



**Republic v Miruka (Criminal Case 14 of 2020)
[2022] KEHC 14880 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14880 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE 14 OF 2020
REA OUGO, J
OCTOBER 31, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

EVANS MIRUKA ALIAS EVANS JAMES MIRUKA ALIAS JUNIOR ... ACCUSED

JUDGMENT

1. Evans Miruka Alias Evans James Miruka, the accused person herein, is charged with the offence of Murder contrary to section 203 and 204 of the Penal Code. The particulars of the offence are that, on the 2nd September 2019 at Bogichonjo village, Nyantira Sub-location, Gionsaria Location in Nyamache Sub-County within Kisii County murdered Peter Nyandika Miruka.
2. On 29th May 2020, the charge was read to the accused person and a plea of not guilty entered.
3. The prosecution case was that the accused person had quarrelled with his brother (the deceased) over 2 mobile phones. Following their argument, the accused person was heard saying that someone will die. The deceased's mother found the deceased lying on ground injured and he told her it was the accused person that inflicted the injuries he had sustained. The prosecution called 6 witnesses to prove its case beyond reasonable doubt.
4. Mellen Nyanchama Nyabuto (Pw1) testified that she knew the accused person and his deceased brother from their childhood. She owns a kiosk (small shop). On 2nd September 2019 the deceased brought 2 phones to be charged. 40 minutes later he collected the 2 phones and paid her Kshs 20/-. Shortly thereafter the accused person came to the kiosk for the 2 phones and she informed the accused that the phones had been collected by the deceased. The accused responded by saying 'today I will kill someone'. At around 7:00 p.m same day Aska Nyaboke Miruka (Pw2) who was the mother to the accused and the deceased also passed by the kiosk to ask for the phones. The following day she had screams and went to Pw2's home and found that the deceased had been killed.



5. Aska Nyabokey Miruka (Pw2) testified that on 2nd September 2019 she had gone to pluck tea when the accused person came and asked her for the phone which had been given to her, for her use. She had spoken to the deceased and asked him to take the phone to be charged and it was taken to Pw1's Kiosk. When she returned home at 7:00 p.m. she found the deceased lying outside. She had not noticed his injuries at first and asked him to get up and open the door. She then saw that he had injuries on his head and arm and asked him what was wrong. There was a lot of blood. The deceased told her that the injuries were inflicted by Evans. She called a boda boda and the deceased was rushed to Nyamache hospital. She then went to the chief. The accused person was not present. She told court that the accused and the deceased lived together in Nyanguso. On cross examination, she testified that the deceased smelled of some alcohol and that the deceased stated the injuries were inflicted by Evans.
6. Isaac Miruka Kibanga (Pw3) a brother to the deceased and the accused person testified that on 2nd September 2019 he was in Transmara cutting sugarcane. He went back home at 5pm and found the deceased lying in a pool of blood. He rushed to Ombati's place to get a boda boda to take him to hospital. On their way to the hospital the deceased was not talking. The deceased had a lot of injuries on his head and arms. He explained that the deceased and accused person did casual work together but did not see the accused person on that day. The 2 also lived together.
7. John Ombati Rogito (Pw4) testified that he is a boda boda operator and that on 2nd September 2019 at 9:30 p.m. he heard a knock at his door and found his neighbours, Pw2, Pw3 and Evaline Miruka outside his house. They asked him to take a patient to hospital. The patient was at his mother's house. He had cuts on the head and right arm. They put the deceased on the motor bike but the deceased was pronounced dead when they arrived at the hospital. He recalled to have seen the deceased earlier eating chips at Rianguru. The deceased and the accused are well known to him.
8. Doctor Motongo Kelvin Gitagia (Pw5), a medical officer in charge of Health in Nyaribari testified that he did a post mortem on Peter Nyandika Miruka on the 8/9/2019 at 14.20 hours. The body was of an African male of 5.5cm in height. The body had multiple cut wounds on the head and facial above the eye and both cheeks. The right hand had an open fracture of the right humerus. On the anterior neck there was a puncture wound. On the head there was multiple skull fracture including fractural bone fracture and both were temporal bone fracture and parietal bone fracture. There was also massive intracerebral haematoma. He concluded that the cause of death was cardio pulmonary arrest due to massive
9. No 71824 CPL Japheth Musimi (Pw6) attached to the Directorate of Criminal Investigations at Nyamachee Sub-county testified that the investigating officer in the case PC Richard Tumi No 62046 had been transferred to Ruai. On 3rd September 2019 a report of murder was received at Nyangusu Police Station. PC Tumi and IP Kabogo went to interrogate witnesses and met Pw2 who informed them that she left her phone to the accused person to take it to be charged and went back home at 7:00 p.m. and found the deceased injured and was taken to Hospital. Pw1 reported to have received 2 phones from a boy who had been sent by the deceased and after 40 minutes the deceased collected the 2 phones. Pw4 assisted the family to take the deceased to hospital. The accused person ran away for about 7 months but was arrested on 12th April 2020. On cross examination he testified that no murder weapon was recovered.
10. At the end of the prosecution case the court found that the accused person had a case to answer and put him on his defence. He elected to give unsworn testimony and testified as Dw1. He testified that he lived in Mosali in Maasai land and drove a tractor. On 2nd September 2019 he left Maasai and met with the deceased in the morning and offered to buy him a drink. They went to a club in Nyamache drunk and then he went home. The deceased asked the accused person to buy him chips and he did so



before they parted ways. He testified that he did not quarrel with the accused person. He maintained that he was falsely charged as he did not kill his brother.

Submissions

11. At the close of the defence case both parties were directed to put in their submissions and both the prosecution and the defence have filed their written submissions.
12. Mr. Job Mulati, in the submissions made on behalf of the prosecution contend that the death of the deceased was proved by the evidence of Pw1, Pw2, Pw3 and Pw4 who saw the deceased with injuries before he was pronounced dead on arrival at the hospital. The death was caused by the accused person as the deceased told Pw2 that it was the accused person that had caused his injuries. They cited the cases of *Philip Nzaka Watu v Republic* [2016] eKLR and *Moses Wanjala Ngaira v Republic* [2019] eKLR. It was further submitted that the conduct of the accused person before and after committal of the grievous harm act also infer to a guilty mind. Before committing the act, the accused person informed Pw1 that he was going to kill someone that day. The prosecution argues that the statement forms part of the *res gestae*, indicating intention as was stated in the case of *Ratten v R* [197]3ALL ER 801. Similarly, after committing the gruesome act, the accused person disappeared from his home area only to be arrested after 8 months. It was argued that from the nature of the injuries suffered by the accused person it can be inferred that the assault was intended to cause grievous harm.
13. Mr. Magara, counsel for the defence submitted that the accused was not in the vicinity of the crime scene as he had travelled to Kilgoris. The accused person did not know that his brother had died and therefore failed to attend his funeral. According to the defence, there is no evidence directly linking the accused person to the crime. The prosecution relied on circumstantial evidence which does not meet the legal threshold to put the accused person on his defence. The dying declaration is unreliable taking into account the state of the deceased who was clearly traumatized and shocked and could not be in a state of mind to make a legally valid declaration in regard to the accused person.

Analysis And Determination

14. The offence of murder is defined under section 203 of the *Penal Code* thus; “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” From this definition, the prosecution is expected to prove the following facts beyond reasonable doubt:
 - (1) The death of the deceased and cause of that death;
 - (2) That the accused committed an unlawful act or omission that led to the death; and
 - (3) That the accused committed the unlawful act with malice aforethought.
15. The fact of the deceased’s death is undisputed. Pw2 testified that they saw the deceased with injuries. Pw3 and Pw4 who took the deceased to hospital testified that he was pronounced dead on arrival. The death was also confirmed by Dr. Mutonga Kelvin Gitagia (Pw5) who conducted the post mortem at Nyamache Sub-county Hospital on 8th September 2019.
16. Having established the fact of the deceased’s death, the prosecution was required to prove the cause of death. Pw5 testified that the body had multiple cut wounds on the head and facial area above the eye and also cuts on the cheeks. The right hand had an open fracture of the right humerous. On the anterior neck was a puncture wound. There were multiple skull fracture including frontal bone fracture and also both the temporal and penetal bones were fractured. There was a lot of bleeding across the skull and clots. Pw5 formed the opinion that the cause of death was cardiopulmonary arrest due to massive intracerebral haemorrhage secondary to assault by sharp object.



17. I now turn to consider whether the prosecution proved that it was the accused person who committed an unlawful act or omission that led to the death of the deceased. I agree with the submissions of the defence that there was no direct evidence linking the appellant to the injuries sustained by the accused person. There was no direct evidence tying the accused person to the commission of the crime, no eyewitnesses claimed to have seen him kill the deceased. The only evidence in support of the prosecution case was circumstantial.

18. The Court of Appeal in *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, held that:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence.....

.....

Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 this Court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

(See also *Sawe v. Republic* (supra) and *GMI v. Republic*, Cr. Ap. No. 308 of 2011.

In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.

19. Pw1 gave oral testimony that she heard the accused person saying that someone was going to die that day after he came to her kiosk and found out that his brother had collected the 2 phones from her. Pw2 also testified that the deceased told her that the accused person was responsible for his injuries. The prosecution case therefore hinges on a dying declaration. Dying declaration are admissible in evidence when made when death is imminent as the deceased is expected to have had a strong motive to be truthful. In *Peter Kimathi Kanga vs. Republic* [2015] eKLR the Court expressed itself as follows on this issue:

“Dying declarations are a legally accepted exception to the rule against hearsay. Their statutory basis is in Section 33 of the *Evidence Act* which provides that a statement of a person who is dead whether written or oral is admissible when it relates to the cause of his death. It is instructive that the statement (referred to as a dying declaration) is admissible under the Act whether or not the deceased was at the time of making it under expectation of death.



Courts have on their part formulated rules to guide the reception and weight to be attached to dying declarations and it is sensible that one made when death is imminent will be accorded a high degree of credit since in the extremity of life's ebbing away, it is expected that one has a strong motive to be truthful. In the interests of fairness to an accused person, a rule has also developed that a court should approach a dying declaration with caution and act on it only if satisfied as to its veracity and if there is corroboration, but only as a cautionary rule of practice, not a legal requirement. See *Choge -vs- Republic*(Supra); *Pius Jasunga S/o Akumu -vs- Republic* [1954] Eaca331 and *Musila -vs- Republic* [1991] KLR 322.”

20. In this case, Pw2 who was the mother to both the accused person and the deceased testified that when she found the deceased lying down on the ground injured, she asked him who had injured him to which her dying son told her that his brother, the accused, is the person who inflicted the injuries he had sustained. Although the accused person contends that since the deceased mentioned the name Evans, it could have been any other person in the village. However, it was Pw2's testimony that when the deceased talked of 'Evans' in the dying declaration, it could only mean the accused person who was well known to her as Evans. I am therefore satisfied that the statement made to Pw2 was a dying declaration and find Pw2 as a credible and trustworthy witness as she had no reason to lie against her son, the accused.
21. The evidence of Pw1 and that of Pw2 on the dying declaration places the accused person in the locus in quo. Although the accused person in his defence testified that he left early to go back to work, the prosecution evidence prove otherwise. Pw1 testified that the accused person went to her kiosk after the deceased had picked the 2 phones leading to the inference that he did not go back to work as per his testimony. The prosecution evidence point to the accused person as the person who committed the unlawful act which caused the death of the deceased.
22. The next issue in contention is whether the element of malice aforethought was established by the prosecution. Section 206 of the Penal Code provides:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

 - (a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - (c) An intent to commit a felony;
 - (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”
23. In this case, malice can be inferred from the weapon used and the place of injury. Dw5 testified that there was massive bleeding across the skull that were caused by a sharp object probably a panga or machete. On cross examination, he testified that the injuries were not sustained due to an accident as the deceased tried to defend himself using his hand and sustained an open fracture of the right hand at



the humerus. The evidence of Pw1 also point to the fact that the accused person had the intention to do grievous harm. The Court of Appeal in *Mary Wanjiku Gitonga v Republic* [2010] eKLR held that:

“Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.”

24. In the end, I find and hold that the prosecution proved all the ingredients of the information of murder against the accused person, beyond reasonable doubt. Consequently, the Court finds the accused person, Evans Mirukaalias Evans James Mirukaalias Junior guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and convict him accordingly.

DATED, SIGNED AND DELIVERED ON LINE VIA MICROSOFT TEAMS AT BUNGOMA THIS 31ST DAY OF OCTOBER, 2022.

R.E. OUGO

JUDGE

In the presence of;

Accused: Present

Mr. Magara present for the Accused person.

Mr. Muriuki for state counsel ODPP

Emily/Aphline: Court Assistant

