



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 13 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL MUNGAI WAIRIMU alias Igam.....ACCUSED

JUDGMENT

1. The Accused herein, Daniel Mungai Wairimu alias Igam is charged with Murder contrary Section 203 as read with Section 204 of the Penal Code. The Information states that on the night of 16th September, 2016 at Karura Trading Centre in Kiambaa Sub-County of Kiambu County, he murdered Dennis Kamau Muthoni. He denied the charge and was represented by Mr. Mathenge.

2. The prosecution case is as follows. The deceased Dennis Kamau Muthoni was aged 30 years in 2016. He worked as a tout and lived in Karura village. The Accused also resided in the same village.

3. On the material night, a local **James Mungai Kuro** (PW1) was on his way home from Karura Trading Centre at 8.00pm. He was approached by the deceased who told him that he had been stabbed by "Igam", the nickname by which the Accused was known in the village. The deceased exposed his torso to show PW1 the stab on the chest from which blood was trickling down the chest. PW1 dispatched one Kang'ethe to call the relatives of the deceased and waited at the scene which was 100 metres from a bar known as Homebest where the Accused worked or hang around.

4. The deceased's mother **Judy Muthoni Kamau** (PW2) was home when the report was relayed to her. She immediately proceeded to the scene where she found the deceased lying down. The deceased allegedly repeated the claim that "**Igam**" had stabbed him. PW2 mobilized help from among others a nephew, **Bernard Nganga** (PW3) who ferried the deceased to Gachie Sub-County Hospital in his vehicle. Because the hospital demanded a letter from police, PW3 rushed to Kihara Police Post and got the letter. However, on arriving back at the hospital, he learned that the deceased had already succumbed to his injuries.

5. It appears that one Ndungu among others had earlier proceeded to Karura Administration Police post (AP) and made a report to **PC Samsom Mwaniki Mwangi** (PW4) concerning the stabbing and death. It is the evidence of PW4 by that time, the Accused had also come to the station and sat down as if intending to seek services. However, upon hearing the report, the Accused left quickly and disappeared. He could not be traced in his home at Karura on that night or the following three months.

6. On 22/09/2016 a postmortem examination was conducted on the body of the deceased. On his chest was a penetrating stab wound cutting through the ribcage to the heart and accompanied by bleeding. The pathologist's conclusion was that death was due to exsanguination due to severe chest injury due to a penetrating sharp force trauma. On 27/01/2017 **AP. Sgt Kariuki** (PW7) of Karura AP Post was tipped that the Accused had reappeared in the village. He trailed him to his home where he was found hiding in a banana plantation and was arrested.

7. Upon being placed on his defence, the Accused elected to make an unsworn statement. He testified that in the material period he worked as a watchman at a bar (presumably at Karura Village). That on the material date, at about 8.30pm he heard people claim that he had stabbed someone. He therefore ran to Karura AP Post where he found PW4. But before he could report to him, he heard a noisy crowd approaching the post and decide to escape. He spent the night away from his home and on learning of the death of the victim, went to hide in Narok where he remained until 27/01/2017. On his return to Karura police officers came to the home and arrested him.

8. The court has considered the evidence on record and defence submissions. There is no dispute that the main actors in this case are all residents of Karura village and were known to one another. It is not in dispute that the deceased was stabbed on the chest on the material date and succumbed to the injuries on the same date, and that the Accused was named as a suspect. There is no dispute that the Accused had approached PW4 at the AP post on the material night in view of the report but subsequently escaped from the village, returning after three months.

9. The cause of the deceased's death was not in dispute. The postmortem form produced as **Exhibit 1** by PW8 with the consent of the defence clearly indicates that the cause of death was single penetrating stab wound inflicted on the chest. This is consistent with the evidence

of PW1, PW2 and PW3 who were among the first people to observe the deceased while he was at the Karura Trading Centre.

10. The court must determine whether the Accused of malice aforethought inflicted the fatal injury on the deceased. The evidence mounted by the prosecution to connect the Accused with the offence consists firstly, of the victim's dying declaration, and secondly, the conduct of the Accused subsequent to the stabbing of the victim. There was no eyewitness to the alleged stabbing which admittedly occurred close to the place where the Accused worked. The closest to an eyewitness was PW1 who said that as he walked home, he was met by the deceased and who told him that he had been stabbed by "Igam" the Accused's alleged nickname.

11. The defence has vigorously attacked the credibility of this witness primarily by pointing out that he did not report to police the identity of the assailant or the fact that he had seen the Accused and deceased near the scene (outside Homebest bar) prior to the incident. First of all, PW1 clearly stated he was not the person who made the first report, and going by the account of the night's events, the earliest report was made to PW4 by a person named Ndungu and others. PW2 said that a cousin made the report to police.

12. Another report was made by PW3 at Kihara Police Post a little later. It appears that PW2 also made a further report at Karura Police Post. There were, according to Moses Mungai Nyoike (PW5) the Chief Karura Location, several reports made to him by different callers on the incident. He too rang the officer in charge Rweno Police Post at 9.00pm to report the incident. Hence **Cpl Omeru (PW8)** and one IP Ouma had proceeded to the scene and later to the Kihara Sub-County Hospital where they met PW3 who told them that the victim had died. In these circumstances, nothing turns on the issue of the contents of the first report.

13. As regards the alleged lies by PW1 cited by the defence concerning the sighting of the Accused and deceased prior to the stabbing, the allegation is based on the fact that the witness's statement did not include such sighting. The witness did not during his evidence in chief refer to this sighting but that the Accused worked as a watchman at Home best bar.

14. When the issue was raised with him during cross-examination by the defence, he stated *inter alia* that:

"Yes, the Accused was at Homebest at the time. The deceased caught up with me as I was leaving the Centre to go home- a few metres from Homebest. Yes, I saw the two men outside Homebest prior to this". [shown statement recorded on 19/09/2016]. As I stood by the deceased waiting for help, I could see the Accused outside Homebest bar. Yes, I did not tell police about this. Yes..... this is my Further statement. Equally it does not refer to presence of Accused outside Homebest on the material night. So far as I knew the Accused worked alone as guard outside the bar. The lighting at scene is very bright. It is a security flood light at centre. People were moving about the centre at that time. No, I have never had a dispute with Accused".

15. Pausing there, the Accused himself admitted he was on duty at the bar on the material date when he overheard unnamed people accuse him of stabbing the deceased, and he indeed ran to the AP post where PW4 received him. The fact that PW1 did not include the sighting of deceased with the Accused prior to the incident in his statement does not make him a liar, indeed he reiterated this in his re-examination. It must always be borne in mind that the statement of a witness to police is ordinarily a compressed narrative of an event and that, it is not unusual that a witness will leave out certain details, which in this instance were elicited through the line of questioning adopted by the defence.

16. PW1 was consistent on the content of his evidence -in -chief during his cross examination. The defence submissions emphasized the alleged discrepancy above to discredit the key evidence by the witness to the effect that he deceased made a dying declaration to him. On this, PW1 was unshaken, stating that the deceased reported to him the stabbing but not the circumstances and that due to his condition at the time, the witness did not engage the victim in a lengthy conversation.

17. However, concerning the deceased's mother, PW2, her statement to police did not record the all-important assertion that the deceased made any statement to her concerning his assailant in their conversation by the roadside. The witness PW1 who all along stayed with the deceased would have heard this conversation and perhaps PW3 who came to the scene soon after PW2. PW2 on her own account fainted even before the deceased could be removed from the scene to hospital, and secondly, the deceased's condition must have deteriorated further during the hiatus making it unlikely that he could have held any meaningful conversation with his mother.

18. Dying declarations are received in evidence pursuant to the provisions of section 33 (a) of the Evidence Act which states: -

"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;...”

19. In this case, it is the evidence of PW1 that the deceased not only told him that **“Igam”** the Accused had stabbed him but also showed him the wound. He stated that the deceased at the time spoke in Kikuyu language, words to the effect: -**“Please take me to the hospital. Igam has stabbed me in the chest”**.

20. The Court of Appeal in **Choge v Republic [1985] KLR 1**, citing the case of **Pius Jasanga s/o Akumu v R [1954] 21 EACA 331** considered at length the issue of admissibility of and weight attachable to evidence relating to dying declarations tendered pursuant to the above section of the Evidence Act . The Court stated that:

“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.

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 declarations 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 Premanda [1925] 52 Cal 987).

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 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). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).

It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (R v Eligu s/o Odel and another [1943] 10 EACA 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).

21. The statement to PW1 qualifies as a dying declaration under Section 33(a) of the Evidence Act. PW1 also saw the injuries on the deceased and later PW2 and PW3 confirmed the injuries. It appears that the Accused himself learned of this accusation very soon thereafter and ran to the local police post. There is evidence by PW1 that there was floodlight security mast at the centre enabling good visibility, and secondly, he had seen the Accused and the deceased together outside Homebest bar prior to his encounter with the deceased.

22. The Accused all but admits that he worked and was on duty at the Homebest bar on the material date and that he was close enough to the scene to hear accusations or statements made to the effect that he had stabbed someone. These bits of evidence appear to corroborate the dying declaration. Besides, the Accused and deceased were well known to each other and the circumstances obtaining at the time of the incident, notwithstanding the presence of other people at the centre, appear to rule out the possibility that the deceased was mistaken in identifying his assailant.

23. Additionally, the identification of the Accused as the assailant is strengthened by the Accused’s admitted conduct subsequently. First, he headed out to the AP post but when he saw the relatives of the deceased come in to make a report, he fled from the police post. Notably, he had arrived before the alleged noisy mob but had not made any report to PW4 who was on duty. PW4 himself admitted that the vehicle carrying the people who reported to him came into the post at a high speed and alarmed, he went out to investigate. The Accused took advantage of the distraction to escape from the police post, never to return. In his own words, he fled to Narok, returning on 27/01/2017. If as suggested in his evidence, he feared the alleged noisy mob approaching the police post on the night of 16/09/2016 and therefore fled, there was no explanation why he did not give himself up to police on the next day at Karura or soon after in Narok.

24. Moreover, even upon his return to Karura on 27/01/2017 he did not go to the police station directly but was caught in a thicket while hiding. His conduct discloses guilty knowledge. The only reason he ran to the police post in the first place was to conceal himself from the public, now that the offence had become public, and when subsequently members of public came there, he escaped and spent the night away from his home. He thereafter fled to Narok hoping to avoid arrest. He had three months to surrender himself or report to police but did not. This Upon return to Karura, he did not report to police but was caught hiding in a banana thicket. This is not the conduct of a man who considered himself falsely accused but one who carried the heavy burden of guilt.

25. It is true that in this case no person saw the Accused stab the deceased. However, the entire circumstantial evidence taken together with the dying declaration leave little room for doubting the culpability of the Accused. The principles applicable in dealing with a case where the prosecution case rests primarily on circumstantial evidence are settled. In **Joan Chebichii Sawe -Vs- Republic (2003) e KLR** the Court of Appeal restated the principles applicable in considering circumstantial evidence. The Court observed that: -

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the Accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the claim of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party Accused.”

26. This passage captures the principles pronounced in the timeless decisions concerning circumstantial evidence, namely **Republic - vs Kipkering Arap Koske**[1949]16 EACA 135 and **Simoni Musoke -Vs- Uganda (1958) EA 715**. In **Musili Tulo -Vs- Republic [2014] eKLR** the Court of Appeal reiterated the need to closely examine circumstantial evidence before making an inference of guilt, the object being to ascertain whether such evidence satisfies the principles in the case of **Kipkering Arap Koske** and in **Musoke’s** case. In **Tulo’s** case, the court restated the principles as follows:-

- “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 the 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 no one else.”**

27. The Court went on to state that:

” In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Accused and incapable of any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of **Musoke -Vs- Republic [1958] EA 715 citing with approval **Teper -Vs- Republic [1952] A.C. 480** thus:**

“It is also necessary before drawing the inference of the Accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which weaken or destroy the inference.”

28. The Accused person was admittedly on duty at Homebest bar, within earshot of the scene where the deceased met with PW1 and he had earlier been spotted with the deceased, a fact he did not expressly deny in his evidence. He escaped after the offence and remained in hiding for three months. There is no evidence that he and the deceased had previously or on the material date been engaged in any argument or quarrel. Motive however is not an element to be proven by the prosecution in this case. See Section 9(3) of the Penal Code; **Choge v Republic [1985] KLR1**; and **Libambula v Republic [2003] KLR 683**.

29. Reviewing all the proven facts the court is persuaded that the Accused was correctly identified by the deceased as the person who assaulted him by stabbing hence his subsequent escape. Malice aforethought as defined in Section 206(a) of the Penal Code can be inferred from the fact that the stab on the deceased was inflicted with a sharp weapon, that the weapon was aimed at the chest, that such force was used that the stab penetrated through the rib cage into the heart of the deceased. See **Republic v Tumbe s/o Ochieng [1945] 12 EACA 63** as recently cited with approval by the Court of Appeal in **Joseph Wanjohi Ndung’u v Republic [2020] eKLR**.

30. In the result, the court is satisfied that the prosecution has proved its case beyond any reasonable doubt and enters a conviction against the Accused for the offence charged, namely, Murder contrary to section 203 as read with Section 204 of the Penal Code.

DATED AND SIGNED ELECTRONICALLY ON THIS 16TH DAY OF MARCH 2021

C. MEOLI

JUDGE

DELIVERED AND SIGNED AT KIAMBU ON THIS 23RD DAY OF MARCH 2021.

M.KASANGO

JUDGE

In the Presence of:

.....**For Prosecution**

.....**For Accused**

Accused Present

C/A :.....