



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Ntonja (Criminal Case 39 of 2016)
[2024] KEHC 16117 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16117 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 39 OF 2016
EM MURIITHI, J
DECEMBER 19, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

KENNEDY NTONJA ACCUSED

JUDGMENT

1. The accused was charged with murder contrary to section 203 as read with 204 of the Penal Code with particulars that he “on the 30th day of September 2014 at Linjoka village, Ntunene location in Igembe North Sub-County, within Meru County jointly with others not before the Court murdered Kenneth Muthamia.”
2. Upon a plea of not guilty, the trial commenced and the prosecution called six (6) witnesses to prove the charge, and when put on his defence, the accused gave sworn testimony without calling any witness.

The Evidence

3. The full testimony of the Prosecution witnesses and the defence is as follows. PW1 Bernard Kabitu Mwenda testified as follows:

I reside at Kaimuru Village, Laare Division. I work as a farmer.

On 30/9/2014 at 1:30am, I was asleep. I heard screams coming from my shamba. It was somebody crying. I woke up and went to the shamba. When I got to the shamba, I found my son Kennedy Muthamia lying on the ground crying. He had been cut on the right hand and on the head. Me John Mati, a neighbour also heard the screams and he had come.

John Mati was asking Kennedy whether he knew who had cut him. I then asked my son whether he knew his attackers. He said it was three people - Ntonja Kennedy, Eliud Muya Mugira alias M’Arunga and Martin.



After my son told me this, I asked Robert Kaburu who had come to answer the scream to go and look for transport. He came after 30 minutes. When the car came, Kennedy Muthamia, Robert Kaburu and I entered the vehicle and we took my son to Maua Methodist Hospital. The doctors started treating him. At 03:00am., we were told he had died. We went to the Police Station at 3:30am to report. It was at Maua Police Station. After Maua, I went to Laare Police station. We went with them home to show them where the incident happened.

The police were shown by the people the footprints where the attackers had followed. That night the light was from a torch light Martin had a torch and I also had a torch. I know the accused. He is my neighbour. He is Kennedy Ntonja. I have known him as we are in the same sub-location and his home is away 800 metres. I have known his family, his father for a long time. I later recorded my statement.

4. On cross-examination by Mr. Mokuu for the accused:

I know the accused. He is Kennedy Ntonja. His father's name is Kimukuu and his mother is Nkirote. Both are deceased.

[Statement that witness had asked the deceased who had cut him]

Yes, he gave Ntonja, Martin, and M'Arunja.

There are others. Ntonja is a common name. The deceased did not name Kennedy.

[Statement dated 1/10/2014]

I had matters fresh in my mind. I wrote the statement after 1 day of the incident.

Accused was arrested in 2016. The killing was in 2014.

He was not arrested immediately. He hid himself. The others are still in hiding.

I did not lead the police to arresting the accused. He was arrested by Sub-location. It is in the same Sub-Location as where the incident happened.

I heard screams of cries. He was talking in Kimeru. From the house where I slept to the area where the scream was coming from is about 100 metres.

It is like from the witness box to the court fence [About 50 metres]

Child had gone to steal miraa and he was found and cut?

No, he was a student. He had seen people in shamba with torches and he went to see what was happening. Area Chief can confirm he was a good student.

5. There was no re-examination.

6. PW2 Micah Mwenda testified as follows:

I reside at Rinjoka, Igembe North. I work as miraa operator.

On 30/9/2024 at 1.27am, we were guarding Miraa belonging to John Mati. As we were guarding, we heard sc

reams of a male crying – It came from the shamba of Bernard Kabitu.

From John Mati when we heard the screams, we ran to the shamba where we heard screams. I had a torch a knife. John also had a torch and knife as we were going towards the shamba we met on the road with Martin, Ntonja and M'Arunga. When we met there, they were coming at a short distance away.



I saw Martin was carrying a knife, Ntonja was also carrying a knife. It is the long knife. It is about 11 metres in length.

When we met with them, Martin, Ntonja and M'Arunga threatened us with the knife indicating that they would kill us. They wanted to cut us.

Martin and M'Arunga had disappeared. It is Ntonja who is the accused. We come from the same place at Rinjoka. I knew him since I was a small. It is 27 years.

When they threatened us, we screamed and some people started coming with torches and they run away. John and I had run to Bernard's shamba. When we reached, I saw somebody had been cut. It was Kennedy Muthamia. I had lived with him. We found Kennedy Muthamia lying on the ground. He had been cut on right hand. I screamed very hard. I later recorded my statement at Laare Police station.

7. On cross-examination by Mr. Mokuu for the accused:

Kennedy Muthamia was my neighbor. We went to the same school. We hailed from the same area. We are not related.

[Statement that the persons followed footsteps]

These was at about 1:30 am. It was in the month of September. There is usually no rains and no mud.

It is a distance from Rinjoka to Ngiri. It is about 500 metres. From the shamba where Kennedy had been injured, we followed footsteps to Ngiri. It is 500 metres, ½ kilometer.

Because there was no rain and mud could you follow foot-steps?

Miraa had been dropped along the way by M'Arunga. We followed footsteps inside people's shamba inside miraa plants. We passed about 15 shambas about 5 acres, 7 acres.

[Witness is told that he had been forced to testify]

I am not a witness of lies. I saw the deceased. He had been cut on the hand at the place between wrist and elbow. He had also been cut on the head.

The father of the deceased (PW1) came after we had made screams.

We met 3 people. M'Arunga, Martin and Ntonja. We met in the shamba of Bernard. It was not on the road. It was inside the shamba.

We were at John Mati's shamba when we heard screams. I went together with John Mati running to find out. John Mati was ahead of me. It was inside the miraa plantation.

We had heard the screams.

According to me, Kennedy Muthamia was guarding miraa.

I know the deceased. The accused is only older than me by a few years. The incident happened in 2014. He was arrested after 1 year. He was arrested at Rinjoka. He was arrested at market selling miraa in the same area.

From 2014 to 2016, the accused had ran away after 1 year when he thought people had forgotten, he came back. The 2 other people have run away but they are living.

8. There was no re-examination



9. PW3 Amos Murithi testified as follows:

I reside at Meru Laare area. I work a businessmen on 30/9/2014 at 5:00 am, I was at home, I had risen to go to school. It was then at Rinjoka Primary School. I was at class 8.

As I prepared to go to school, I saw three people came to the house. It was three men. The first one was my cousin Eliud Mugira, Ntonja and Martin.

I was outside house, when they came, they carried a load in a paper bag. It was my cousin Eliud Mugira who was carrying the load. It was in a plastic paper bag.

My cousin said the luggage should stay at our house and he would come for it later. At this time, I used to live alone in my house.

When he gave the load, he was in the house and I put on the table. Eliud Mugira Ntonja and Martin then run away. I did not know where they went.

After that I saw three other people following the first three and the came following them. It was Micah Mwenda, John Mati and Fredrick Karimba.

When they came they asked me who had come by and I told them my cousin had came and they took me with the load and said we should go to the police station. They also searched for anything in the house. They found the load. It was a load of miraa. We went with it to the police station at Laare. I recorded my statement.

At the time 5:00pm I had received the three, Martin, my cousin and Ntonja. Ntonja is the accused. I had electrical light in the house. They also spoke with me. I know the accused as my neighbor. I have known him for about 10 years.

10. On cross-examination by Mr. Mokuu for the accused:

In 2014, I was 16 years old. I am 23 years old now. I know the purpose of oath. My statement was written on 1/10/2014. I had gone on 30/9/2014 and told to go back the next day.

[Witness referred to the handwritten statement of the witness, 2nd paragraph.

"I can recall clearly on 30/9/2014 at around 5:00am. I had woken up to prepare myself to go to school and I was out of my house answering a call of nature. It was when my cousin Mugiira came carrying a load and asked me to keep for him. He said he had been called by Ntongai and Martin and he could come for his property...]

It was three people who came two stayed outside. I saw them.

The statement is different I saw the two other persons.

It is true that I only saw my cousin. I did not see the others.

Eliud Mugiira run away because of this case. The case of murder. The deceased is Kenedy Muthamia.

Mugiira is the correct name for my cousin. M'Arunga is a nickname. He is my cousin. I know him well.

I know the accused. He is M'tonja. I am Amos Murithi. I know him as Ntonja. My village is Rinjoka. From our home to the accused's house is not far. We share a sub-chief. One could hear another call from the other place.

Ntonja is a common name.



I did not see Martin and Ntonja. Mugira said he had been called by Ntonja and Martin. My cousin said he had been called by Martin and Ntonja. I knew who he was talking about the accused and Martin. They were friends.

11. There was no re-examination.

12. PW4 Fredrick Tharimba testified as follows:

I reside at Laare. I work as a farmer.

On 30/9/2014 at 1.30 am, I heard screams. I was at home. I woke up and went to the shamba from where I had heard screams. The shamba belonged to Bernard Kathira. From my shamba to the shamba where I had the screams is such as from the witness box to the Gate. [about 20-30 metres.

When I went from my house to the place where I heard the screams. I went and found Kennedy, lying on the ground. He had been cut on the head and on the arm.

At the scene besides the deceased, I saw M'Arunga, Martin and Ntonja. I was with Mati and Micah. As they saw our torches, they ran away. We had torches and we were going to the place where the screams were coming from. We left Kennedy there and started chasing after the said M'Arunga, Ntongai and Martin.

We followed them upto the gate belonging to Amos Muriithi they entered. As they realized that we were following them, they left the miraa they were carrying with a young boy.

We took the miraa and the young boy and we went to report at the Laare police station. The young boy said that he had been given the miraa by Ntonja, Martin and M'Arunga.

The accused is Ntonja. I know him he is from my village. I know him since he was a small boy, His father is of agemate.

I saw the accused and the others using the light from my torch. I later recorded my statement.

13. On cross-examination by Mr. Mokuu for the accused:

I am 65 years old.

[Witness is shown the original of his statement]

This is now sign [witness demonstrates on paper]. When the statement was taken, I was giving information with the police writing it down.

Q. The signature on the statement is different?

I signed the statement.

I heard screams from my house. We went and found Kennedy lying on the ground.

Q. Did you meet anyone?

We met with Mati and Micah (PW2) inside the shamba.

It is true that you never met with Martin, Ntonja and M'Arunga.

Yes, it is true it is not written in the statement that I met the three and that I followed the 3.

[Witness is referred to the statement indicating that he heard someone screaming from the outside. I rushed out about 20 metres from my house and on arrival; I found Kennedy Muthamia bleeding from the cuts on hands and head. There was John Mati and John Kaikwara trying to stop bleeding. His father asked for a vehicle to take him to hospital. It took 30 minutes.



With a group of seven men, we followed footsteps and miraa leaves that was dropped by thieves on the road as they escaped.

At Runkuri village the footsteps lead to the house of Miriti who is the son of Martin and on searching we found miraa under the bed.

On asking him he said M'Arunga, Martin and Ntonja gave him for safe keeping"]

The statement was written fresh. I had better memory of the facts at the time.

It is true that it is not recorded that we met with three people as I have told the court.

It's not the truth what is recorded in the statement rather than what you have told the court today?

I saw Ntongai.

The shamba are small. My shamba is 10 acres. The shamba of Kabitu (PW1) is 4 acres. The distance between my shamba to shamba of Kabitu is only a boundary. We are adjacent.

From my house to the house of Kabitu house is near.

Q. In September, there is usually no rain?

We have rains in January. There is usually no rain in September.

Q. It not true that it is difficult to follow footsteps without mud and rain? The shamba is regularly picked of miraa.

There was dust on the land and dust on the land could show footsteps.

[It is put to witness that the evidence is framed to convict the accused]. The deceased was guarding his father's miraa when he was attacked."

14. There was no re-examination.
15. PW5, the Investigations Officer, No. 91892 PC Daniel Kiptanui attached to DCI Embu East testified as follows:

I worked previously at Laare Police in Egembe North Sub-County. I left Laare in 2019. I am the Investigating Officer (I.O).

On 30/9/2014, I recall at 9:00am while at the station one person Bernard Kabira reported at the station that the previous night 01:30am his son Kennedy Muthamia had been attacked while guarding miraa at his shamba. He had been injured on the head and the hand. He reported that they took him to Maua Methodist Hospital where he died while undergoing treatment.

After the report was recorded in the O.B my colleagues Sgt. PC Chebui, PC Kipngetich PC Etule and I went to the scene of crime at Linchoka village Ntunene location. We went upto the shamba where it was alleged the attack took place. We found blood stains. We also established that miraa had been harvested as alleged. We interrogated neighbours. We found two neighbours who said they were the first responders who heard screams when the deceased was attacked and when they went to see what happened one of them met with three people namely Martin, Ntonja and Eliud, who were running away from the shamba.

As we proceeded with interrogating another villager said they were able to follow footprints of the attackers and they led them to the house of one Amos Muriithi. We all went to the house of Amos Muriithi and we recovered fresh harvested miraa which had been put in a polythene bag. We interrogated Amos Muriithi as to how the miraa got there and he told



us that they had been brought by one person named Eliud with two others whom he did not identify.

We were able to identify witness and we went back to the station and they recorded their statements. On 8/10/2014 I went with the family to the deceased to Methodist Hospital where post mortem was carried out on the body. The postmortem was conducted by Dr. Njeru and the cause of death was established to be head injuries and the postmortem form was duly completed.

I proceed with the investigations to trace the suspect. We went to their homes severally but we did not succeed in arresting them. After about 2 years on 5/7/2016 one suspect Kennedy Ntonja was arrested and brought to the station. He was arrested by police officer. I do not recall filing for an order to hold the suspect at Maua Law Courts. We later charged him with murder before the court.

We were not able to arrest the other suspects. I have been informed by the current Investigating Officer that they have not been found to date. When looking for the suspects we conducted search in the house of the various suspects in the same village.

From the shamba where the deceased body was found to the shamba of the 1st respondents is about 100 metres. I drew a sketch map showing the miraa farm distance where the deceased was found and where the first respondents and also the distance from where the deceased was attacked and where we found the freshly harvested miraa. This was about 5 Km. I wish to produce the sketch plan PExh No. 1. That is all.

16. On Cross-examination by Mr. Mokuu for the accused:

Investigation Diary. I was assisted by PC Kipgetich as the Investigator. The 1st report of the attack was made on 30/9/2014 at 5:00 am. The incident allegedly took place the same day at around 1.30am. I am not the officer who received the report. I only met the person who made the report. At the report the deceased have already passed on. The person who made the report is Bernard Kabitu. His initial report that around 1.30 hrs while his son was guarding miraa he was attacked by thieves who cut him. The report does not contain the name of the suspect.

[It is put to the witness that father of the deceased stated that the son was not guarding miraa]

I have testified that we went to the miraa shamba.

Eliud, Ntonja, Martin. There are among people but that name one could be physically identified. We conducted our investigations.

Before this incident. I had worked for 8 years.

Rinjoka is about 8 km to the police station.

Ntonja is a common name in the locality. Ntonja, During investigations we were told its nickname of the suspects.

We went to Amos' house.

Amos Murithi (PW3). We recovered miraa. It was just a small parcel of roughly 2 kgs. One could buy this from market. We do not have the miraa as exhibit. Freshly harvested. It is an area where any home has miraa.



Is there any specific to show the miraa came from the shamba? No. There was nothing specific.

Sketch map

Witness who said he met the suspects. The witness who said he met the suspect is Micah Mwenda (PW2). I cannot be specific on where they met but the witness was responding to where the screams were coming from. The witness was guarding adjacent miraa shamba.

Accused- was he ever arrested

Yes, that is why he is here.

I cannot recall how he was arrested. I am the one who preferred the charges. I have affidavit before Maua CM's Court. There is no way a person could be brought to court without arrest. He was arrested on 5/7/2016.

I was with the matter until 2019 when I went on transfer. They disappeared completely. The current Investigating Officer states one of the suspect is deceased. On transfer I handed over the file.

17. There was no Re-examination.

18. PW6 Dr. Sammy Githu Wachira, MOH Nyambene hospital testified as follows:

I have an MB.CHB. from Moi University 2013.

I have post mortem dated 8/10/2014 conducted by my colleague Dr. Charles Mucheni Muchangi. I know Dr. Njeru. We worked with him as MOH Mutuati. I took his place at Mutuati Hospital Igembe North. Dr. Njeru is away for Postgraduate studies. I confirm that his report is in his handwriting and signature. He is at University of Nairobi.

Report of Kennedy Muthamia of 8/10/2014.

General observations:

Clothes soiled with dirt and blood.

Male African of 28-30 years of good nutrition. Average physique and 194CM height.

Postmortem charges

Body in rigor mortis and cold due to preservations.

External appearance

Head – Deep extensive cut wound 10cm long on top of head extensively into the shin skull bone and brain matter herniating out injuring to sagittal sinus [on top of the head]

Right hand was amputated at the wrist joint severing the radial and ulna vessels and cutting the bones ulna and radius bones and only the skin was supporting the hand and cut by sharp object.

Internal appearance

Cardiovascular system- severe ulna and radical vessels at the right.

On head skull bone cut through and brains matter herniating out with sagittal sinus.

Opinion on cause of death was cardiopulmonary arrest as a result of severe head injury and hypovolemic shock due to assault using sharp object. Death certificate completed and signed by Dr. Charles Njeru on 8/10/2014.



19. There was no cross-examination.

20. DW1 Kennedy Ntonja, the accused, testified as follows:

I am 34 years old. I have been in custody since 2016. I am married. I have two children, my parents died when I was young. I have two brothers. I worked in the miraa trade. I used to buy and sell miraa.

Murder charge.

I deny the charge, I did not know Kennedy Muthamia.

Rinjoka village is very big village.

On 30/9/2014 during the day. I was at Laare town. I had taken miraa to the town. I left home at 12:00 noon and got to Laare at about 3:00pm. After selling my miraa. I went back home and arrived at 5:00pm,

That evening I stayed at home. On the following day I went to the village and got other workers and took them, to work at my in-law's shamba and we started harvesting miraa. It was in the same village. On the day, I went to buy banana leaves to wrap miraa, I was told that there were many people who had come and I was warned that I should not go back as members of the public had come looking for me and they were angry accusing me of having killed someone. It was my brother who called me. I went away back home. My home from my in law's shamba is nearby, from Meru court to Makutano junction is about 1 kilometre.

I was arrested after 1 year when the incident happened I stayed at home and I found that no one was coming there to look for me. I started living home. On 5/7/2016, I went Laare. I met with 3 people- Musa, Kirimi and Ngiiri, I met them at a land corner where they were fencing on a land then.

The three asked me whether I was Kennedy Ntonja. I confirmed. They asked me whether I could direct them to M'arunja and Martin, they asked for my phone. They said if I could not tell them where the two were, they could arrest me as a suspect having killed a person together with the two.

Evidence before the court.

The evidence prosecution said Martin and M'Arunga were the only who killed the deceased.

They took me to the Laare Police Station. None of the three person who arrested me testified in court.

I did not know the decease beneath Muthaura. I did not kill.

I have never had any problem with the law. I was only once arrested during a Sunday at Mombasa but I was released.

The offence, I think it could have been a mistaken identity as Ntonja is a known name in this area.

PW1 BERNARD KABILA MWENDA

I saw him in Court. I do not know him. The Kennedy Ntonja referred is not me. There are many Ntonja's in the village.

PW3 Amos Murithi, I saw him in court, I do not know the witness. I do not know the three people mentioned.



When I was arrested. I was not arrested with any items.

I never went into hiding. I was at home. I stayed at home for 2 weeks without going out and no one came looking for me from police, villagers elders or anyone.

I pray for the court to release me.”

21. On Cross-examination by the Mr. Masial for DPP:

I worked in Miraa trade for 3 years. Miraa trade is daily work.

[You did not leave home for 2 weeks after the killing]

I decided to stay at home when I heard they were looking for me. I fleered because I heard I had been mentioned.

[Ntonja's are many. How did you know it was you]

They came looking for me and when I was told I went away. No body came home. Even police officers.

During the one year I was in my area. I used to go to Laare.

I do not know PW1 Bernard. PW2 Micah Mwenda; PW3 Amos Murithi; and PW 4 Fredrick Tharimba are not known to me. I do not know the witnesses.

They could have mistaken identity on the name Ntonja.

The witness said it was Ntonja. They did not say Kennedy Ntonja. There was no proof that it was me the Ntonja they were referring to having killed.

When I worked in the miraa for three years, each used their weapons they have, C-line etc I do not have a miraa farm. I don't have anything to guard miraa.

I do not know Martin- Mawira. I do not know any of the witnesses in this case. I do not know anything about the case.

I do not know the witnesses. They have mistaken Kennedy Ntonja. They only said Ntonja and there are several Ntonja's in the village.

[In the village you are known as Ntonja]

There are several Ntonja's. I am Kennedy Ntonja. I would only respond to Kennedy Ntonja. I do not know about the case. It was trumped up charge.

Why did they say it was you?

The witnesses did not want anything from me.

22. There was no re-examination.

Submissions

23. On the evidence, it was urged for the Defence, in Submissions dated 23rd July 2024, that the prosecution's case was based on hearsay statements and a case of mistaken identity as follows:

“Your Lordship all the testimony on record is circumstantial; non of the witnesses was an eye witness. It is mostly hearsay.

ON PROSECUTION



PW1 was BERNARD KABITU MWENDA the father to the deceased. His evidence was that upon hearing screams he woke up and rushed to the source whereupon he found his deceased son on the ground crying. This witness further stated that together with one JOHN MATI a neighbour they sought to know from the deceased whether he knew those who had cut him to which he replied NTONJA KENNETH, ELIUD MWENDA NTORINGA & MARTIN.

Your Lordship this is the closest testimony as to what may have transpired.

When you compare this testimony with the defence, would one say that the perpetrator has been identified with any degree of certainty.

Can what the deceased said pass as dying declaration.

PW2 MICAH MWENDA testimony doesn't help a lot [as] his version is that together with one JOHN MATI they were guarding Miraa when they heard screams. That on their way to the source of the screams they met with MARTIN, NTONJA and M'ARINGA. Who are these? Can this pass as identification.

Your Lordship those who have testified are mentioning single names i.e NTONJA, MARTIN MWENDA etc. the threshold is beyond reasonable doubt. Has the culprit been identified with any degree of certainty.

Has the accused herein been positively identified and linked to the murder; -these are pertinent question that need an answer.”

24. Counsel for the Prosecution in Submissions dated 1st September 2024 at paragraphs 15 and 16, principally, asserted that it had established the charge on the basis of the admissible dying declaration of the deceased and identification by the PW3, a brother to one of the suspects who were at large, as follows:

15. The second element, PW2 (Micah Mwenda) was able to identify the accused together with two other persons when he proceeded to the scene of crime. Therefore, this was the evidence of a single witness and the court must closely analyse the evidence to satisfy itself that the evidence was credible and truthful beyond doubt.

In *Mohamed Boru Guyo v Republic (2022) eKLR* the court held that:

‘The law is that the court can convict on the basis of oral or circumstantial evidence. More so, the court can convict on the basis of the evidence of a single witness if it believed that the evidence was trustworthy. All that the court is required to do is to warn itself of the dangers of convicting on the evidence of a single witness and convict if it is fully satisfied that the evidence points to the culpability of the accused’.

The direct evidence against the accused was that PW2 (Micah Mwenda) heard screams of the deceased and dashed over to the scene. On his way to the scene, he was accosted by the accused who threatened to cut him using a c-line which necessitated in him running away. The incident happened at 1.30 am and he was

able to positively identify the accused as he was carrying a torch with him.

In the case of *R v Turnbull* the court stated:



'Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made'.

The source of light which was emitted from the torch, PW2 had the sufficient means to see the accused whom he knew personally. It was about recognition and not identification of a stranger.

Additionally, the deceased made a dying declaration to PW1 (Bernard Kabitw Mwenda) to the effect that it is the accused who attacked him and was therefore clearly pointed out as the person responsible for the deceased death.

A dying declaration is an exception to the hearsay rule. Section 33(a) of the Evidence Act provides for admissibility of a statement made by a deceased person as his dying declaration,

In the case of *Philip Nzaka Wanjiku v Republic* (2016) eKLR the court held:

'Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Statements made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of death'.

The principles of law on reliance on a dying declaration to support a conviction were stated by the Court of Appeal in the case of *Choge v Republic* (1985) KLR as follows:

'The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind induced by the most powerful considerations to tell the truth'.

In the present case, the words uttered by the deceased and heard by PW1 were to the person who had attacked him, and were uttered at the point of death since the deceased died on the same day from the said injuries. They are therefore admissible under section 33(a) of the Evidence Act.

Furthermore, PW2 (Micah Mwenda) upon positively identifying the accused, the assailants proceeded to the home of PW3 (Amos Murithi) on the fateful day. PW3

was able to recognise the accused and his cousin who is nicknamed (alias) as

M'arunga (suspect who is still at large). PW3 evidence is corroborated by PW2 as to the people he had recognised earlier at PW1's farm.

Lastly, the accused was in the company of Martin and M'arunga who remain at large shortly after the attack on the deceased. The accused ran away after incident only to be arrested after 2 years. This evidence is provided through the testimony of the investigating officer.

The direct and circumstantial evidence irresistibly leads to the conclusion that the cause of the deceased death was as a result of the accused unlawful act.

16. Finally, the doctor's opinion upon examining the deceased body corroborates the evidence of PW1, PW2 and PW4."

25. Judgment was reserved.



Issue for determination

26. The primary issue for determination is whether the accused was properly identified as one of the perpetrators by way of deceased's dying declaration and by any eye-witness account. There was evidence of death of the deceased but there is need for evidence of the accused's involvement in the killing of the deceased and of his malice aforethought, if he is identified as one of the perpetrators of the death.

Determination

27. In the end upon considering the evidence of the prosecution and that of the defence as a whole counselled by the Court of Appeal for East Africa in *Okethi Olale v Republic* [1965] EA 555, and noting especially the accused's defence of mistaken identity in the use of his one name Ntonja in the description of one of the attackers, the Court finds it unsafe to convict for the following reasons.
28. While Counsel for the DPP is right as to the admissibility of the dying declaration under section 33 (a) of the *Evidence Act*, he ignores the principle applicable to reliance on a dying declaration for conviction. The DPP omits to underscore the caution with which the Court must consider a dying declaration as held by the authorities. While the statement in a dying declaration is admissible, it requires exercise of caution to seek corroboration to found a conviction.
29. This Court has had occasion to discussion on the issue in a recent decision MERU HCCRC NO. 60 OF 2015, *R. v. Stanley Mugambi Nkunja, Joseph Kimathi Kamuru & Ezekiel Ntongai Rwata* of 8th July 2024, as follows:

“Dying declaration

40. In *Aluta v. R* (1985) KLR 543, 547 the Court of Appeal discussed the general principle of the law on dying declaration as follows:

“In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and in admissible for a trial judge to put forward a theory not canvassed in evidence of in Counsels' speeches. A trial judge should approach the evidence of the dying declaration with necessary circumspection. It is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. *Okale and Others v. Republic* [1965] EA 555.”

The Court of Appeal in *Kihara v. R* (1986) KLR 473, 476-7 similarly held as follows:

“Though there is no rule that dying declaration must be corroborated, court needs to caution itself that in order to obtain conviction on dying declaration, it must be satisfactorily corroborated, *R. v. Said Abdulla* (1945) 12 EACA 67, *R. v. Mgundulwa s/o Jalu and Others* (1946) 13EACA 1167 at 171. Particular caution must be exercised as to when and where the attack took place and also about the identification of the assailant and the



weapon used. It may be that the dying person could not remember all that and may not be telling the truth. In *Ramazani bin Mirandu* (1934) 1 EACA 107 it was stated:

“The fact that the deceased told different persons that the appellant was the assailant is evidence of his belief that such was the case, it is no guarantee of accuracy.”

See also *Choge v. R* (1985) KLR 1.

- 30 Commenting on need for caution on dealing with dying declarations in circumstances similar to this case in *Pius Jasango s/o Akumu v. R* (1954) 21 EACA 331, 332, which is cited in *Choge v. R*, supra, the Court of Appeal for Eastern Africa said:

“Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (*R v. Ramazan bin Mirandu* (supra); *R v. Muyovya bin Msuma* (supra)). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).

It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (*R v. Eligu s/o Odel and another* (1943) 10 EACA 90; *Re Guruswani* [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in *R v. Eligu s/o Odel and Epongu s/o Ewunyu* (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. (*R v. Said Abdulla* (1945) 12 EACA 67; *R v. Mgundulwa s/o Jalo* (1946) 13 EACA, 169, 171).”

- 31 The principle of caution and corroboration of dying declaration is reiterated by Philip Nzaka Watu, supra, cited by counsel for the DPP. The decision cited *Kihara v R* and *Choge v. R*, supra, and in the complete relevant passage held as follows:

“Decisions of this Court abound on admission and reliance on a dying declaration. Suffice to mention only two, *CHOGE V. REPUBLIC* [1985] KLR1, *KIHARA V. REPUBLIC* [1986] KLR 473 and *NELSON JULIUS KARANJA IRUNGU V. REPUBLIC*, CR. APP. NO. 24 of 2008. Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of



law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in *CHOGE V. REPUBLIC* (supra):

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

32. In this case, the person who was with the deceased’s father PW1 when he allegedly received the deceased’s dying declaration, one John Mati, who the deceased’s father said he had met at the scene when he responded to distress screams, was not called as a witness. It was this John Mati, who had also asked the deceased who his attackers were and his evidence that the deceased had named his attackers as Kennedy Ntonja, Martin and M’Arunga, who would have supported the testimony on the dying declaration by PW1.
33. If the deceased had named his attackers to his father and John Mati, whom PW1 knew very well as neighbours, it would have been unnecessary to follow the attackers’ footsteps in an attempt to discover who they were. PW1 would simply have told the police that the attackers had been named and the police would have gone off to trace the named attackers. As held in *Okethi*, it is not for this court to conjure a story as to why the police and members of the public would have had to follow footsteps of the attackers when the deceased had in a dying declaration already named as his attackers some three persons who were neighbours and well-known to the deceased’s father.
34. PW2 only testified to responding to the screams from the deceased when he together with John Mati allegedly met three persons named as Ntonja, Martin and M’Arunga. He does not say that he saw the three persons or any of them at the scene and he particularly does not say he witnessed any or all the three beating and inflicting injury on the deceased. This circumstantial evidence of the three persons who were allegedly named by the deceased as his attackers should have been carefully supported by the statement of the dying declaration by the person to whom it was made and evidence of identification or recognition of the accused and his co-suspects as the persons who so shortly escaped from the scene of the attack as not to break the chain of events. As it is now, evidence that the three were met by PW2 and John Mati when the two went to respond to the screams was not conclusive.
35. There was no description to identify the accused as the Ntonja that the deceased had spoken of as being part of the attackers. The accused’s defence that Ntonja was a common Meru name in the context of the evidence in this case is sufficient to raise a reasonable defence as to the identification of the accused as one of the attackers who inflicted fatal injuries on the deceased at the time of stealing miraa from the farm which he was guarding. PW1 who testified on the dying declaration did not state what description of the attackers that the deceased gave so as to lead him to conclude that the deceased was talking of the Kennedy Ntonja the accused herein and not any other person.
36. A conviction based on a dying declaration requires corroboration by other material evidence implicating or pointing to the guilt of the accused. In this case, the only other evidence of the accused involvement is given by PW3, a sixteen year old witness who testified that he had on the morning of the



incident been asked to keep a luggage of what was established to be Miraa allegedly stolen from John Mati's farm and informed by his cousin, known by his nickname of M'Arunga and who was named as one of the attackers by the deceased, that he had been called by Martin and Ntonja. The said PW3 did not see the accused or his co-suspect who were named by his cousin. It was hearsay evidence based on a statement by his cousin M'Arunga.

37. Evidence of identification by a single witness such as that of PW3 identifying his cousin as the one who brought in a luggage of the miraa alleged to have been stolen from John Mati's farm where the deceased was a watchman, requires corroboration and it cannot itself be corroborative of another piece of evidence which requires corroboration, as here the alleged dying declaration of the deceased.
38. Evidence of PW4 that he saw the accused and two others at the scene is clearly not reliable in view of the fact the witness says that the persons he purports to identify ran away when they saw the torches approaching and they chased after them. It is not clear how close the witness was to be able to identify the suspects. It would also appear to be an embellishment of the evidence of PW5 as initially recorded in his state as he accepts on cross-examination that "it is true that it is not recorded that we met with the three people as I have told the court."
39. Although the other elements of the offence of murder (see Republic vs. Nyambura & 4 Others [2001] KLR 355) namely the killing of the deceased by an unlawful act, it was not established that the accused was one of the perpetrators and the court would then not enter into the inquiry as to whether the act leading to the killing was done with malice aforethought. And the accused's defence of mistaken identity is not answered on the evidence.

ORDERS

40. Accordingly, for the reasons set out above, the Court finds that the Accused's defence has raised a reasonable doubt as to his identification as one of the perpetrators of the offence, and the Court does not find it safe to convict on this state of evidence.
41. The Court gives the accused the benefit of the doubt and he is acquitted of the offence of murder contrary to section 203 as read with 204 of the Penal Code, and there is, consequently, issued an order for his immediate release from custody unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED ON THIS 19TH DAY OF DECEMBER 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms. Nandwa, Ms. Kitoto, Mr. Masila & Ms. Mukangu, Prosecution Counsel.

Mr. Mokuu for the Accused.

