances, the identification of the Accused, indeed, recognition presented no particular difficulties.
 44. In countering this evidence, the accused gave an alibi. He stated that he is from Rumuruti having been born at Suguta Marmar and relocated to Rumuruti during El nino. He said that on 19/5/2015 he was grazing his cattle. He denied knowledge of PW1 or ever having lived at Kimagandura.
 45. DW2 maintained that the has lived with the Accused at Rumuruti for many years. On cross examination he conceded he had no documents to show that he lived in Rumuruti. He said that on 19/5/2015 the Accused was home with his animals.
 46. A look at the recorded evidence readily shows that the alibi evidence adduced by the Accused is sprung like a surprise only in the defence. I have painstakingly pored through the evidence and particularly the cross examination and it is clear that the alibi is only introduced at the defence stage
 47. That on its own in no way lessens the burden on the prosecution to prove its case beyond reasonable doubt.
 48. It is trite law that when an accused person pleads an alibi, the burden of proving the falsity, if at all, of the defence of alibi lies with the prosecution. In the case of Victor Mwendwa Mulinge vs. R [2014] eKLR the Court of Appeal while addressing alibi defence stated:

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja vs. R* [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the



case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

49. The standard required for consideration of the defence was outlined in *Uganda v Sebyala & Others* [1969] EA 204, where the learned Judge quoted a statement by Georges CJ., in *Tanzania Criminal Appeal No. 12D 68 of 1969* who observed that:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.

50. In *John Odera Omenda & another v Republic* [2014] eKLR Majanja J stated;

“The trial court, in taking the approach it did, failed to consider the veracity of that defence and determine, in light of the entire evidence, whether the prosecution had met its obligation to the required standard. This not a case where the appellants merely asserted an alibi they gave sworn testimony and produced evidence. The 1st appellant produced a discharge summary and a receipt for payment confirming that he had been admitted to hospital on the material day. The testimony was supported by his wife. The 2nd appellant produced documentary evidence that he was employed in Eldoret at the time the incident took place and his wife supported his defence.”

51. It is the duty of this court therefore to weigh the evidence before it testing the veracity of the evidence on both divides and based on the strength of the evidence, and bearing in mind the burden that is exclusively on the shoulders of the prosecution to prove their case beyond reasonable doubt, make a finding on whether the prosecution’s evidence displaces the alibi raised by the Accused.
52. In my considered view, the evidence of PW1 was firm and consistent complete with the history of the Accused settling in the area and with minute details of the Accused’s encounter with PW1 and the deceased on the material evening, which encounter involved the Accused who was visibly annoyed questioning the two whether they had an issue with the erection of a kiosk at the Accused’s plot. The act causing the death of the deceased was committed hot on the heels of this encounter and witnessed by PW1. There is no iota of evidence of any grudge harboured by PW1 against the Accused to raise any possibility of a frame up. Contrary to the submission by Accused’s counsel, the issue of a mistaken identity cannot arise in view of the long knowledge of PW1 of the Accused.
53. It is worthwhile to note that immediately after committing the offence, the accused fled from the area and he was arrested on 7th August, 2018, approximately three years after the offence, a period long enough for him to have moved and settled in Rumuruti.
54. In light of the evidence on record, the alibi defence cannot possibly be true. I therefore find that the prosecution evidence on record displaced the alibi defence of the accused and reach the unhesitating conclusion that the Accused committed the unlawful act that caused the death of the deceased.

Whether the Accused had malice aforethought

55. As noted earlier, the law is explicit on what constitutes malice aforethought. I reproduce Section 206 of the Penal Code which provides;

“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.”
56. It follows that on whether the accused had malice aforethought, the state through the prosecution must establish facts that are consistent with existence of malice aforethought on the part of the accused. The Eastern Court of Appeal in the case of *Republic v Tumbe S/O Ochen* [1945] 12 EACA63 in determining whether malice aforethought had been established, considered the following elements:
- (1) The nature of the weapon used.
 - (2) The manner in which it was used.
 - (3) The part of the body targeted.
 - (4) The nature of the injuries inflicted either a single stab/wound or multiple injuries.
57. In our instant case, the Accused, who for unknown reasons, was angry that evening, questioned the deceased and PW1 over his kiosk that was being erected at a plot. He took his time to go home and arm himself with a panga and a rungu only to be met by the two as they headed home. He set upon the deceased, and, according to the Post Mortem report, he inflicted multiple grave injuries on the head of the deceased. PW1 saw him cut the deceased 3 times. He then ran away and disappeared for a whole 3 years. Put together, all these facts are consistent with the elements set out in *Republic vs Tumbe S/O Ochen* (supra).
58. The accused used a dangerous weapon a panga, he used it severally to inflict injury on the deceased, he targeted a delicate part of the body, the head, and he inflicted multiple grave injuries. There cannot be, in my view, a better demonstration of malice aforethought.
59. From the foregoing, am satisfied that the prosecution has proved all the ingredients of murder against the Accused beyond reasonable doubt. I find him guilty as charged and convict him of murder contrary to Section 203 of the Penal Code.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF JUNE 2024

A.K. NDUNG’U

JUDGE

