Republic v Onyango (Criminal Case E043 of 2020)
[2023] KEHC 1255 (KLR) (24 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1255 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE E043 OF 2020

TM MATHEKA, J

FEBRUARY 24, 2023

BETWEEN

REPUBLIC ..... PROSECUTION

AND

SHADRACK OTIENO ONYANGO ALIAS SHIDA ..... ACCUSED

RULING

1. The accused person Shadrack Otieno Onyango Alias Shida was charged with Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*.

2. It was alleged that on June 19, 2020 at Flamingo estate in Nakuru East Sub-County within Nakuru County he murdered Alphan Ogaye Ougo.

3. The accused person pleaded not guilty and the matter went into full trial.

4. PW1, was PC Ken Ayisi, stationed at Bondeni Police station on the material date. It was his testimony that on June 19, 2020 at around 7.30 p.m. he was called by the OCS who directed him to go to a place where some young men fighting at Flamingo estate. He proceeded there in company of PC Kirui PC Omondi and the Driver.

5. At the scene they found he found a person lying on the ground surrounded by a crowd of people. He and his colleagues tried to disperse the crowd and when the finally got to the person he was bleeding from the head, back and neck and appeared like he had been stabbed severally. PW1 said he tried to lift him but he could not get up, He was only screaming asking for help. He was saying “shida! Shida! Mmenimaliza’ According to him the injured man was talking about a person whose name he PW1 knew personally by the name Shida as a member confirm gang group at Rhonda area called “Wa Tz”. He said the accused was also known as Blackie He said by the time the m/v cam to pick him he had died. PW1 testified that he also knew the deceased as a member of another confirm gang at Kivumbini and his nick name was ‘Young’.

6. This witness further testified that the Kivumbini gang upon hearing of the death of their member came to Flamingo to revenge. They found the PW1 and his colleagues. PW1 called for reinforcements. When the Kivumbini gang could not reach its member they began to set houses on fire. The witness told the court because he knew majority of the gang members he felt his life was in danger and had to go on transfer. At the time of the trial he was serving at Kitengela Police Station.

7. On cross examination he told the court that he did not have anything to show that there was a gang going by the name or that the accused person was a member of that gang. He also said he did not know the accused person's full names except Shida & Shadrack. He confirmed that of the three officers who went to the scene he was the only one who heard the deceased speak. No member of the public recorded a statement as having heard the deceased utter the said words. Referred to his statement he confirmed that the deceased stated 'shida, shida mumenimaliza' and the mumenimaliza is in plural. He confirmed that in his statement he had not mentioned that there was a person by the name Shida and who that person was.

8. Counsel questioned the witnesses' knowledge of the gang members and asked whether the officer was a member or beneficiary of the same. The officer denied the same and stated that they were vijana wanasumbua.

9. He confirmed that he had not run away for fear of arrest. That he was not called to an ID paraded when the accused was arrested and that no one consulted him about the accused person's arrest.

10. On re-examination he told the court that the accused was arrested because he was mentioned by the deceased. He denied that he was the only one who knew Shida and that there were other officers who knew him.

11. PW2, was PC Benard Odhash was at the material time attached to Bondeni Police station. He testified that on 16th December 020 at about 11 am while at work with his colleague Donald Kiprotich he received a report from an informer, a member of public at Flamingo Estate that there was a group of youths who were connected with the murder of November 28, 2020 of Alphonse Ogayo by confirm gang members.

12. They rushed to the place and found Shadrack Onyango Brown Mukami and Joseph Ndungu whom they arrested and took to Bondeni Police Station. He said they found them with the phones they were using for confirm work, Shadrack had two and Itel and a Guava phones. The others had techno phones. They handed the three over to DCI He said he could only see Shadrack in court. He could not explain what had happened to the other two. He said the phones had certain massages which linked then to confirm work. He said the DCI took over the case and it was the I.O who could explain what happened.

13. On Cross examination he told the court that a report of murder had been made at the station. That there was an OB entry that the deceased was murdered by members of confirm group. That this group member was notorious for extorting money from members of the public using mobile phones.

14. That the assailant was identified as Shida/Shadrack. That he went to arrest them because the deceased was murdered by members of confirm group and members of the public confirmed that he was a member. He confirmed no names of the suspects were given to him prior to the arrest. He also confirmed that he did not know who made the murder report and that no one identified the accused for the arrest. He said he did not have any evidence that the accused had killed the deceased.

15. On re-examination he testified that the murder happened on November 28, 2020, that he could not recall when the report was made at Bondeni Police Station. He said the IO was from DCI.

16. PW3 was Dr Anthony Wanaina Ngige, a physician. He conducted the post-mortem on the body of 20-year-old Alphan Ogae Ougo at the Nakuru County Public Mortuary on June 24, 2020.

17. He found stab wound s to the chest left pectoral region 2.5 cm long, left para sternal region 2cm long, on head right side 1cm long, on right temporal region 3cm long, on the limbs on right arm 1.5 cm long, on thumb 1cm long, on left thigh 3cm long left leg 2cm long, right thigh 7 stab wounds. There was a bruise on the right temporal region 5x4 cm and 3x2 cm. The body had moderate palor with no petecae or cyanosis.

18. Internally there was in the left chest penetrating stab wound through the 3rd and 4th Ribs ,4th intercostal space, collapsed right lung 2.5 litres of blood in the chest, penetrating stab wound through left side of the heart.

19. He formed the opinion that the cause of death cardiac arrest secondary to sharp force trauma to the heart in keeping with homicide.

20. The body was identified by Domitila Aluoch Oponde & Wilson Onyango.

21. He produced the post-mortem report as PEx1.

22. On cross examination he told the court that the injuries were not defence injuries but injuries caused with the intention of killing the deceased. He found 17 stab wounds. He said he could not tell whether the injuries were caused by different weapons

23. PW4 was Cpl Samson Osamba testified that he was at the material time working at DCI Nakuru East on General Investigations. He told the court that on June 9, 2020 while on night duty with his colleague PC Mutuku he received information that there was a gang of youth known as confirm at Flamingo estate. He rushed there and found the OCS Bondeni station and his officers sorting out a fracas (kutuliza ghasia) between two rival confirm gangs; Kivumbini and Rhonda area. That they found the decased had been cut with pangas and was dead. He died near the house of one Eunice Awuor whose house was also set on fire. That other houses had ther window panes broken. That the scene was processed by scenes of crime personnel from DCI led by C.I Wahome.

24. He testified that the body as taken to the mortuary. He established that the rival gangs were fighting because the Kivumbini gang was revenging the murder of their member by the Rhonda gang, He said he the OCS Bondeni connected an operation the following day at 5:00am and about 20 youths were arrested. He established that these one were culpable of arson an charged them in Naivasha Magistrates Court CR Case No. 598 of 2020.

25. Regarding the accused, he said that PW1 PC Ayisi told him that the deceased had mentioned Shida when he the PW1 found him. That this officer knew the gang members and was able to connect Shida with Shadrack Otieno as that was his nick name in the gang. That the accused was a member of confirm group from Rhonda

26. He testified that he established that the deceased was attacked by 6 young men.

27. That on 6th December 2020, officers on patrol met Shida and arrested him.

28. He testified further that his witness Eunice Awuor had disappeared and switched off her phone after noting that the accused person was on bond. She could not be traced to testify.

29. On cross examination, he could not tell when the said witness had come to court and seen that the accused was on bond. He confirmed that it was PC Ayisi who knew the accused as Shida. He did not give him(PW4) any description of the said Shida . He said it was the accused who told him that his

name was Shida. That he did not conduct any investigation with regard to the name neither did he ask the accused for his ID card to verify the same. He said the accused was a Kenya but could not state how he had established that. Asked whether he had visited the house of the accused he said the accused had no fixed abide and said he lived with friends who could not be found because they had run away. He said the accused's grandmother who was living in Rhonda ran away to Uganda. He said It was PC Ken Ayisi's evidence that he relied on that the accused was a member of confirm. He said confirm members wore silver teeth. Put to task he said he did not record in his statement that the confirm members wore silver teeth. He did not recover the murder weapon; neither did he have any DNA to link the accused to the murder.

30. H also said that it wa police officers who knew the accused as Shida, that no member of the public recorded a statement that he had seen rge accused at the scene, that the DCI did not locate the accused's phones at the scene at the material time. He said he based the charge on the dying declaration. He confirmed that the word shida is in the kamusi and it means tabu or problems. He confirmed that the OB did not bear the name Shida despite his insistence that the deceased in uttering the words Shida he was naming the accused. he did not have evidence said that the officers did not even write Shida as the alais of the accused in the OB.

31. On re-examination he testified that the main reason for bringing the accused to court was that he was identified by PC Ayisi who knew him physically.

32. The prosecution closed its case. The matter now is for determination as to whether the prosecution has established a *prima facie* case to warrant the accused being put on the defence.

33. Mr. Mongeri for the accused person filed written submissions while the prosecution chose to rely on evidence on record.

Accused Person's Submissions.

35. The following issues were set out for determination on behalf of the accused person, by his counsel, Mr.Mongeri.

    1. Whether the ingredients of murder have been satisfied
    2. Whether failure to place the accused person at the scene of crime jeopardizes the prosecution's case
    3. Whether the dying declaration by the deceased can be safely relied on
    4. Whether the accused person was positively identified
    5. Whether failure to call crucial witnesses jeopardizes the prosecution's case
    6. Whether the evidence adduced by the prosecution is sufficient to put the accused person on his defence.

36. On whether the ingredients of the offence of murder were satisfied; it was submitted that the offence of murder is defined under Section 203 of the *Penal Code*. The court in *Republic v Anthony Wambua Willy* [2021] eKLR established that the prosecution must prove all ingredients of the offence of murder in order to sustain a conviction. It was submitted that the prosecution failed to prove ingredients of murder.

37. That the prosecution never availed any eye witness or murder weapon used to cause the death of the deceased.

38. On whether the accused was placed at the scene of the crime it was submitted that he was not placed at the crime scene as the prosecution failed to call an eye witness to the murder and explain the incident that led to the death of the deceased.

39. On whether the dying declaration by the deceased could be relied on counsel submitted that there was need for corroboration in this case since the prosecution case was solely anchored on the alleged dying declaration of the deceased allegedly made to PW1.

40. Counsel argued that the alleged dying declaration mentioned Shida in plural and could only be interpreted as lamentation. He faulted the prosecution for failing to avail the witnesses who were present at the scene to corroborate the evidence of PW1.

41. On whether the accused was positively identified it was argued that according to PW4 the incident herein occurred at around 1930hours and as such identification would have been a challenge. No witnesses were called to identify the suspect and no identification parade conducted. Counsel relied on the *Charles Mbogo Nagila v Republic* [2018] eKLR where the court cited the Court of Appeal in *James Murigu Karumba v Republic* [2016] eKLR held thus in regard to the evidence of identification:

> " It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In Wamunga v R [1989] KLR 424 this court held at page 426 that,
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> > "Where the only evidence against a defendant is the evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.""

42. On the fifth issue, the defence faulted the prosecution for failing to call Eunice Awuor who it was alleged was present at the scene to shed light on who killed the deceased. The defence relied on *Peter Nyamu Mutithi v Republic* [2021] eKLR which cited with approval the case of *Bukenya v Uganda* [1972] EA 549 on the failure to call a crucial witness, the court stated: -

> " In our view, the failure by the prosecution to call crucial witnesses weakened their case to an extent that they failed to prove the case against the appellant beyond reasonable doubt as required in criminal cases. The gap created by the failure of the prosecution to call important witnesses is a doubt whose benefit we must give to the appellant which we hereby do."

43. On the sixth issue, it was argued that the prosecution had failed to establish a prima facie case against the accused to warrant his being put on the defence.

Analysis & Determination

44. The only issue for determination is whether the prosecution has established a prima facie case to warrant the accused being placed on his defence.

45. Under section 306(1) of the *Criminal Procedure Code* cap 75 Laws of Kenya, when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is no evidence that the accused person committed the offence, the court should, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

46. Under section 306(2) on the other hand, when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is evidence that the accused person committed the offence, the court should proceed to put the accused to his defence to present evidence in his defence.

47. What then is a prima facie case? The test of this was settled in the case of *Bhatt v Republic* (1957) E.A 332 where the Court of Appeal expressed itself as follows:

> " Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if at the close of the prosecution case it is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to suggesting that the court would not be prepared to convict if no defence is made but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true as Wilson J said that the court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively"

48. The offence of Murder is defined by Section 203 of the *Penal Code* as follows;

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

49. To obtain a conviction the prosecution must prove that there is death of a person, caused by an unlawful act or omission of the accused person and the unlawful act or omission was actuated by malice aforethought. Malice aforethought is defined at Section 206 of the *Penal Code* thus:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
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> (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;
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> (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;
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> (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."

50. The death of the deceased has been proved by all the prosecution witnesses. The post-mortem report produced confirms that he died as a result of cardiac arrest secondary to sharp force trauma to the heart in keeping with homicide. The fact of death is not in doubt.

51. Who caused the death? It is also not in dispute that none of the prosecution witnesses witnessed the murder. Even the said Eunice Awuor mentioned by PW4 is said the be the owner of the house behind

which the deceased died. As to whether hse witnessed the incident is neither here as her evidence was not called. Nothing was placed before court to establish that she had disappeared because the accused was on bond. There had been no reports with respect to any fears by the witness for her life or that she had been threatened and the prosecution never raised any need for witness protection for the witnesses. The Criminal Justice System should not expose witnesses or potential witnesses to danger as that is the surest way for the people to lose trust in the system. If what PW4 said is true then there was failure in the system and we ought to hang our heads in shame for a moment then get up take corrective measures to ensure it works.

52. It is also unfortunate to have it on record that a police officer dealing with this issue would feel that his life is in danger and the mkono was serikali that is said to be omnipresent and with eyes everywhere, with the instruments of law enforcement, would fail to see this and to deal with the issue but only resort in transferring the officer. We have a problem.

53. That said the case for the prosecution is based on allegations that there exists youth gangs going by the name confirm in the two estates Kivumbini and Rhonda, That on this day they were fighting and that how this deceased met his death.

54. That serikali would know of the existence of these gangs and their modus operandi and simply leave them to continue to exist and to carry out their extortionist activities against the respect for the rule of law without any retaliation is unbelievable. What explanation would the Ministry of Interior have for this state of affairs, of the IG of Police or the DCI? Kenyans cannot be expected to take care of their security when we have all these government agencies whose role is to deal with such situations.

55. Let us look at the evidence.

56. The only evidence against this accused person is that he was a member of confirm just like the deceased. Their two gangs fought. And that the deceased mentioned his name in his dying moments. An alleged dying declaration is the evidence upon which the prosecution expects this court to place the accused on his defence.

57. S. 33 of the *Evidence Act* Cap 80 provides for the admissibility of a dying declaration:

    a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

58. In *Musili v Republic* [1991] eKLR the Court of Appeal stated this

> In our view this was a strong evidence of a dying declaration made immediately after the fatal assault and given by witnesses who were found by the lerned trial judge to be witnesses of truth and credibility. The law in Kenya relating to acceptance of dying declarations as evidence is clear that whilst corroboration of a statement as to the cause of death made before his death by the deceased is desirable it is not always necessary in order to support a conviction. To say so would be to place such evidence on the same plane as accomplice evidence and would be incorrect – (U) R v Elighu s/o Odel and another (1943) 10 EACA 90.
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> However, it has always been stressed by the Court of Appeal that although there is no rule of law that to support a conviction there must be corroboration of a dying declaration, but it is generally unsafe to base a conviction solely on an uncorroborated dying declaration, and

that too great weight should not be attached to dying statements which should be received in evidence with caution (T) R v Ramzani bin Mirandu (1934) 1 EACA 107, (T), R v Mgundulwa s/o Jalu and others (1946) 13 EACA 169, (K) Pius Jasunga s/o Akumu v R (1954) 21 EACA 331.

59. In *Chogo v Republic* [1985] KLR on the admissibility of the dying declaration in the following passage cited the judgment of the Court of Appeal for Eastern Africa in *Pius Jasanga s/o Akumu v R* (1954) 21 EACA 331 at 333:

> "In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.
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> In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to dying declaration in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (R v Muyovya bin Msuma (1939) 6 EACA 128. See also R v Premananda (1925) 52 Cal 987.)
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> The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:
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> The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting; and ... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed ...The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (Ramazani bin Mirandu (1934) 1 EACA 107; R v Okulu s/o Eloku (1938) 5 EACA 39; R v Muyovya bin Msuma (*supra*).
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> 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).
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> 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 9; 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 of 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)."

60. The alleged dying declaration was reported by PW1 to be “Shida! Shida! Mmenimaliza! Shida! Shida!”. It is on record that no one identified the accused as a person known as Shida. The I.O relied solely on

the evidence of PW1, PW1 consfirmed that he was not consulted or involved in the arrest of the accused person . PW4 confirmed that there was no description of Shida given by PW1 and there was nothing in the OB when the murder was reported to connect any person by the name shida with the said murder.

61. PW1 said there was a crowd at the scene but not one but him heard the deceased utter those words despite his own evidence that the deceased was screaming for help.

62. The I. O conceded that the Shida stated was in plural. It could have referred to more than one person or the problems the deceased was going through upon being stabbed. He stated that he established that 6 young men attacked the deceased. He did not name any of them. He did not explain why they had not been arrested or what their roles or that of the accused person was if at all.

63. Not a single piece of evidence was produced to support the allegation that the accused and the deceased were members of any gang. The phones recovered and alleged to contain the evidence were not produced in court. And no member of the public either from Rhonda or Kivumbini testified to this.

64. In addition, the scenes of crimes personnel did not testify yet they are said to have processed the scene. The conclusion to be drawn from this is that they did not find anything to connect the accused with the scene of the crime.

65. I have set out the case for the prosecution in detail herein above. The case for the prosecution stands on the shaky leg of a dying declaration that could mean anything. The I.O did not investigate the case but relied on the statement of PW1. No one placed the accused at the scene and there is no connection established by evidence between the death of Alphan and the accused person,

66. The prosecution has demonstrated that a young man died a brutal death. But they have failed to show how this accused before court is connected with tat death,

67. This is one of those cases where not a scintilla of evidence is placed before the court to connect the person charged with the offence.

68. The prosecution has failed to establish a *prima facie* case against the accused person to warrant his being put on the defence. I therefor make a finding of not guilty under section 306 (1) *Criminal Procedure Code*, dismiss the charge and acquit him accordingly.

69. He is to be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED THIS 24TH FEBRUARY 2023

MUMBUA T MATHEKA

JUDGE

CA YEGO

M/s Murunga For The State

Ms Moenga Holding Brief For Mr. Mongeri For The Accused Person.