



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 31 OF 2015

REPUBLIC.....PROSECUTOR

-versus-

JOHN OCHIENG NGUKA.....ACCUSED

JUDGMENT

1. **Yoweri Museveni Paul** (hereinafter referred to as **'the deceased'**) died several days after he was allegedly injured. On completion of police investigations, **John Ochieng Nguka**, the accused person herein, was charged with the murder of the deceased.

2. It was alleged that the accused person murdered the deceased on 14/05/2015 at Otho Trading Centre within Migori County in the Republic of Kenya. The accused person denied the information and he was tried.

3. The prosecution called a total of six witnesses. **PW1** was **Dr. K'Ogotu Vitalis Owuor** who conducted the post mortem examination on the body of the deceased. **Austin Nyapala Oniang**, a retired career civil servant and an uncle to the deceased testified as **PW2**. The arresting officer **No. 225514 APC Hezron Oguttu** attached at Otho Administration Police Lines testified as **PW3**. The Manager of a Bar known as U-Turn Bar in Otho village one **Caren Akinyi Ngoya** testified as **PW4**. An Aunt to and who lived with the deceased one **Linnet Akinyi Nguka** testified as **PW5** and the Investigating Officer **No. 79589 Corp. James Nzioka** testified as **PW6**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

4. This was a case where the findings of the police through **PW6** were not based on the testimonies of the witnesses who testified. Whereas **PW6** testified that he recorded statements from eye-witnesses to the effect that the accused person fought and injured the deceased using a bottle at the U-Turn bar (hereinafter referred to as **'the Bar'**) on 14/05/2015 and which injuries led to the death of the deceased, none of the alleged eye-witnesses so confirmed. **PW4** who managed the Bar testified that whereas the deceased and accused person were at the Bar on the said date she only saw the deceased injured on the hand as she walked into the Bar after taking a stubborn customer outside. She saw the accused person assisting the deceased and took him to the nearby hospital as the accused person also proceeded to report the matter to the police at the nearby Otho Administration Police Lines. That, since the incident involved an injury, one of the staff at the Bar also reported the matter at the Otho Administration Police Lines.

5. **PW5** learnt of the injuries the deceased sustained in the morning of the following day when she was called into the house where the deceased used to sleep in. **PW5** saw injuries on the head and hand and on asking the deceased what resulted into the said injuries the deceased told **PW5** that when he parted way with the accused person after closing business he was attacked by three people unknown to him who cut him with a panga but that the accused person later managed to take him to hospital. As the deceased had already been taken to hospital, **PW5** did nothing more.

6. On 20/05/2015 **PW2** saw the deceased at the Otho Trading Centre with a bandage on his left hand and the deceased told him that he had been injured using a bottle during a fight with the accused person whom **PW2** knew quite well. Later **PW2** learnt that the deceased's condition deteriorated despite medical intervention in Migori. As a family, they organized and took the deceased to Kisii County Referral Hospital where he was later transferred to Jaramogi Oginga Hospital in Kisumu but passed on the way to Kisumu on 31/05/2015. The body was taken for preservation at the Migori County Referral Hospital Motuary. **PW2** reported the matter to the Police at Nyatike where **PW6** undertook the investigations.

7. **PW6** then visited the Bar and interrogated the staff where he learnt of the fight between the deceased and the accused person on 14/05/2015 resulting to the injuries which the deceased sustained. He recorded statements from several witnesses and organized for a post mortem examination which was conducted by **PW1** in the presence of his colleague **PC Sata**. **PW6** then issued an Order of Arrest against the accused person which was executed by **PW3** on 23/09/2015. Upon confirming that the accused person was mentally fit to stand trial through a medical examination, **PW6** charged the accused person with the offence.

8. The prosecution then rested its case with the foregone evidence and on consideration of the evidence this Court placed the accused person on his defense. The accused person opted for and gave unsworn testimony. The accused person stated that when he was with the deceased at the Bar there was a woman who the deceased wanted to drink with and another man as well so wanted the woman and that a fight broke out

and the person who was unknown to him injured the deceased using a bottle and left. That, he immediately reported the matter to the Administration Police Lines at Otho and took the deceased to the nearby hospital. That, he later took the deceased home and since he was his conductor he used to find out how he was fairing until he passed on. He denied killing the deceased.

9. The accused person did not call any witness and closed his case. Counsels were given time to file written submissions, but none complied. The matter was henceforth set for judgment.

10. As the accused person was charged with the offence of murder the following three ingredients must be proved to uphold a conviction: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

11. The said ingredients will be considered singly hereunder.

(a) Proof of the fact and cause of death of the deceased:

12. It is not in dispute that the deceased person in this matter died. That position was confirmed by PW1, PW2 and PW5. The first limb is hence answered in the affirmative.

13. As to the cause of the death of the deceased, PW1 produced a Post Mortem Report which he prepared upon conducting a post mortem examination on the deceased. He observed lacerations on the left hand and cut wound between the thumb and the index finger which was about 5cm in size and was stitched. There were two hairline fractures on the right side of the head. The injuries were likely to have been caused by a sharp object. PW1 gave the possible cause of death as cardio-respiratory arrest due to subdural haemorrhage secondary to assault. Since there is no any other evidence contradicting that of PW5 on the cause of death of the deceased, this Court so concurs with that medical finding. The second limb of the ingredient is hence proved.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:

14. The evidence on record yields that the prosecution's case was centered on circumstantial evidence since none of the witnesses was an eye-witness. The nature of the circumstantial evidence herein rested on what can be deemed as a dying declaration by the deceased on which the evidence of PW2 is anchored.

15. Suffice to say that the law on how circumstantial evidence is to be handled by a trial Court is by now well settled. A lot has been said by Courts and there is settled precedence on the subject. In view of the numerous decisions on the subject I will only refer to that **Solomon Karimi -vs- Republic (2014) eKLR** where the Court of Appeal in considering the issue expressed itself as under: -

"7. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy the tests that:

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 none else."

16. Further in the case of **Ndurya v R (2008) KLR 135** the Court of Appeal held that before convicting someone based on circumstantial evidence, the Court has to be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt. (See also **Sawe v. Republic (2003) KLR 364** and **R v. Kipkering arap Koske and Another 16 EACA 135.**)

17. With that background, I will now deal with the dying declarations. **Section 33(a)** of the **Evidence Act**, Chapter 80 of the Laws of Kenya provides as follows: -

"33. Statements, written or oral or of 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 and 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.”

18. Further, Courts have had several occasions and interrogated the above provisions. In *Pius Jasunga s/o Akumu vs= R. (1954) 21 EACA 333* the predecessor of the present Court of Appeal had the following to say:-

“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.....It is 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 & 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.”

19. The Court of Appeal in a later case of *Stephen Muturia Kinganga v. Republic (2013) eKLR* reiterated the foregone.

20. In dealing with this issue therefore, this Court remains cautious of the danger of receiving a dying declaration without the necessary corroboration as so laid down in the foregone binding judicial precedents. I will now intently look at the evidence of PW2 with a view to first ascertain whether it discloses a dying declaration and if so whether there was adequate corroboration.

21. PW2 met the deceased almost a week after the alleged assault at the Otho Trading Centre and enquired how he was fairing as he had received information from his wife that the deceased had been injured in a fight. The deceased then told PW2 that he was involved in a fight with the accused person and got injured. He further informed PW2 that he had received adequate treatment and he was fairing on well. PW2 did not ask for the details and the circumstances under which the fight took place. And, that was all.

22. The statement by the deceased to PW2 did not give the circumstances of the transaction which resulted in him getting injured. It appears to have been just a casual talk between the two relatives. That conversation is to be looked against what the deceased told PW5 whom they lived together. It may have been possible that the deceased lied to PW5 because he did not want her to know that he was involved in a brawl over a woman. Likewise, it was possible that the deceased told PW2 so since PW2 already had some background information that the deceased was injured in a fight with the accused person.

23. This Court therefore finds and hold that the alleged statement by the deceased to PW2 did not meet the criterion in law and does not amount to a dying declaration under **Section 33(a)** of the **Evidence Act**. Having therefore found the dying declaration as unreliable am afraid that the remainder of the evidence on record falls short of connecting the accused person with the injuries sustained by the deceased.

24. This Court is hence unable to certainly say that the unfolding events and circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability it is only the accused person who occasioned the injuries on the deceased and no one else. I am equally alive to the holding by the Court of Appeal in the case of *Sawe v. Republic (2003) KLR 364* that despite the strength of suspicion against an accused person, the guilt of that person cannot be proved on the strength of that suspicion but by evidence beyond any reasonable doubt.

25. In view of the foregone, the consideration of the third ingredient of the offence of murder will be of no value in this matter.

26. Consequently, this Court finds the accused person herein, **John Ochieng Nguka, NOT GUILTY** of the murder of **Yoweri Museveni Paul**. The accused person is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of June 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Marvin Odero Counsel for the accused person.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant