



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 8 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**YONA MATINDE MEREMO.....ACCUSED**

**JUDGMENT**

1. **Joseph Chacha Wambura Magoiga** (hereinafter referred to as '**the deceased**') died a day after he was allegedly attacked and injured. On completion of police investigations, **Yona Matinde Meremo**, the accused person herein, was charged with the murder of the deceased.

2. The particulars of the information were that the accused person, jointly with another person not before Court, murdered the deceased on 23/02/2016 at Kuromanguja village in Kuria East District 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 the father of the deceased called **Joseph Wambura Magoiga**. **PW1**'s brother one **Joseph Chacha Magoiga** testified as **PW2**. **No. 81670 Cpl. Hellen Koech** stationed at DCI Kuria East testified as **PW3**. **Dr. Ruwa Mwatela Sammy** who conducted the post mortem examination on the body of the deceased testified as **PW4**. **PW1**'s neighbour one **Consolata Siganuge Immaculate Obiyo** testified as **PW5** whereas the Investigating Officer **No. 46482 PC. Joshua Adenya** attached at DCI Kuria East 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. **PW1** was called by one **Obiya Chacha** (not a witness and hereinafter referred to as '**the caller**') on 23/02/2016 at around 08:00pm and informed that the deceased had been assaulted by two people namely the **accused person** and **Meremo Nyamohindi** at the caller's homestead. The caller whose home was about one kilometre away asked **PW1** to go and find out how the deceased was. **PW1** rushed to the scene and only met the caller but not the deceased or those who allegedly assaulted the deceased. The caller informed **PW1** that the trio had gone towards the river. **PW1** followed the footpath to the river in vain. He then returned to his home.

5. Back to his home, **PW1** called his brother, **PW2**, whom they later went back to the home of the caller to continue with the search of the deceased. Both interrogated the caller who led them towards the river. With the aid of some torches **PW1** and **PW2** saw some blood trail from the door of the caller's house going towards the river. They followed the blood trail which led them into a cassava plantation wherein they found the deceased, although critically injured but not dead. According to **PW1** the deceased was unconscious. They took him to Kegonga Dispensary where he was admitted and treated of four severe head injuries. **PW2** left **PW1** with the deceased at the Dispensary as he went home to raise some funds for the treatment.

6. It was in **PW2**'s absence, at around 11:00pm and midnight, where **PW1** stated that the deceased 'stabilized' and told him that he had been attacked and injured by the accused person and **Meremo Nyamohindi**, but could not talk further until he died in the evening of the following day. **PW1** stated that the deceased spoke in the presence of a Nurse.

7. **PW2** stated that the deceased was conscious when they found him in the cassava plantation and even told **PW1** and himself that he had been injured by the accused person and the caller.

8. **PW5**, a neighbour to **PW1** heard screams not far from her house in the night of 23/02/2016 and for fear of an attack called her other neighbour and alerted him of a looming danger. Three of her neighbours came to her home and kept vigil. **PW5** recognized the voices of those who screamed as those of the accused person and the deceased whom she knew. **PW5** stated that she even walked out of her house into her compound and with the aid of moonlight only saw the deceased carrying a panga. She asked him why they were making noise but there was no response. **PW5** then went back to sleep and only heard in the evening of the following day that someone had been attacked near her home and later died.

9. The matter was reported to Ntimaru Police Station by another brother to **PW1**. By then the deceased had passed on and taken to **PW1**'s home. Burial preparations were under way. **PW3**, **PW6** and other officers visited the home of **PW1** and found the body of the deceased in a

house wrapped with a bandage around the head. They interrogated the people and collected the body to Migori County Referral Hospital Mortuary for preservation pending investigations. PW3 and PW6 later recorded statements from potential witnesses. Whereas PW1 stated that he led the police to arrest the accused person at Ntimaru PW6 stated that the accused person was arrested at the Police station where he had gone to report an attack on him and that the accused person was badly injured. PW6 produced various photographs taken at the scene as exhibits.

10. The post mortem examination on the body of the deceased carried out by PW4 confirmed several deep cut wounds on the head of the deceased amid compound fractures of the skull. PW4 opined that the possible cause of death was neurovascular collapse secondary to severe head injury following multiple severe force trauma to the head. PW4 produced the Post Mortem Report as an exhibit.

11. PW6 then led the accused person to Migori County Referral Hospital where he was certified mentally fit to stand trial. PW6 preferred the current information against the accused person.

12. The prosecution then rested its case and on consideration of the evidence this Court placed the accused person on his defense. The accused person opted for sworn testimony without any witness. In denying the offence the accused person narrated an ordeal he underwent in the night of 23/02/2016. That, as he was returning home in Kuromanguja village from selling some oranges at the market he was accosted by three men who mercilessly assaulted him and robbed him of what he had. That, in the course of the struggle he sustained serious injuries on his hand and lost a finger. The hand was badly disfigured. That, he continued raising alarm and was assisted by **John Getanganyi** (not a witness) who took him to hospital. He later reported the matter to the Area Chief who gave him a letter to take the police and on arrival at the Ntimaru Police Station he was instead arrested and eventually charged. He stated that the deceased was one of the attackers. He prayed that the information be dropped for his innocence.

13. At the close of the defence case Counsels were given time to file written submissions, but none complied. The matter was henceforth set for judgment.

14. 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.***

15. The said ingredients will be considered singly hereunder.

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

16. It is not in dispute that the deceased person in this matter died. That position was confirmed by PW1, PW2, PW3, PW4 and PW6. The first limb is hence answered in the affirmative.

17. As to the cause of the death of the deceased, PW4 produced a Post Mortem Report which he prepared upon conducting a post mortem examination on the deceased. He observed several lacerations on the head with multiple compound fractures of the skull. The injuries were likely to have been caused by a sharp object. PW4 gave the possible cause of death as neurovascular collapse secondary to severe head injury following multiple severe force trauma to the head. Since there is no any other evidence contradicting that of PW4 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:**

18. The identification of the assailant(s) was attempted by way of dying declarations and voice recognition. The evidence mainly rested on circumstantial evidence since no one witnessed the incident. Although the caller seemed to have witnessed the incident, or in a way taken part, he was not availed as a witness and his absence not explained.

19. 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.”***

20. 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.*)

21. 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.”**

22. 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 7<sup>th</sup> 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.”**

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

24. 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 PW1 and PW2 with a view to first ascertain whether the deceased made a statement and if so whether the statement amounted to a dying declaration and further if there was corroboration.

25. PW1 stated in examination-in-chief that when he was first called by Obiya Chacha he was told that the deceased had been assaulted by the **accused person** and **Meremo Nyamohindi**. He also stated that when he was at the hospital with the deceased and as PW2 had left to look for funds for treatment the deceased stabilized and he told him that he had been injured by the accused person and Meremo Nyamohindi, but the deceased could not say anything further. That was between 11:00pm and midnight and the short conversation was before a Nurse. On cross-examination, PW1 stated that when he found the deceased in the cassava plantation in the company of PW2 at around 09:00pm, the deceased was unconscious.

26. PW2 stated during examination-in-chief that when they found the deceased at the cassava plantation the deceased was very conscious and could even speak. That, the deceased told PW1 and PW2 that he had been injured by the **accused person** and **Obiya Chacha**.

27. The two versions of the alleged statement of the deceased are at a great variance. The deceased could not have been unconscious, according to PW1, and very conscious, according to PW2, at the same time and place. Further, the deceased could not have given two different sets of names of the people who assaulted him. That position renders the twin evidence of PW1 and PW2 highly doubtful. It is unbelievable and cannot be a basis of a statement to be considered further as a dying declaration. Further, the Nurse whom PW1 referred to did not testify and the absence was not explained.

28. This Court therefore finds and hold that the deceased did not make any statement to PW1 and PW2 as alleged. That being so and without further ado, **Section 33(a)** of the **Evidence Act** does not aid the prosecution.

29. On the voice identification, PW5 stated that she heard screams in the heart of the night and being afraid of an attack, she called one of her neighbours who readily came to her house in the company of two other neighbours. That, as the voices drew near her house, she recognized the voices of the accused person and the deceased. That, she moved out of her house and, with the aid of moonlight, saw the deceased carrying a panga. That, the deceased did not respond when PW5 asked him why they were screaming as they disappeared.

30. PW5 did not state the exact words used in the screams. She also did not state for how long she had known the accused person and how they interacted. She only stated that she knew the accused person as he used to sell drugs to her 30-year-old daughter whose daughter was unwell and used to pass by their home three times a month. PW5 conceded that the one who used to sell drugs to her daughter instead dealt with the daughter. Further, when PW5 moved out of her house she only saw and identified the deceased and not the accused person.

31. The conditions to be satisfied for the credibility of voice recognition evidence were discussed by the Court of Appeal in *Malindi Criminal Appeal No. 27 of 2016 Safari Yaa Baya vs. Republic (2017) eKLR* as follows, that: -

**(a) It was the accused person's voice;**

**(b) The witness was familiar with it and recognized it;**

**(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.**

32. The Court of Appeal had also previously held in **Karani vs. R (1985) KLR 290** and **Choge vs. R (1985) KLR 1** that just few words like 'break her legs' sufficed.

33. By weighing the uncorroborated evidence of PW3 against the said conditions, it is apparent that the evidence of PW5 fell short of meeting the said criterion. I therefore find and hold the evidence of PW5 unreliable and decline the invitation that PW5 recognized the accused person through his voice.

34. 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.

35. In view of the foregone, the second ingredient is found in the negative and the consideration of the third ingredient of the offence of murder will be of no value in this matter.

36. Consequently, this Court finds the accused person herein, **Yona Matinde Meremo, NOT GUILTY** of the murder of **Joseph Chacha Wambura Magoiga**. The accused person is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 23<sup>rd</sup> day of November, 2018.**

**A. C. MRIMA**

**JUDGE**

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

**Mr. Kisia** Counsel for the accused person.

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

**Evelyne Nyauke** – Court Assistant