REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 15 OF 2020

REPUBLIC .....PROSECUTOR

VERS

LEONIDA MONGINA KEBANE.....ACCUSED

JUDGMENT

1. The accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

2. The particulars of the offence are that on 18th July 2020 at Keboba village in Masaba North Sub-county within Nyamira County the accused jointly with others not before the court murdered Hyrine Kerubo Nyakundi.

3. The accused pleaded not guilty to the charge and the prosecution called eight witnesses to prove its case. In the ensuing trial the accused was represented by Mr. Bwonwong'a Advocate while the prosecution was led by Senior Prosecution Counsel Desmond Majale.

4. A brief background of the case as submitted by Mr. Majale in his opening statement is that on 18th July 2020 at about 10:30 pm the deceased went to visit Juvenalis Kebane, the husband of the accused in his house. That the accused's son informed the accused of the deceased's presence in the house and the accused stormed in the house demanding to know why she was there and the accused's husband being apprehensive of what the accused could do, told the deceased to leave the house. It was then that the accused, her son and daughter-in-law followed the deceased, intercepted her and assaulted her causing her the injuries that culminated in her death.

5. Edwin Kegongo Kebane (PW1), a son of the accused testified that on 18th July 2020 at around midnight he was in his house adjacent to that of his parents when he heard the accused quarrelling with his father, Juvenalis Kebane. He stated that he wanted to go to his parents' house but he could not do so because his house had been locked from outside. He narrated that his house and his parents' house were about fifteen meters apart and he could hear them arguing. It was his testimony that he heard the accused asking why the deceased was in their house. PW1 told the court that only he and his parents lived in that compound but on that day his brother Daniel and the deceased were also present. He however elaborated that he saw the deceased passing by the road at around 6pm but he did not see her in his father's house. He confirmed that he knew the deceased as his father's friend and that his father had brought her home at a time when his mother was away in Mombasa. PW1 stated that the next morning he left his house after being picked by his driver so that they could go to work. He further stated that he never saw anyone in the compound that morning and that he did not bother to go to his parent's house.

6. Boniface Nyaundi Mobisa (PW2), testied that the deceased was his mother; that on 19th July 2020 at about 6am his sister Pewin Mobisa visited him and informed him that the deceased was hospitalized at Keumbu. He stated that the two of them went to the hospital and he saw that the deceased had injuries on the shoulder, legs and hands and transferred her to Kisii Level 5 Hospital. PW2 stated that when he inquired what had happened the deceased told him that she was at home when Kebane called her to his house to collect her wages; that, when she went to the house the accused, her son Edwin and his wife Hellen locked her inside and that at about 2am they were joined by Wangombe, Osoro and Nyataka and that is when the attack occurred. PW2 stated that the deceased told him that they stripped her of her clothes, beat her and then stabbed her with a knife. He further testified that the deceased further told him that she was rescued by Nyachoka, Kebane's son, and that she went to Margaret's (PW3) house while naked to ask for help following which she was taken to Keumbu hospital. PW2 stated that after the deceased had been treated and admitted he left and went home but was later informed that the deceased had died. PW2 stated that the deceased had worked at Kebane's home for months and that she was well known to Kebane's family.

7. During cross-examination PW2 testified that he went to the scene and found the deceased's clothes and blood on the ground. He stated that the deceased's clothes were torn and stained with blood. He informed the court that while they were at Kisii Referal Hospital the deceased informed him that the accused had hired Wang'ombe, Osoro and Nyataka to assault her. He stated that although he mentioned those names to the police officer who recorded his statement he did not know why they were omitted from his statement. He told the court that the person who testified as PW1 was not Edwin as Edwin was in Dubai.

8. Margaret Moraa (PW3), the deceased's aunt and also a sister-in-law of the accused, testified that on 18th July 2020 at around 3:45am the deceased went to her house screaming asking for help and informed her that she had been attacked by the accused, Edwin (her son) and

Edwin's wife Hellen. She stated that when she opened the door the deceased was naked and she had blood all over her body and due to her injuries she could not wear clothes or walk. PW3 stated that she covered the deceased with a piece of cloth and then went to the deceased's house and informed the deceased's daughters who got a motorbike and the deceased was rushed to Keumbu hospital. PW3 stated that she later got information that the deceased had died.

9. In cross-examination (Margaret Moraa) PW3 stated that she was the first person to speak to the deceased after the attack and that the deceased informed her that she was attacked at Kebane's home by the accused, Edwin and Hellen. It was her evidence that the deceased did not mention Osoro, Nyataka and Wang'ombe to her and that the person who testified as PW1 was Machoka but was not Edwin

10. Sharon Kemunto Mogusii (PW4), said she was the daughter of the deceased. She testified that on 18th July 2020 she was at home with the deceased and her siblings when at about 6pm the deceased received a phone call which she said was from her employer Kebane who wanted her to go and collect money that he owed her. PW4 stated that the deceased told them that she would return with supper and left for Kebane's house. PW4 stated that at about 3am Margaret (PW3) went to their house and told them to carry the deceased's clothes and follow her; that they followed PW3 to the river where they found the deceased who was completely naked and bleeding. She stated that the deceased could not walk so they hired a motorcycle and took her to Keumbu Hospital. PW4 testified that her sister Perine left to call their brother Boniface (PW2) and she was left with the deceased and that while they were alone the deceased told her that she had been attacked at a field by six people namely the accused, the accused's son Edwin, his wife Hellen, the accused's grandson and two other. PW5 told the court that of the people mentioned by the deceased she knew the accused because the deceased had worked for the accused's husband for several months. PW4 denied the existence of a grudge between the two families.

11. In cross-examination, PW4 stated that her mother was attacked by six people but she did not give their names to the police when she recorded her statement. She also stated that the deceased's clothes were recovered in a field but she did not know who the field belonged to. She disclosed that she never went to the scene of crime but stated that she knew the accused and her son Edwin who she identified as the person who was in court as PW1.

12. No. 238963 IP Kipyegon Jefferson (PW6) was the Deputy Officer Commanding Station Keroka Police Station (Deputy OCS) at the time material to this case. He testified that on 20th July 2020 while at the police station the OCS informed him that the OCS Keumbu had called him and drawn his attention to a scene of a suspected murder in the area. PW6 testified that he immediately proceeded to the scene (homestead) and commenced investigations. He stated that he established that on 18th July 2020 the deceased had visited Juvinalis Kebane who was estranged from his wife the accused in this case; that Daniel Koirongo had spotted her in Kabane's bedroom and demanded to know who she was and broke the glass window and feeling threatened, Kebane asked the deceased to leave and it was as she was leaving that the accused, Daniel and other people that Kebane did not know, attacked her. PW6 stated that he was shown the path where the deceased was attacked. He stated that he recovered the deceased's clothes from the scene. He further stated that the deceased's skirt which he recovered at the scene was torn and that it had bloodstains. PW6 stated that he asked PW1, who was at the scene, to accompany him to Keroka Police Station where he handed over the matter to the DCI.

13. In cross-examination PW6 stated that the assault took place along a path leading to Kebane's house and that he saw blood on that path. He further stated that there were police officers who took photographs of the crime scene and that the investigating officer would provide further information. PW6 told the court that he was not the one who found the deceased's clothes but that he was shown where they had been collected. He further stated that PW2 was the one who identified the clothes as belonging to the deceased.

14. No. 56844 Sergeant John Okoth (PW7) attached to Keroka Police Station testified that on 21st July 2020 he was instructed by DCIO Alloys Onyango to take over the murder case that was initially being handled by PW6. He stated that the matter had initially been reported as an assault case vide OB No. 9/20/07/2020 (Exhibit 5) but upon the death of the deceased the case was escalated to murder. He stated that he received a jumper (Exhibit 1) a bloodstained blouse (Exhibit 2), a bloodstained skirt (Exhibit3) and a scarf (Exhibit 4) which clothes were allegedly collected at the scene of the crime and were identified as belonging to the deceased by her children. He stated that a post-mortem was conducted on the deceased's body on 28th July 2020 and that on 29th July 2020 he prepared an exhibit memo form for the clothes and obtained a blood sample from the body and the same were taken to the government chemist but he did not receive the results as the exhibits were taken away from the lab before the conclusion of the analysis. PW7 stated that he recorded the statement of PW1 who stated that the accused suspected that the deceased was having an affair with her/husband Juvenalis Kebane and that on the day of the assault PW1 found the accused, his brother, his brother's wife and three other people assaulting the deceased. PW7 stated that he did not record the statement of the deceased because she died before he took over the case. He told the court that the accused was not arrested but that she was taken to the station by her relatives. He further stated that the other suspects had fled and could not be traced at their homes but the police were looking for them.

15. In cross-examination PW7 stated that the main suspects were the accused, her son, her daughter-in-law, three other people mentioned by the accused's husband and her other son Edwin. He stated that the names of the other three people were not given to him as PW1 could not see their faces since it was at night. He stated that the names of Wang'ombe, Osoro and Nyataka were not mentioned to him. He told the court that the scene of the assault was a path that was approximately 100 meters from Kebane's house.

16. Dr. Ochieng Brian Ayara (PW8) a consultant pathologist based at Kisii Teaching and Referral Hospital testified that he performed the post-mortem on the body of the deceased at the Hospital. He testified that he conducted an internal and external examination and found that the cause of death was exanguination (blood loss) due to bilateral spen-tibio fibular fractures due to assault. PW8 produced the post-mortem report as Exhibit 6.

17. In her defence which was sworn the accused testified that on 18th July 2020 she was living in her son's (Geoffrey Motondo) house because he was away in Mombasa. She stated that her husband was a drunkard who had chased her and her daughter-in-law away. She further stated that she was summoned to Keroka Police Station where she was asked about the assault and was detained for four days before she was arraigned in court. She denied knowing the deceased or any of the other people mentioned by the witnesses. In cross-examination she told the court that her son's house was adjacent to that of her husband's but because it had a perimeter wall and she never left the compound she never saw her husband. She also stated that she lived with Geoffrey's children

18. In summing up Mr. Bwonwong'a, Learned Advocate for the accused submitted that the prosecution failed to link the accused to the death of the deceased as none of the witnesses saw the accused assault the deceased. He submitted that the evidence was inconsistent and uncorroborated hence unreliable. He stated that there was no corroboration that the accused murdered the deceased as the blood sample results were never produced and that the deceased's clothes were found several meters away from the house of the accused. Mr. Bwonwong'a urged this court to find therefore that the charge against the accused had not been proved beyond reasonable doubt and acquit her.

19. **Section 203 of the Penal Code** provides that:

> ***"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."***

In the case of **Joseph Githua Njuguna v Republic [2016] eKLR** the Court of Appeal outlined the ingredients of the offence of murder as follows:-

> ***"…13 Under section 203 of the Penal Code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See Milton Kabulit & 4 others v Republic [2015] eKLR."*** (Underlining mine).

20. In this case the **fact of the deceased's death is not in doubt**. There is also no doubt in my mind that the death was by a human hand or that the deceased was killed. On the issue of death, all the witnesses stated that the deceased succumbed to her injuries while at Kisii Teaching and Referral Hospital. PW5 even stated and this was not controverted that he identified the body of the deceased to the doctor who performed the post-mortem a fact which was corroborated by the doctor (PW8).

21. On the cause of death, Dr. Ochieng Brian Ayara (PW8) stated that when he examined the body of the deceased he observed that her left forearm had an abrasion measuring 3x2 cm; the right upper arm had defensive wounds measuring 4x4cm; the left leg had a deep laceration 3x3cm deep and that the right leg had a stitched laceral anterior tibia 5cm. He stated that he came to the conclusion that the cause of death was exanguination (blood loss) due to bilateral spen-tibiofibular fractures due to assault. Assault is an offence under our law and is therefore an unlawful act. It is clear that the deceased in this case died as a result of the injuries she sustained following an attack perpetrated upon her on 18th July 2020. There is no evidence that the assault on the deceased was sanctioned by the law or that the assault was a result of circumstances such as provocation or self defence that would justify or excuse it under the law. I am satisfied therefore that the fact that the death was by a human hand and that it was by an unlawful act was also proved beyond reasonable doubt. Killing a person is unlawful except in circumstances authorized by law as was held in the case of **Gusambizi Wesonga –vs- Republic [1948] 15 EACA 65** cited with approval in the case of **Republic V Boniface Isawa Makiod [2016] eKLR.** In that case it was held that:-

> ***"Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self-defence of property."***

22. **Whether the accused was the perpetrator of the unlawful act that culminated in the death of the deceased**. As submitted by learned Counsel for the accused, none of the prosecution witnesses witnessed the assault that led to the death of the deceased and there is therefore no direct evidence. Nevertheless, where there is no direct evidence, a court can rely on circumstantial evidence linking the accused to the offence charged. In the case of **Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR,** the court stated:-

> ***"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. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -***
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> ***"It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."***

23. This position was reiterated in the case of **Republic V Jumaa Kaviha Kalama Ndolo [2020] eKLR** where the court stated:-

> ***"Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion. It works by cumulatively, in geometrical progression, against other possibilities and has been likened to a rope composed of several cords:***
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> > ***One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. There may be a combination of circumstances no one of which would raise a reasonable suspicion but the three taken together may create a strong conclusion of guilty with as much certainty as human affairs can require or admits of."***

24. In the instant case, the exculpatory facts presented by the prosecution are that on the material day the deceased told her daughter (PW4)

that she was going to Kebane's house; that the deceased was seen going to Kebane's house by PW1; that PW1 heard his mother and the accused quarrelling over the deceased's presence in that house; that the deceased's bloodstained clothes were found on a path leading from Kebane's house and that before she died the deceased made a dying declaration to PW2, PW3 and PW4 when she told them that she was assaulted by the accused, her children and other people that she had hired.

25. The test to be applied when considering circumstantial evidence is settled and there is now a long line of cases on that issue. In the case of **Sawe V Republic [2003] eKLR** the Court of Appeal stated:-

> ***"In order to justify a conviction 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 chain of circumstances relied upon. 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 remain with the prosecution. It is a burden which never shift to the party accused."***

26. In the case of **Abanga alias Onyango V. Rep Cr. A No.32 Of 1990(Ur)** the court observed:-

> "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."

27. Applying the above test to this case my findings are as follows: On whether the deceased was at Kebane's home, PW1 stated that on 18th July 2020 at about 6 pm he saw the deceased walking by the road next to Kebane's house and that he heard the accused saying that the deceased was in their house. PW1's evidence was corroborated by the evidence of the deceased's daughter (PW4) who stated that the deceased told them that she was going to Kebane's house as he had called her to go for her wages. This was further corroborated by evidence by PW2 and PW4 that the deceased worked at Kebane's house. Although PW1 stated that he did not hear any commotion at his parent's house on the material night although his house was approximately fifteen meters away he was certain that he saw the deceased there. He also told this court that he was the one who told his mother that the deceased was in the house. Therefore the fact that the deceased was in Kebane's house was proved beyond reasonable doubt.

28. The other exculpatory fact is that the deceased's clothes were found on a path leading to the accused's homestead. PW2 testified that when he went to the scene he saw the deceased's clothes and some blood on the path. IP Kipyegon Jefferson (PW6) also stated that when he went to the scene, he received the deceased's clothes from Scene of Crime Officers who told him that the clothes were collected from a path near the accused's house. Sergeant John Okoth (PW7) the investigating officer also testified that the clothes were collected from the scene of the assault and that he received them from PW6 when he took over the case. Although the three officers did not themselves find the clothes on the path they all confirmed that the path was close to the accused's homestead and that the clothes were stained with blood. I am satisfied that the lack of clarity in their testimony was explained by the evidence of Margaret Moraa (PW3) who testified that the deceased was stark naked when she went to her house to seek help. In my view the evidence by PW4 confirmed that the clothes which were collected on a path near Kebane's home belonged to the deceased. PW2 and his sister PW4 further confirmed that those clothes belonged to the deceased. There is therefore evidence beyond reasonable doubt that the deceased was assaulted on a path close to the home of the accused. It is my finding that this fact coupled with the fact that the deceased was in that house and that the accused was heard quarrelling with her husband regarding the presence of the deceased in their house are proof that the accused had opportunity to assault the deceased. Margaret Moraa (PW3) testified that the deceased was completely naked when she went to her house and that she had blood all over her body and that she awakened her at about 3.45 am to ask for her help. PW3 stated that she covered the deceased with a piece of cloth because the nature of the injuries made it difficult for her to put on clothes. PW3's testimony that she went to the deceased's house and called her daughters and also told them to carry clothes for the deceased was corroborated by PW4 and I am therefore satisfied that she was a truthful and credible witness and that her evidence lends credence to the evidence that the clothes and blood found at the scene in fact belonged to the deceased and that the deceased was assaulted on a path as she was leaving Kebane's house. It is instructive that PW2's testimony was that the deceased told him that the attack took place at 2am which lends credence to PW3's testimony that the deceased went to her house at 3.45am.

29. The other exculpatory fact was the statement the deceased made to PW2, PW3 and PW4 that the accused was among the people who assaulted her. These three witnesses were very steadfast and I find it a fact from the evidence that the deceased indeed made the statements to them. As to whether the statements amounts to a dying declaration **Section 33 (a)** of the **Evidence Act (Cap 80)** states that:-

33. Statement by deceased person, etc., when ***Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, ... 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;……."***

30. The principles governing dying declarations were considered by the Court of Appeal in the case of **Philip Nzaka Watu v Republic [2016] eKLR**. The court held that:-

> ***"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. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in CHOGE V. REPUBLIC (supra):

> ***"The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker 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."***

31. The court reiterated those principles in the case of **Charles Njonjo Gituro V Republic [2019] eKLR**; and in the case of **Moses Wanjala Ngaira V Republic [2019] eKLR** where it held inter alia:-

> ***"19. The situation in Kenya is, however, different as exemplified in section 33 of the Evidence Act (supra). There is a catena of authorities from this Court on the nature and the manner of receiving and considering evidence of dying declaration. We take it from Choge v Republic [1985] KLR 1, citing the predecessor of this Court in Pius Jasanga s/o Akumu R (1954) 21 EACA 331:***
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> > ***"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.***
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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 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. (Republic v Muyovya bin Msuma (1939) 6 EACA 128. See also Republic v Premanda (1925) 52 Cal 987.)***
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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:***
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> > ***"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).***
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> ***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)."***

See also ***R v Eligu s/o Odel (1943) 10 EACA 90***, ***Okethi Okalo v Republic [1965] EA 555***, ***Aluta v Republic [1985] KLR 543***, *and* ***Kihara v Republic [1986] KLR 473***.

> ***20. The law in this area is clearly articulated in the case of Nelson Julius Karanja Irungu vs. Republic [2010] eKLR which was cited to us by learned counsel for the appellant. It is clear however that this case does not support counsel's contention that the deceased's statement does not qualify as a death declaration because she was not under contemplation of imminent death. We do not therefore need to discuss the details as to whether the deceased was in imminent danger of death when she made the statement in question. The statement is clearly admissible in evidence."***

32. In this case, after the deceased managed to escape from her assailants she made her way to PW3's (Margaret Moraa) house to ask for help and she told her that she had been attacked by Leonida (accused), Edwin and his wife Hellen. The deceased's daughter (PW4) stated that when her sister left her with the deceased at Keumbu Hospital the deceased told her that she had been attacked by the accused, Hellen, Edwin and three other people she did not know. PW2 who transferred the deceased from Keumbu Hospital to Kisii Teaching and Referral Hospital also testified that he asked the deceased what had transpired and the deceased informed him that she had gone to Kebane's house to collect her dues when the accused Edwin and Hellen locked her in the house and that at about 2am she was attacked by the accused, Edwin,

Hellen, Wang'ombe, Osoro and Nyakata who stripped her, beat her and stabbed with a knife. The statements by the deceased to the three witnesses related to the events that eventually led to her death and I am therefore satisfied that they amounted to a dying declaration. Whereas a dying declaration does not require corroboration, in this case the same was made to three different people who I found credible and trustworthy witnesses as they had no reason to lie against the accused. The deceased was very consistent in her mention of the accused as one of her attackers and it is my finding that this coupled with evidence that the accused was in fact in Kebane's house leaves no doubt that the accused committed this offence. I am therefore satisfied that this exculpatory fact is inconsistent with the innocence of the accused and it cannot be explained on any other hypothesis other than her guilt. I am not persuaded that the inconsistencies in the evidence of the witnesses regarding the people mentioned by the deceased is fatal to the prosecution's case. My finding finds support in the decision of the Court of Appeal in the case of **Philip Nzaka Watu case (*supra)***

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

and also the case of **John Nyaga Njuki & 4 Others v. Republic, Cr. App. No. 160 of 2000** where the Court of Appeal observed that:-

> ***"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."(Emphasis added).***

I find that in this case there are no discrepancies of the nature that would create doubt and vitiate the prosecution's case.

33. As regards the accused's defence, she stated that she was in her son's house after her husband Kebane chased her away together with her daughter-in-law. She stated that the said house though in the same compound was fenced off and she could not see her husband's house and that she did not leave the compound and had not met her husband. She further stated that she did not know the deceased person. However, it was the evidence of her son PW1 that on that day, he heard the accused quarrelling with his father due to the fact that the deceased was in their house. This proves that the accused knew the deceased and that she went to her husband's house. PW1 also confirmed that the deceased used to go to his father's house and PW2 and PW4 also stated that the deceased had worked for Kebane for several months a fact that was not disputed by the accused. From the evidence it is clear therefore that the accused knew the deceased. She also knew that the deceased was in her husband's house on that night and that she was less than candid when she said she did not leave her son's house. It is my finding that her evidence though sworn was not credible. Moreover it did not shake the very cogent evidence tendered by the prosecution witnesses that clearly tends to her guilt. I am satisfied beyond reasonable doubt that she committed the unlawful act that culminated in the death of the deceased.

34. **Whether the accused person acted of malice aforethought.**

Section 206 of the Penal Code provides circumstances from which malice aforethought may be inferred. They are:

> ***"a. An intention to caused 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 cause;***
>
> ***c. An intention to commit a felony;***
>
> ***d.…"***

35. In determining whether the accused person had malice aforethought, the court must take the surrounding evidence into account. This was held by the Court of Appeal in the case of **N M W v Republic [2018] eKLR** where it stated:-

> ***"It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."***

36. In this case there is evidence that the assault on the deceased was perpetrated by the accused and five other persons and that the deceased sustained multiple injuries as evidenced by the evidence of PW8 (the doctor who performed the post mortem form). PW3 who saw her immediately after the attack stated that she had blood all over the body and she could not put on clothes due to the injuries she had sustained.

The deceased also told PW2, PW3, and PW4 that she was stabbed with a knife. It is evident from the extent of the injuries and the aforestated facts that the assailants intended either to kill the deceased or to cause her grievous harm and therefore it would not be an error to infer that the accused and her co-assailants perpetrated the attack of aforethought.

37. PW1's evidence that on the material night he heard his mother and father quarrelling over a woman who was in his father's house is also significant as it reveals a possible motive for the attack although proof of the motive is not material – **(see Section 9(3) of the Penal Code).** The accused must have been incensed that another woman had come to visit her estranged husband. I am satisfied therefore that the prosecution has proved the case against the accused beyond reasonable doubt. In the premises I find her guilty of the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code** and convict her accordingly.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 28TH DAY OF OCTOBER, 2021.

E.N. MAINA

JUDGE