Republic v Kweli & another (Criminal Case 2 of 2017)
[2023] KEHC 25892 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25892 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL CASE 2 OF 2017

AC MRIMA, J

NOVEMBER 28, 2023

BETWEEN

REPUBLIC ..... STATE

AND

MICHAEL WANJALA KWELI ..... 1ST ACCUSED

TITUS SIMIYU MBANGA ..... 2ND ACCUSED

JUDGMENT

Introduction:

1. Michael Wanjala Kweliand Titus Simiyu Barasa were charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on 26th December, 2015 at Machewa Location, Saboti Division within Trans Nzoia County, jointly murdered Jackson Wanjala Wafuko (hereinafter referred to as 'the deceased').

2. When arraigned before this Court a year later, the accused pleaded not guilty to the offence. A trial followed. The hearing of the prosecution's case did not take off until February 2023 when all the witnesses testified and, on the Court finding that the accused had cases to answer, the accused tendered their defenses.

3. The accused were represented by a common Counsel.

The trial:

4. Four witnesses testified for the prosecution. Their case was straight-forward. That, on 24th December, 2016 at around 5:00pm, PW3 (Francis Wakhoho Fuchaka) returned home from work. He was told by one Simon, a child in their home, that the deceased had beaten their neighbour's son one Kelvin and that the said Kelvin had reported to his uncle, one Michael Wanjala Kweli, the 1st accused herein.

PW3 further heard that the first accused in response confronted the deceased and threatened to beat him. The deceased fled as the 1st accused person assured him that he will never beat up any other child going forward.

5. According to PW3, the deceased also confirmed as much. PW3 also confirmed that the deceased was mentally-challenged, but enjoyed lucid moments. To him, the deceased was always truthful and he had lived with him since his childhood.

6. It was PW3 testimony that at around mid-night on 25th December, 2016 while he was asleep in his house, he was woken up by noise outside the house. He went out, and by the use of torchlight, he saw Kelvin standing outside the house of the deceased. Kelvin was calling the deceased to get out of his house. The deceased did not respond neither did he get out. On seeing the torchlight, Kelvin went away. PW3 returned inside his house and slept.

7. On 26th December, 2016 PW3 went to work as usual. At around 11:00am, he was called by one of his neighbour called Charles Isweti (not a witness) and informed that the deceased had been beaten to near death and he was at his home. PW3 rushed there only to find the deceased had long been taken to hospital. The deceased passed on two days later.

8. PW3 was quite sure that the 1st accused person was the one who had assaulted the deceased since he threatened him a few days before he was attacked.

9. PW1 was one Abigael Fuchaka. She lived in the same homestead with the deceased. On 26th December, 2016 at around 9:00am, PW1 returned home from fetching water from a well. She found the deceased lying outside his house, but appeared injured allover the body. She prepared tea for him, but the deceased declined to take it.

10. It was PW1's further testimony that she also saw two village elders standing next to the deceased. The elders called for an ambulance from Saboti Hospital and the deceased was taken to hospital where he succumbed to the injuries two days later.

11. Eliud Juma Wafukho testified as PW2. He was the father to the deceased. He received a call on 26th December, 2016 at around 11:00am and was informed that the deceased had been attacked and cut. He rushed to the house of the deceased and found him lying down outside the house. He was bleeding and had injuries. He also saw some neighbours there.

12. PW2 stated that as the deceased was still at home, he told him that he had been injured by the two accused persons in this case. He was, however, very exhausted and did not say anything further. He only took some water and did not speak again until he died.

13. No. 229818 PC Jonathan C. Rumba testified as PW4. He was attached to Kitale Police Station and undertook general duties. He was the third investigating officer in the case, the first two having been transferred. He produced the Post Mortem Report as an exhibit. He confirmed that there was no police record that the deceased had been threatened.

14. He had neither visited the scene nor could he ascertain if the deceased had been attacked by a mob injustice.

15. After close of the prosecution's case, the Court found that the accused had cases to answer. They were placed on their defenses.

16. Both accused gave sworn statements and called no witnesses. The 1st accused denied killing the deceased and raised an alibi. He stated that on the alleged date he was at his usual working place as a boda boda rider at Gituamba market. He also denied threatening the deceased and stated that when he learnt that

Kelvin had been assaulted by the deceased, he told the deceased if he would ever punish a child by beating then he should report the matter to the police.

17. He denied having been summoned or charged of threatening the deceased. He also stated that the deceased was mentally-challenged and used to beat people around.

18. The 2nd accused also denied killing the deceased. He stated that on the material day, he took his livestock for grazing and heard screams from the home of the deceased. He later learnt from passersby that the deceased had been injured.

19. He stated that he lived well with the deceased and that they used to graze their animals together.

20. After close of the defence cases, parties filed written submissions.

21. Through their respective submissions, the accused contended that the prosecution failed to discharge its burden of proof. They contended that the alleged dying declaration was so weak as to sustain a conviction. They referred to various decisions in buttressing their arguments and urged this Court to dismiss the information and grant the accused their liberties.

22. The prosecution did not file any submissions. It, however, briefly submitted orally that it had discharged its burden of proof to the required standard to establish that the accused murdered the deceased. It urged this Court to find the accused culpable as charged.

Analysis:

23. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -

    (a) the death of the deceased occurred;

    (b) that the accused committed the unlawful act which caused the death of the deceased; and

    (c) that the accused had malice aforethought.

24. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased:

25. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).

26. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, PW1. PW2 and PW3 vouched that they saw the lifeless body of the deceased which was later taken to the mortuary. PW2 also vouched the death of the deceased in attending a post mortem examination of the deceased.

27. The second way in which the death of the deceased was proved was through the medical evidence in the Post Mortem Report. According to the Post Mortem Form which was filled in by Dr. Patrick Musita (not a witness) who conducted the post mortem, the cause of death of the deceased was severe head injury with massive haemorrhage due to trauma.

28. This Court, therefore, finds and hold that the death of the deceased and the cause thereof were proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:

29. In this matter, the evidence that etndered to link the accused with the death of the deceased was the alleged dying declaration by the deceased top PW2.

30. A look at the law and judicial pronouncements on the legal doctrine of dying declarations is, hence, paramount. The starting point is the law. Section 33(a) of the *Evidence Act*, Chapter 80 of the Laws of Kenya provides as follows: -

> 33. Statements, written or oral or of 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:
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> 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 and 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.

31. Further, Courts have had several occasions and interrogated the above provisions. In *Pius Jasunga s/o Akumu -vs- R* (1954) 21 EACA 333 the predecessor of the present Court of Appeal discussed the aspect of a dying declaration. In that case, the deceased had been found lying on the road with a stab wound in his chest. He told the police officer who had found him that he had been stabbed by the appellant. The officer took him to hospital from where the deceased's statement was also recorded. In that statement, the deceased stated that he was on his way home when the appellant and another person confronted him. The appellant demanded money from him and assaulted him; he also threatened that he would kill him if he did not give him money. The appellant then drew a knife stabbed the deceased in his chest. He fell down and the appellant and the other man ran away. He died of internal haemorrhage and shock the following morning.

32. In discussing the admissibility of a dying declaration, the Learned Judges in the Jasunga case (supra) had the following to say: -

> In Kenya the admissibility of a dying declaration does not depend, as it is 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 the dying decelerations 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.
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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.

> 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 circumstances of confusion and surprise calculated to prevent their being accurately observed...The deceased may have stated his inferences from facts concerning which he may have committed important particulars, from not having his attention called to them.
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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. Ramazani bin Mirandu* (1934) 1 E.A.C.A 107; *R v. Muyovya bin Msuma* (1939) 6E.A.C. A. 128. The fact that the deceased told different persons that the appellant was the assailant is evidence of consistency of his belief that such was the case: it is no guarantee of accuracy.

33. And, on whether a dying declaration must be corroborated in order to sustain a safe conviction, the Appellate Court had this to say: -

> 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 &Another* 1943) 10 E.A.C.A 90; *re Guruswami* (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... But it is, generally speaking, very unsafe to base a conviction solely on a 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 E.A.C.A 67; *R v Mgundwa s/o jalo and others*, (1946) 13 E.A.C.A 169, 171.).
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> In addition to the cases cited above, we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration, unless, as in Epongu's case (Epongu s/o Ewunyu, (1943) 10 E.A.C.A 90) there was evidence of circumstances going to show that the deceased could not have been mistaken in his identification of the accused.
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> The learned trial judge convicted the appellant based on the assessors' unanimous verdict that the appellant was guilty.

34. Still on the issue of corroboration of a dying declaration and speaking generally, the Court of Appeal in *Aluta v Republic* [1985] KLR 543 stated 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 inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in counsels' speeches. A trial judge should approach the evidence of a 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 an accused and not subject to cross-examination, unless there is satisfactory corroboration.

35. Commenting on the above somehow wavering position of the Court of Appeal on the need for corroboration in dying declarations, the Court in *Republic v James Githinji Wamani* [2020] eKLR had the following to say: -

> One theme that keeps recurring whenever evidence of dying declaration is considered is that of corroboration of the declaration. It is apparent from the excerpts of the Jasunga case which have been reproduced here that as much as the Court of Appeal for East Africa

> appeared to downplay the need for corroboration of the evidence of a dying statement, it still acknowledged that "... we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration." Thus, the absence of corroboration may not necessarily be fatal to the prosecution case but it is still relevant all the same; I suppose the degree of its relevance depends on the circumstances in which the declaration was made which in turn vary from one case to another.

36. On the weight to be attached to a dying declaration, the Court in the Jasunga case (supra) rendered as follows: -

> The statement was, apparently taken when the accused was suffering from extreme exhaustion: it was un acknowledged and there is no means of knowing whether the deceased would have acknowledged its correctness or would have wished to alter or add to it, had he been able to do so. If the statement had, on the face of it, been incomplete because the accused had sunk into a coma before he finished it, it would have been inadmissible (*Waugh v The King*, (1950) A.C 203) ... It is not necessary, in order to render a dying statement admissible, that it should be a complete account of the attack, provided that it is, or may rationally be assumed to be, all that the deceased wished to say about it. (Sarkar on Evidence, 9th Edition, p 510). But the weight to be accorded to a dying statement must depend, to a great extent, upon the circumstances in which it is given, and the effects of a wound may dim the memory or weaken or confuse the intellectual powers. (Sarkar on Evidence, 9th Edition pp.303,309).

37. The Supreme Court of India in *Uka Ram vs. State of Rajasthan*, Appeal No. 749 of 2000 declined a dying declaration on account of the mental instability of the deceased. The Court said as under:

> ..... the dying declaration was not reliable beyond reasonable doubts for reason that existed a doubt about the mental condition of the deceased at the time she made the dying declaration.....

38. From the foregoing, the following elements of dying declarations arise; that is: -

    i. The statement must have been made by the deceased.

    ii. The statement must refer to the accused.

    iii. The statement must relate to the cause of one's death, or as to any of the circumstances of the transaction which resulted in one's death.

    iv. Whereas there is no standing rule on the need for corroboration of a dying declaration, extreme caution must be taken in assessing the weight to be attached to a dying declaration.

39. In applying the above to the case at hand, it was the evidence of PW2 that the deceased told him that the accused had attacked and injured him. By then, the deceased was helplessly lying down outside his house and could barely speak. In fact, PW2 stated that the deceased had no strength to speak and really struggled to say anything. The deceased then called for water and did not speak thereafter although PW2 would have wanted him to say more on the attack.

40. It is on record that PW2 was not the first, or among the first persons, to reach where the deceased was. PW1 met the deceased when he had already been injured by 9:00am. She prepared tea for him, but

the deceased declined to partake. The deceased did not tell PW1 anything on the attack although their houses were next to each other and in the same compound.

41. Further evidence was led that there were two village elders on site and that they were the ones who even called for an ambulance from Saboti hospital that took the deceased for medical intervention. Again, the deceased never told them of whatever had happened to him.

42. It is, therefore, of importance to note that none of the many persons who had gathered in the home of the deceased heard the deceased tell his father (PW2) of what had happened to him.

43. Lastly, and fundamentally important, there was evidence that the deceased was mentally-challenged and only enjoyed lucid moments. It was, however, not clear whether the deceased was in such a moment when he allegedly talked to PW2.

44. This Court has weighed the deceased declaration with a lot of caution. The totality of it is that the declaration, although admissible in evidence, is unreliable and, if anything, of very low probative value.

45. Therefore, with the evidence of the deceased in the form of the dying declaration off the way, there is nothing else to connect the accused or any of them with the injuries which the deceased sustained.

46. What comes out of this case is that the 1st accused was highly suspected to have attacked the deceased due to allegations that he had threatened the deceased with dire consequences days before. But, that evidence remained purely hearsay. Further, nothing turned out on the 2nd accused in this case and it is not clear why he was even charged in the first place.

47. The Court of Appeal spoke to suspicion in *Sawe –vs- Rep* [2003] KLR 364 as follows: -

> Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

48. In *Mary Wanjiku Gichira s. Republic*, Criminal Appeal No 17 of 1998, the same Court held that: -

> ... suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.

49. A similar view was expressed by the Tanzania Court of Appeal in *R vs. Ally* (Criminal Appeal No. 73 of 2002) [2006] TZCA 71 where it was held that: -

> Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.

50. Therefore, whereas there may be some suspicion that the accused may have been involved in the death of the deceased, that suspicion alone, however strong, cannot form a basis of conviction in a criminal case. It remains the cardinal duty of the prosecution to prove every element of the offence.

51. The prosecution, therefore, failed to prove that any of the accused was responsible for the death of the deceased in any way whatsoever.

Disposition:

52. Having found that there is no evidence that the accused killed the deceased, this Court returns the verdict that the accused are found not guilty of the murder of the deceased.

53. Consequently, the accused are hereby acquitted pursuant to Section 322(1) of the *Criminal Procedure Code*. They are hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 28TH DAY OF NOVEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

Mr. Bikundo, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.