



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Arunga (Criminal Case 52 of 2016)
[2023] KEHC 3783 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 52 OF 2016**

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

FESTO AMBASU ARUNGA ACCUSED

JUDGMENT

1. Festo Ambasu Arunga is charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya. Particulars of the offence allege that on the 1st day of November 2016, at Ebuhando Village in Ebuhando Location, Emuhaya District, within Vihiga County, he murdered Jared Owino, hereinafter referred to as the deceased. He pleaded not guilty to the charge, on 29th November 2016. The hearing of the case for the prosecution commenced on 19th June 2019. 6 witnesses testified.
2. The first on the stand was Rosemary Were Hellen, who testified as PW1. She testified that on 31st October 2016, at 3.30 PM, the deceased came to where she was taking care of cattle, and they then walked home together. When they got home, they sat and began to talk. The accused then came into the compound. He had firewood, which he offered to her to buy. He asked for an axe, and she gave it to him. He began to split the wood. The deceased then left the pair, leaving his jacket behind, saying he was going to sell trees. After the accused finished splitting wood, he too left, saying he was going to his home. She was woken up the next morning, at 6.00 AM, by the deceased who was saying that he had been cut by the accused. She did not go to where he was, and she went about her business. She took out her cattle at 7.00 AM, to tether them at the farm. She met a neighbour, Mama Rachael, who she told about the deceased. They went out to look for him, and found him in a maize farm, seated on a stone. He had cuts on his head and fingers. He was then still alive, and they spoke to him. He said that he went to ask the accused to give him a place to sleep, and the accused had removed his clothes and attacked him. He said that it was around 7.00 PM to 8.00 PM, on 31st October 2016, when that



- happened. She went and reported the matter to the village elder, who summoned the family of the deceased. They went to the scene, and found that the deceased was still alive. He explained to them what had happened to him. The accused also came to the scene. The people present wanted to lynch him, but were restrained by the village elder. The accused was forced to carry the deceased, to take him to hospital. The deceased subsequently died later that day. She said that she did not know how the deceased got his injuries.
3. Martin Okoko Isaya testified as PW2. He was a village elder. He said that he got information, on 1st November 2016, at 6.00 AM, from PW1, who told him that a person had been cut, and was outside her compound. He sent for a relative of the deceased, and they proceeded to the scene. He found the deceased where he had been made to sit. His fingers had been cut, and were hanging. He had also been cut on the head. It was said that it was the accused who had done it. The deceased did not explain why the accused did it. PW2 called out the accused's name, as their home was just metres away. The accused came to the scene. He admitted that he was the one who had cut the deceased, whereupon he ordered him to carry him on his back to a place where they could get a motorcycle. They went to a stage, and a motorcycle took the deceased to a police post at Kimia. A vehicle took him to hospital. He was taken to hospital, via police station. The police later came to the scene, and he escorted them there, and showed them where he had found the deceased seated. They visited the home of the accused, and noticed blood in the compound, outside a house. The police entered the house and came out with a panga. The accused was not with the police then. He said that the panga had blood on it.
 4. Robai Mukabi testified as PW3. She stated that the deceased had visited her home on 31st October 2016, at 10.00 AM. He was served tea. He wanted to sell wood, to raise money to repair his bicycle, and she assisted him get a buyer. The deceased did not come to their home that evening and night. She said that he used to sleep in her house whenever he was around. The next morning PW2 called her, and when she went to his home, he told her that the deceased had been cut, and was at the compound of PW1. When she went to the scene, she found the deceased still talking. He had injuries to his hands. He said that he got drunk, and could not come home, and that the accused asked him to sleep at his home. He stated that when they got home, the accused began to assault him. She looked for the accused, who told her that the deceased wanted to finish him. When PW2 came, he ordered the accused to carry the deceased, so that he could be taken to hospital. She accompanied them to the police. She witnessed the conduct of post-mortem on his body. She said that PW1 used to sell alcohol, and the deceased got drunk there. She said that youth present wanted to beat the accused, but were restrained.
 5. Dr. Dixon Mchana Mwaludindi followed as PW4. He was the pathologist who conducted post-mortem on the body of the deceased. The body had disseminated cut wounds on the back of the scalp, left forearm outer aspect, left palm and 2nd and 4th fingers, right palm, index finger and small finger. He had a stab wound on the front of his left leg. On the chest, there was a contusion on the breast bone, and the 2nd and 4th rib spaces. There was also a contusion on the abdomen, on the right side of the large intestines. On the head, there was no fracture of the skull, but inside, the brain was mildly swollen. The spleen had 2 lacerations from blunt trauma, with moderate bleeding into the abdominal cavity. He opined that the cause of death was bleeding shock, secondary to mixed cause trauma, following assault.
 6. Corporal of Police Kenneth Mugambi, service number 77811, testified as PW5. He had taken over the investigation file from the initial investigating officer, Daniel Karanu, who had since been transferred. He confirmed that he did not conduct any investigations himself, and that he only took over the file and the exhibits. He said that the investigation diary did not have a record of how the panga and knife were recovered, although the statement of the investigating officer indicated that they were recovered from the house of the accused, but the accused was not present when the recoveries were made. He



- said that the incident was reported at the police station on 1st November 2016. He further said that the statement of the investigation officer referred to a confession.
7. The prosecution case closed thereafter, and the accused was placed on the defence.
 8. The defence hearing happened on 7th December 2022. The accused denied killing the deceased, saying that he only heard that he died. He said that he was with the deceased on 1st November 2016, drinking at the home of PW1. He said that he left the deceased at the home of PW1, at 5.00 PM, and went home. He said that the deceased did not spend the night at his house, and that it was only he, his wife and children who slept there. He said that the panga produced in court was not his, and that he only saw it in court. He said that PW2 called him to the scene, and requested him to assist carry a sick person. That sick person was the deceased, who had injuries on his head and arms. They took him to a boda boda stage, and he was ferried to hospital, but he did not accompany the party that took him to hospital. He later heard that he had died. He was arrested by PW2 and others, and taken to the AP Camp at Kima. He said that he was not taken home after that, and that no search was done at his home, and that he did not understand how the panga produced in court was recovered. He said that he did not kill him, and that the witnesses lied. He said that he was in good terms with the deceased, and that they had drunk alcohol together the previous day.
 9. At the close of the oral hearings, the accused, through Mr. Ondieki, made oral submissions. He submitted that there was not direct eyewitness evidence to the offence, and that the case was built largely on circumstantial evidence. He said the prosecution was relying on hearsay, what was said by the deceased, which he said did not reach the threshold of a dying declaration. Ms. Kagai, for the Republic, responded, and urged the court to look at the record.
 10. The elements of the offence of murder, as set out in section 203 of the *Penal Code*, are the fact of death, the cause of it, the role of the accused person in the causation, and the fact that the death is caused by the accused with malice aforethought.
 11. From the material before me, there is proof that the deceased in fact died. PW3 was his relative, she identified his body for post-mortem purposes. PW4 was the pathologist who did an autopsy on his body, after it was identified by relatives. On the cause of his death, PW4 said it was shock as a result of bleeding, secondary to mixed cause trauma, following assault.
 12. So, who was responsible for the death of the deceased? No eyewitness evidence was presented. PW1 put the accused and the deceased together on 31st October 2016, at her home, where they left at different times. According to her, the deceased left first, and the accused followed much later. That tallies with the defence statement of the accused, that he and the deceased were together at the home of PW1, drinking alcohol. According to his version, he left the deceased at the compound of PW1. According to PW1, the deceased called her early the following morning, or at least he heard his voice, but she paid no heed to his calls, until an hour later when she found him in a maize farm, she went on to inform PW2. She did not explain why she ignored him at first, and why she had to wait until someone else came to the scene before she could venture to find out what he was saying. It is also curious that she denied that she used to sell alcohol, yet PW3 and the accused were very positive that she did, and the accused and the deceased drank alcohol at her home. Secondly, she did not disclose that the deceased was seated within her maize farm. She spoke of the maize farm as if it belonged to someone else, until PW3 said it was hers.
 13. The only thing that links the accused to the injuries, that the deceased sustained, is the claim by PW1, PW2 and PW3, that the deceased made statements, to effect that it was the accused who injured him, and that they spoke to the accused who said that the deceased wanted to finish him. I find it curious that the accused would have remained around, and even have the audacity to come to the scene where



the deceased was, if it was him who had indeed perpetrated the acts that injured the deceased. Anyhow, the statement by the deceased would be what is called a dying declaration. The question is, did the same reach the threshold.

14. Dying declarations are provided for under section 33(a) of the *Evidence Act*, Cap 80, Laws of Kenya, in the following terms:

“Statement by deceased person, etc., when.

Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

- (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...”

15. The effect of section 33(a) is that a statement made by a person, who subsequently dies, regarding the cause of his death, would be admissible, whether or not the same was made under expectation of death. The justification given for admissibility of a dying declaration, although the statement is not on oath, is that certainty of death is an inducement to compel the dying person to tell the truth before they face their maker. See Kyalo Mbobu, *The Law and Practice of Evidence in Kenya*, lawAfrica, Nairobi, 2011. Dying declarations amount to hearsay, and could be considered as part of the *res gestae*, and apply as exceptions to the hearsay rule.
16. However, caution must be exercised, for the dying declaration is not a statement made under oath. It was cautioned, in *Tuwamoi v Uganda* [1962] EA, that whether such statements are to be taken as part of the *res gestae* or dying declaration, the trial court has to test them for reliability to avoid causing injustice. In *Pius Jasinga s/o Akumu v R* [1954] 21 EACA, it was stated that the weight to be attached to such a dying declaration or such a statement depends, to a large extent, on the circumstances under which it was given, and that there was need to be cautious, and to consider the circumstances of identification. It was said, in *Ajionzi v Uganda* [2002] 1 EA 6 (Okello, Mpagi-Bahigine & Engwau JJA), that corroboration is not a requirement before a dying declaration is admitted or reliance placed on it, but it is considered unsafe to rely on such a declaration, unless there is satisfactory corroboration.
17. There are statements from 3 witnesses who spoke to the deceased prior to his death, where they say that he said that it was the accused who injured him. One witness said that the deceased had approached the accused for accommodation, when the assault happened; the other said that the accused and the deceased were drinking together, after which the accused invited the deceased to go and sleep in his house, and then the assault happened. The other said that no reason or circumstances of the assault were given to him. I am satisfied that such a statement was made by the deceased to the 3 witnesses. What I need to do next is to determine whether the court should rely on it, as it was a statement which was not made on oath, and it was hearsay.
18. It is clear from the cases that I have cited above, that a trial court ought not just rely on a dying declaration merely because one was made. There has to be caution, and the circumstances have to be



considered. The 3 witnesses who testified on this did not give a consistent narrative of the circumstances under which the deceased said he came to be assaulted. PW1 said that the deceased and the accused were at her home, and they left her compound at different intervals. They did not appear, from her testimony, to have been together, for she did not say that the 2 ever spoke to each other, or acknowledged each other. The deceased left first, according to PW1, to go and sell trees. The accused was left behind, splitting wood, and left after he was done with that task. There was no indication that the accused was headed to where the deceased had gone. According to PW3, the accused and the deceased were together, from what the deceased allegedly told her, when she spoke to him before he died, drinking alcohol at the home of PW1. They then left together, from what she was told by the deceased, and the accused offered to accommodate the deceased at his home, although he, the deceased was awaited at the home of PW3, where there was accommodation for him. PW2 said that the deceased said that the accused cut him at his home.

19. Of the 3 witnesses, only PW1 was with the accused and the deceased before the deceased materialised the following day with fatal injuries. PW1 was with the 2 at her home, but, according to her, the 2 had not come together, and left at different times. From that evidence it would appear that the 2 were not together, as they left her home. So I have this hearsay evidence from PW1, PW2 and PW3 that the deceased told them that he was with the deceased at his home, and that was where he was injured. I find it difficult to believe the testimony of PW1. She was not candid with the court. She sold alcohol, but she did not disclose that to the court. She sold alcohol to both the accused and the deceased, going by the testimonies of PW3 and the accused, but she did not say so in her testimony. PW2 was also not very helpful, for being a village elder, he should have known that PW1 sold alcohol at her house, and that the accused and the deceased must have been at that compound to drink. It would appear that he was not candid with the court over that to either protect PW1 or himself, for allowing the brewing and sale of illicit alcohol at the home of PW1. So, from the testimonies, I cannot tell how drunk both the accused and the deceased were, whether they came together to the home of PW1 and whether they left at the same time. The testimony of PW1 would have been more reliable than that of PW3, for it would have been an eyewitness account, while that of PW3 would be hearsay, but that of PW1 is undermined by her lack of candour as indicated above.
20. No eyewitness was presented by the prosecution to testify on what exactly happened to the deceased. The circumstantial evidence is very weak. It only shows that the deceased and the accused met at the home of PW1. If her testimony is to be believed, they left separately. PW2 and PW3 did not see the 2 together at any point. There is a gap and blank on what happened between then and the next morning when the deceased was found at the maize farm of PW1. There is nothing to show that the 2 were together, save for the hearsay by PW1, PW2 and PW3, based on the dying declaration of the deceased made to them, according to them.
21. PW2 spoke of a panga that he saw the police recover from the house of the accused. He said that it was bloodstained. That panga was presented as an exhibit by PW5. The said panga would have been useful in placing the deceased at the home of the accused, and, thereby lending credence to the dying declaration. However, evidence around the panga was not handled properly. Other than the word of PW2, who was a bystander, the prosecution ought to have called the police officer to testify as to the recovery of the panga from the house of the accused. It would have helped, even without having to call the police officer who recovered the panga, to have an inventory of its recovery prepared and produced. On the inventory of recovery of exhibits, the courts have repeatedly said that the inventory is a document generated by the police to help them in investigations, and is not mandatory requirement of the law that it be done. However, it is a useful accountability tool, for if the police propose to rely on an item recovered from an accused person or from his residence, to place that person at the scene of a crime, then the police must have concrete evidence on that recovery. Something much stronger than



a mere oral narrative of what happened. A document prepared at the time of the recovery, signed by the persons who witnessed the recovery, including the accused person. The burden on the prosecution is to prove the case against the accused beyond reasonable doubt. That would include proving beyond reasonable doubt that the thing allegedly recovered was beyond reasonable doubt recovered from the accused or from his residence or house. No inventory of the recovery of the panga, nor of the other items that PW5 placed on record as exhibits, was produced, signed by the police officers who were present at the recovery, and other individuals present, such as PW2, and, of course, the accused himself. The same principle would apply to the investigation diary. It documents the steps taken by the investigating officer during the course of the exercise of investigating the crime. It is an accounting tool. To show that the police did the right thing. Part of what should be recorded should be the items recovered from the suspect the subject of the investigations, for which the investigation diary or log is prepared. PW5 conceded that the investigation diary, in respect of the instant case, did not document whether a panga was recovered from the accused herein. So, there is nothing on record to show that the panga produced as exhibit in this case had anything to do with the accused or the deceased.

22. More crucially, it was alleged that the panga had bloodstains. No evidence was presented that the said panga was ever subjected to forensics, to establish whether it had the alleged bloodstains, and if it had bloodstains, to confirm whether the same belonged to the deceased. That way the deceased would have been linked to the panga, and to the accused. There would then be credence to the dying declaration that it was the accused who assaulted him, and caused him the injuries, that he eventually died of. PW2 also testified that there was blood at the compound of the accused. No photographs were presented from scenes of crime personnel, to demonstrate that there was indeed such blood. It was not said that any of that blood was collected and presented to the Government Chemist for analysis, to establish whether the same was human blood, and whether, if it turned out to be human blood, it was that of the deceased.
23. The prosecution case is built its largely around the dying declaration, but as seen above, it would be unjust to convict the accused person only on the basis of that statement. The circumstantial evidence that should support the dying declaration is very weak. There are gaping gaps in the case, which, if plugged, would have supported the dying declaration, by placing the accused and the deceased together, in a manner that would have given veracity to the dying declaration.
24. The next consideration is whether the death was caused with malice aforethought, in the event that the evidence links the accused person to the death. The question would be whether he had malice aforethought.
25. Malice aforethought is defined in section 206 of the *Penal Code*. Section 206(b) states:

“Malice aforethought

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.”
26. Under section 206, malice aforethought is to be inferred an intent to cause death or to cause grievous harm, or the knowledge that the act causing death could cause death or grievous harm, or an intent to commit a felony, or an intention to facilitate escape from custody of a person and in the process a death is caused.
27. The deceased suffered extensive injuries, including fingers that were so badly cut that they were literally hanging. The infliction of such terrible injuries can be basis for a conclusion that the person who caused them intended either to kill the deceased or to cause grievous harm or was indifferent to whether such injuries could cause death or grievous harm or had knowledge that they could cause such. Both point to presence of the *mens rea* for murder, malice aforethought. However, the evidence on record falls short.
28. Overall, I am persuaded that the prosecution was not able to marshal sufficient evidence to establish beyond reasonable doubt, that the accused person caused the death of the deceased herein by his act. Consequently, I do hereby find and hold that the accused herein is not guilty of the offence of the murder, of Jared Owino, contrary to section 203 of the [Penal Code](#), as read with section 204 thereof, and I acquit him accordingly, under section 322 of the [Criminal Procedure Code](#), Cap 75, Laws of Kenya. He shall be set free, unless he is otherwise lawfully held.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF APRIL 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Ondieki, Advocate for the accused person.

