



**REPUBLIC OF KENYA**

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

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

**CRIMINAL CASE NO. 1 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ALFRED ONGERI OMARI.....ACCUSED**

**RULING**

1. The accused, ALFRED ONGERI OMARI, was charged with the murder of JARED ATANG'A ATANG'A, which took place on 8<sup>th</sup> December 2017 at Nyamesocho Sub-location, Geteri Location, Masaba South Sub County within Kisii County. After the accused pleaded not guilty the prosecution marshalled five witnesses to prove its case. The fact and cause of death was not disputed as the post mortem form produced by the investigating officer, PC Harun Gachoki Muriuki (PW 5), showed that the deceased died from severe head injuries.

2. The prosecution case was that on the night of 8<sup>th</sup> December 2017, the deceased, having been attacked elsewhere, came to his home. His wife and family members raised alarm causing people to come to his aid. Among those who came were his brother Charles Magati (PW 1) and two village elders Charles Nyagaka Moturi (PW 2) and Kennedy Matundura (PW 3). They found the deceased had been cut severally on the head and was bleeding profusely. They got a vehicle which took him to Gesusu Hospital where he died on arrival.

3. The prosecution case is that the deceased was murdered by the accused and three other people when he was found in the home of Benard Oburi son of Onyanzi. When police officers went to the home accompanied by the Assistant Chief, James Orina Ondicho (PW 4), on the next day they found blood stains in his home. They also recovered the deceased's jacket and phone.

4. The evidence implicating the accused was a dying declaration made by the deceased where he implicated four people including the accused. PW 2 testified that when he arrived at the scene he found the deceased who was crying and naming several people among them the accused. A dying declaration is admissible under **section 33(a)** of the Evidence Act (Chapter 80 of the Laws of Kenya). It is established that the court may rely on a dying declaration to convict an accused but it is not necessary that it be corroborated (see **Pius Jasunga s/o Akumu v. R. [1954] 21 EACA 331** and **Choge v. Republic [1985]KLR 1**). However, the court must act with caution in accepting it in order to support a conviction. In this case it is only PW 2 who heard the dying declaration. PW 1 and PW 3, who arrived at the scene earlier than him, confirmed that the deceased could not speak. PW 3 stated that the only words uttered by the deceased on inquiry from PW 1 was "Nisaidie". All this evidence points to a deficiency on this aspect of the evidence. In addition, given the importance of a dying declaration, the evidence is inconsistent with what the deceased could have said as those present did not move to arrest the culprits, who were well known and resided in the neighbourhood, immediately.

5. There is also evidence of PW 3 who stated that the accused and two others were at the locus in quo on the night when they followed the traces of blood left by the deceased. I do not accept this evidence as it is clear that the three suspects including the accused were not named by PW 3 in the first statement to the police. Further, PW 2, who was with PW 3 at the time, did not testify to seeing them. It also beats logic why PW 3, who had heard the so called dying declaration, did he move to have the accused arrested on that very night.

6. PW 5 testified that the accused was charged because he was implicated by the key suspect's wife, Christine Sarange. He admitted that she recorded two statements while in custody and only named the accused in the second statement. Even though she was not called as a witness, her statement having been made in custody while she was a suspect is doubtful and cannot be relied on to support a conviction.

7. All in all, I find there is insufficient evidence to put the accused on his defence. He is found not guilty under the provisions of **section 306(1)** of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya). He is accordingly acquitted. He is set free unless otherwise lawfully held.

**Dated and delivered at Kisii this 28<sup>th</sup> day of November 2018.**

**D.S MAJANJA**

**JUDGE**

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Mr. Kaburi Advocate, for the accused.