



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
(CORAM: CHERERE-J) _

CRIMINAL CASE NO. 16 OF 2017

BETWEEN

REPUBLIC.....PROSECUTOR

AND

BERNARD MWITI LINTARI.....1ST ACCUSED

KAIRITHIA GODFREY MWITHIA alias Goddy.....2nd ACCUSED

JUDGMENT

1. BERNARD MWITI LINTARI and KAIRITHIA GODFREY MWITHIA alias Goddy (Accused 1 and 2 respectively) are jointly charged with the offence of Murder Contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the charge are that **On 20th February, 2017 at Maburwa market, Muthara sub-location in Tigania East Sub-County within Meru County, jointly murdered PETER KARUTI**

PROSECUTION CASE

2. The prosecution called four (4) witnesses in support of its case.

PW1 PETER KALEMIA MAITHULI stated that on the material date at about 09.00 pm, he left the two accused person repairing Accused 1's motor cycle at Maburwa shopping centre and went into a bar where he found Peter Karuti and Joel taking alcohol. It was his evidence that at about midnight, he was called outside and with his phone torch light, he saw accused persons pushing the motor cycle. He also saw Peter Karuti lying down injured and he informed him that he had fought with accused persons and that accused 2 had stabbed him on the back from which he died shortly thereafter.

3. PW2 CYPRIAN MUTHENYA found his brother Peter Karuti lying dead at Maburwa shopping centre at about 12.20 am and PW1 informed him that deceased was killed by the accused persons.

4. An autopsy on deceased's body was conducted on 27.02.2017 by Dr. Mohamed Hika. A postmortem form **PEXH. 1** reveals that the deceased suffered deep penetrating wound on back of neck and bruises on anterior neck and had died of severe hemorrhage secondary to assault using a sharp object.

5. PW4 CPL NICK ODHIAMBO stated that Accused persons were arrested and charged on the basis of information received from PW1 who reported that deceased had implicated them as the ones that injured him.

DEFENCE CASE

6. In his sworn defence, accused 1 recalled that on the 19.02.2017, accused 2 and deceased left him and other patrons in a bar at Maburwa market. That shortly thereafter, he went out and found deceased lying down with Accused 2 next to him. That he went home and was arrested a day later and charged. His witness stated that after they left the bar at about 10.30 pm, he saw a man lying outside.

7. Accused 2 in his sworn evidence stated that he saw accused 1 and deceased quarrelling on the material night outside PW1's shop at about

08.30 pm. That he later helped accused 1 push his motor cycle and was arrested the following day and charged with an offence that he did not commit.

ANALYSIS AND FINDINGS

8. I have considered the evidence on record and submissions made on behalf of Accused 2. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients which are: the death of the deceased; that Accused persons committed the murder and that they were actuated by malice. (See **Anthony Ndegwa Ngari v Republic [2014] eKLR**).

a. The death of the deceased

9. A postmortem form **PEXH. 1** reveals that the deceased suffered deep penetrating wound on back of neck and bruises on anterior neck and had died of severe hemorrhage secondary to assault using a sharp object.

b. Proof that accused persons or any one of them committed the unlawful act which caused the death of the deceased

10. Whereas there is evidence that both accused persons, deceased and PW1 were at Maburwa market on the material night, none of them saw accused persons or any of them assault the deceased.

11. The foregoing leaves the Court with no option but to make reasonable deductions from the available evidence.

12. In order to establish the accused's culpability, the prosecution led evidence from PW1 who stated that deceased informed him that he had fought with accused persons and that accused 2 had stabbed him on the back. It was further his evidence that he saw both accused persons push a motor cycle away from the scene.

13. Section 33(a) of the **Evidence Act**, provides that:

“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.”

14. In **Philip Nzaka Watu vs Republic [2016] eKLR**, the Court of Appeal stated the following on admission and reliance on a dying declaration:

“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

15. The court of appeal in the case of **Choge v Republic [1985] KLR** set out the admissibility of the dying declaration in the following passage:

“The general principle on which a dying declaration is admitted in evidence is that is in a declaration made in extreme when the matter is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

16. The predecessor of the court of appeal in the case of **Pius Jasunga S/O Akumu v Republic [1954] EACA 333** succinctly held as follows:

“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 passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval....it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (Republic v Eligu S/O Odel & Another [1943] 10 EACA 9) and 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 the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration.”

17. I have considered the evidence on record vis some vis the dying declaration. The person that allegedly informed PW1 that he had seen deceased lying outside the bar was not called as a witness to testify as to whether he saw accused persons at the scene having been there

before PW1.

18. That accused persons were seen by PW1 pushing a motor cycle from around the scene deceased was lying was not out of the ordinary for the reason that PW1 stated in his evidence that he had left the 2 accused persons repairing the said motor cycle near the scene.

19. From the foregoing and having considered the evidence adduced by the prosecution and in the absence of satisfactory corroboration, I find that it would be very unsafe to base a conviction solely on the dying declaration of the deceased person made in the absence of the accused persons and not subject to cross examination.

20. Accordingly, I have come to the conclusion that the state has failed to prove its case beyond reasonable doubt. Accused persons are hence found **NOT GUILTY** of the offence of murder and are as a result acquitted.

21. Accused persons shall be set at liberty unless otherwise lawfully held. It is so ordered.

DELIVERED AT MERU THIS 22ND DAY OF APRIL, 2021

T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Accused 1 - Present

Accused 2 - Present

For the Accused 1 - Mr. Ashaba hb for Mr. Ngugi Advocate

For the Accused 2 - Mr. Ashaba Advocate

For the State - Ms. Mbithe