



**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL CASE NO. 29 OF 2016**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**JARED BOGONKO KIBAGENDI.....ACCUSED**

**JUDGMENT**

1. The accused, **JARED BOGONKO KIBAGENDI** (“the accused”), is charged with the murder of **WILLIAM GETANGE MEMBA** (“the deceased”) contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The incident is alleged to have taken place between 21<sup>st</sup> and 23<sup>rd</sup> June 2015 at Metembe Sub-location, Marani Sub-county within Kisii County. After the accused denied the charge against him, the prosecution marshalled 5 witnesses while the accused gave sworn testimony in his own defence.
2. The case against the accused was as follows. Kefa Areba Ondicho (PW 4) recalled that on 21<sup>st</sup> June 2015 at about 8.00pm, he was with the deceased at Nyankongo within Kisii town. They left together to go Marani but only reached Matembe as the vehicle could not go any further. As they were walking to their respective homes, he heard the deceased talking to his wife and informing her that he was coming home. He then called another woman whom he told he wanted to meet before he went home. Since he could hear the conversation, PW 4 recognised the voice as that of Florence Kwamboka (PW 2). In a short while, PW 2 appeared along the road and left with the deceased while PW 4 proceeded to his home. As he was walking home, the deceased called him and told him that he was staying at PW 2’s place. When PW 4 arrived home, a boda boda rider called him and informed him that the deceased had been stabbed.
3. PW 4 proceeded to Kegoge Dispensary where the deceased had been taken. He found the deceased had been injured on the chest, the abdomen and thigh. He spoke to the deceased who told him that he had been stabbed and beaten by *Omwoyo* and the accused whom he knew as PW 2’s son. After leaving the Dispensary he went to look for PW 2 and found her leaving her home on a boda boda with two children whereupon he arrested her and took her to the nearby Police Post.
4. The deceased’s brother, Samuel Kegera Meema (PW 1), testified that on the material night at about 10.00pm, he was awoken by screaming. His mother told him that the deceased’s wife had called him and told him that the deceased had been beaten. He went to the Kegoge Dispensary where the deceased was. He found him bleeding profusely from the left side of the stomach and the mouth. The deceased told him that while he was on his way home, he went to the accused’s home to ask for water whereupon the accused and another person, *Wilson Omwoyo Okombo* (“*Omwoyo*”), attacked him with a hammer and knife. The deceased later taken to Kisii Teaching and Referral Hospital where he was treated and discharged. His condition became worse and he was taken back to the hospital where he died after two days.
5. The accused’s mother, PW 2, recalled that on the material night at 10.00pm, the deceased whom she knew as “*Chief*” came to her gate to ask for water. As he was leaving, she heard the deceased screaming. When she went out she heard the area Chief by the name *Omwoyo*, asking why people were fighting. She told the court that at the time, the accused was leaving the house on the way to a funeral when he found people fighting. She later heard that the deceased had died.
6. The accused’s sister, Jessica Kerubo (PW 3), recalled that on the material night she was asleep in the house with the accused, his wife and sister. She testified that the accused informed them that he was going to a nearby funeral and after he shut the door, she heard some noise and when she looked through the window, she saw the *Omwoyo* fighting with the deceased while the accused was assisting the deceased. She went outside and assisted the deceased, who was drunk, get to the road before he was taken to hospital.
7. PC Gilbert Koech (PW 5), testified that he arrested the accused on 18<sup>th</sup> November 2016. He also produced the post mortem report prepared by Dr Momanyi Peter Morebu.

8. In his sworn testimony, the accused told the court that on the night of 21<sup>st</sup> June 2015 at about 9.00pm, he was at a funeral. After a while he decided to go back home and on the way he met three people, *Areba* who was known as “*Father*” and the deceased, who was known as “*Chief*”. The area Chief, *Wilson Omwoyo*, was also present. They were quarrelling and fighting. He told the court that he saw the deceased beat *Wilson Omwoyo* and who then retaliated by beating the deceased. Both *Wilson Omwoyo* and *Areba* as PW 2 and PW 3 raised alarm. PW 3 called a boda boda rider which took the deceased to hospital. The accused was later informed that he deceased had died.

9. The offence of murder is defined by **section 203 of the Penal Code** as follows, “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The prosecution must prove beyond reasonable doubt the following three ingredients; it must prove the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

10. The fact and cause of death of the deceased is not in dispute. All the witnesses confirmed that the deceased had been severely assaulted. The description of the injuries is consistent with the findings of Dr Morebu who concluded that the deceased died from severe bleeding in the chest caused by a blunt injury on the chest and multiple soft tissue injuries.

11. The main issue for determination is whether the accused is the one who assaulted the deceased. The evidence against the accused is largely circumstantial. The evidence implicating the accused directly are the statements made by the deceased to PW 1 and PW 4. Both of them stated that when the deceased was at Kegogi Dispensary he told them that he had been assaulted by the accused and *Wilson Omwoyo*.

12. **Section 33(a)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* permits the admission of statements made by the deceased regarding the cause of death as an exception to the general rule against admissibility of indirect or hearsay evidence. In *Philip Nzaka Watu v Republic Criminal Appeal No. 29 of 2015 [2016]eKLR*, the Court of Appeal, while accepting that such statements are admissible, observed as follows:

*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 ....*

13. Although PW 1 stated that the deceased had implicated the accused and *Omwoyo*, when shown his statement to the police, he admitted that he did not record the fact that the deceased told him that the accused had injured him. Likewise, when his statement was put to him, PW 4 admitted that he recorded that the deceased had told him that *Omwoyo* is the person who had stabbed him. The importance of recorded statements cannot be overestimated. In *Tekerali s/o Korongozi & 4 Others v R [1952] 19 EACA 259* it was observed that;

*We have had reason before to commend on the fact, particularly in cases tried in Tanganyika, that evidence of the first complaint made to a person in authority has not been adduced. Such Statements are admissible under Section 157 of the Indian Evidence Act which applies in the Territory. Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others. [emphasis mine]*

14. The fact that the deceased informed PW 1 and PW 4 is a such a material fact that it is unlikely that the witnesses would have failed to name those the accused named as his assailants. While I accept that the deceased was in a position to make statements implicating those who assaulted him, it is unlikely that the witnesses to such statements would not record them at the initial opportunity. It is for this reason that I do not find the testimony of PW 1 and PW 4 credible on this point and I reject the deceased’s declarations implicating the accused.

15. Since the PW 1 and PW 4 did not witness the incident, the only other evidence is that of the PW 2 and PW 3. Their evidence is that the accused was fighting with *Omwoyo* when he was beaten and that the accused only came by when he heard screams and proceeded to assist him. The other person who was present, *Areba*, was not called as a witness and this court is entitled to conclude that his testimony would be adverse to the prosecution case. The evidence of PW 2 and PW 3 that the accused only came to the scene where he found the deceased fighting with *Omwoyo* is consistent with the testimony of the accused. Since this is the only direct evidence of what took place on the material night, I find and hold that the prosecution has not proved that the accused murdered the deceased with malice forethought.

16. I therefore acquit, **JARED BOGONKO KIBAGENDI** for the murder of **WILLIAM GETANGE MEMBE**. He is discharged from these proceedings and his sureties are likewise discharged.

**DATED and DELIVERED at KISII this 18<sup>th</sup> day of MARCH 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Sagwe, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.