



IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO 39 OF 2012

(FORMERLY NYERI HC CRIMINAL CASE NO 34 OF 2010)

REPUBLIC.....PROSECUTOR

VERSUS

NJOROGE KAMANDE KANG'ETHE(alias FIRE).....ACCUSED

J U D G M E N T

1. The Accused herein **Njoroge Kamande Kang'ethe** (alias **Fire**) is charged with **murder** contrary to **section 203 as read with section 204** of the *Penal Code*. It is alleged in the information dated 21/09/2010 that on 06/09/2010 at Githuya Village in Murang'a South District within Central Province, he murdered one **Kamande Mwangi Rubue**.

2. On 06/10/2010 the Accused pleaded not guilty at the High Court, Nyeri. On 21/11/2012 the case was transferred to this court without the trial having commenced. Trial eventually commenced before my predecessor, Ngaah, J on 15/04/2014. The judge took the evidence of three prosecution witnesses before he was transferred to another station.

3. The trial continued before me from 09/11/2015. On 16/11/2016 the prosecution closed its case having called a total of seven witnesses. By a ruling dated 14th February and delivered on 17th February 2010 the court required the Accused to offer his defence and fully complied with **section 306(2)** of the *Criminal Procedure Code, Cap 75*. The Accused gave a sworn statement and was cross-examined. He did not call any witness.

4. I have read the testimonies of the seven prosecution witnesses and that of the Accused. I have also considered the submissions of the learned counsels.

5. The case for the prosecution was as follows: PW6 (**Wanjiru Kamande Ngugi**) was the Deceased's neighbor. She had known him for very long. She also knew the Accused person.

6. PW6 testified that on 07/09/2010 at about 7.30 a.m. she was still in bed at her home as she was not feeling well when she heard the Deceased calling her loudly from his home next door. She hurriedly woke up and rushed to the Deceased's home. She found the Deceased outside his house sitting on a chair. She asked him what the matter was. He told her that he had been hit by **Njoroge**. She asked him which Njoroge as there were many Njoroges. He kept quiet she asked him again.

7. The Deceased then answered that it was **Njoroge Fire**. The Deceased then further told PW6 that he had been hit the previous evening about 8.00 p.m. She asked him why Njoroge Fire had hit him. The Deceased said Njoroge Fire was robbing him of KShs 500/00. He further told her that he had robbed him of a similar amount on a previous occasion. He finally told PW6 that he had been hit in the lower abdomen.

8. PW6 observed that the Deceased appeared to be in a lot of pain and kept holding tight and rubbing his lower abdomen. She asked him if he would eat or drink something. He declined. She then went back to her house as she was not feeling well.
9. PW6 further testified that she knew that the Deceased's sister and the local assistant chief had been informed about the Deceased. But in the course of the day she checked on the Deceased many times. His condition seemed to be getting worse.
10. At about 5 p.m. the Deceased's sister called Joyce Wairimu passed by PW6's home before proceeding to the Deceased's home. PW6 then heard her screaming. She rushed to the Deceased's home and found that the Deceased had fallen from his chair. PW6 joined the Deceased's sister in screaming. Many people came. PW6 then learned that the Deceased had died.
11. Later the assistant chief came. Subsequently the matter was handed over to the police who removed the Deceased's body at about 10 p.m.
12. In cross-examination PW6 stated that the Deceased did not tell her where he was when he was hit the previous evening. She did not ask him if he had reported the assault to the police or sought medical help. But she added that the way she found him (in a lot of pain) he would not have been able to walk even to the road near his home, let alone to the nearest hospital. As she was not feeling well herself, she could not take him to hospital. For the same reason she was not able to go to the police patrol base to report the matter.
13. PW6 stated further in cross-examination that the Deceased told her that he was robbed of KShs 500/00. She also stated that she had known the Deceased about 36 years. He used to drink alcohol a lot of times and get very drunk; but he was never rowdy or very incapable when drunk. He was a casual labourer, she said, who would drink whenever, apparently, he had some money.
14. In answer to a question asked by the court, PW6 reiterated that the Deceased told her that he was robbed and assaulted by **Njoroge Fire**, and that she knew this Njoroge Fire as **Njoroge Kamande Kamuna**.
15. In re-examination PW6 stated that when she saw the Deceased in the morning of 07/09/2010 he did not appear drunk.
16. PW7 (**Isaac Mwangi Njoroge**) was the Deceased's village-mate and knew the Deceased who was his half cousin. He also knew the Accused, a fellow villager, as **Njoroge Kamande Kang'ethe**. He had known him since he (Accused) was about 15 years old.
17. PW7's testimony was that on 07/09/2010 at about 7.30 a.m. he was on his way from home going towards his place of work nearby when he was called by a neighbor of the Deceased called Wangui. She led him to the home of the Deceased. He found the Deceased sitting outside his house holding his stomach. He appeared to be in a lot of pain. He (the Deceased) told him that he was sick. He asked him if he had malaria or pneumonia. The Deceased answered that the previous evening about 8.00 p.m. **Njoroge Fire** had accosted him as he was going home from the shopping centre, checked his pockets, and that when he did not find any money he pushed him down and then kicked him and he fell unconscious.
18. PW7 further testified that the Deceased told him that when he regained consciousness he crawled to his house as he was unable to walk.
19. PW7 also testified that he knew Njoroge Fire as **Njoroge Kamande Kang'ethe**. He did not know any other Njoroge Fire. He pointed out Njoroge Kamande Kang'ethe as the Accused person in the dock. He did not know him by any other name; but he knew that the Accused's father, Kang'ethe, was also called by the nickname **Kamuna**.
20. Finally PW7 testified that the Deceased told him that he was assaulted at some place between the

shopping centre and his home, about 100 meters from his home. The Deceased further told him that on a previous occasion the Accused had robbed him of KShs 500/00.

21. In cross-examination PW7 stated that though the Deceased was obviously in distress when he saw him, he (PW7) was in a hurry to go to work and could not take him to hospital or report the matter to police. He did not know if the Deceased used to drink alcohol. Later in the evening of the same day he learnt that the Deceased had died.

22. PW3 (**Joyce Wairimu**) was the Deceased's elder sister. Though she first told the court early in her testimony-in-chief that she knew Njoroge Kamande alias Fire and that she used to see him before the Deceased's death, she immediately thereafter told the court that she had not seen him before; and that she was seeing him for the first time in court.

23. PW3's testimony was that on 07/09/2010 upon learning from one Njoroge Wa Mwangi that the Deceased had been beaten, she proceeded to the Deceased's home at about 3 p.m.. She found him on the floor struggling. He was in much pain. She asked him who had beaten him. He told her **Njoroge** had hit him on the stomach with a shoe. He pointed to his stomach which he was holding.

24. The Deceased further told her that he was coming from the shopping centre the previous evening when he was hit by Njoroge, and that he thought he was dying. She then went out to look for a vehicle to take him to hospital. When she came back after about an hour she found him dead.

25. The Deceased did not tell her why Kamande had hit him. She knew Kamande Njoroge.

26. In cross-examination PW3 reiterated that she had seen the Accused person in court at Nyeri charged with the present offence. She knew that the Deceased used to drink alcohol.

27. PW2 (**APC Peter Koigi Nduma**) was the Administration police officer who received the report of the Deceased's death and the suspect's possible whereabouts from the local chief. Upon being given the name of the suspect he knew the man as he had met him previously. He and other officers proceeded to the local shopping centre where they found the suspect in a bar. They arrested him. Subsequently they handed him over to the police from **Maragua Police Station**.

28. PW4 (**James Muhia Mungai**) was at the material time the local assistant chief. On 07/09/2010 at about 6.20 p.m. he received report of the Deceased's death. He knew him well. He proceeded to the Deceased's home and found his body lying on the floor inside his house. He checked and confirmed that he was indeed dead. He was told of a suspect whom he knew. He reported the incident to his chief. He subsequently learnt that the suspect had been arrested.

29. PW1 (**Gabriel Njogu**) was the Deceased's brother-in-law and had known him since 1965 when he married his (Deceased's) sister. He identified the Deceased's body to the doctor who performed the post mortem examination.

30. PWP5 (**Dr Kanyi Gitau**) performed the post mortem examination upon the Deceased's body on 10/09/2010. He prepared and signed his report which he produced in evidence (**Exhibit P1**). He formed the opinion that the cause of the Deceased's death was respiratory failure secondary to *peritonitis* (which he explained was inflammation of the membrane that covers the intra-abdominal organs). The *peritonitis* was itself secondary to blunt trauma.

31. In cross-examination PW5 stated that the blunt trauma that the Deceased suffered was severe and just above the *pubis*.

32. That was the totality of the prosecution case.

33. The Accused testified under oath. He did not call any witness. His testimony was that he knew the Deceased, and had known him for about 5 years before he died. He also knew his home which was about

4 km. from his home on the opposite side of the local shopping centre.

34. The Accused denied that he killed the Deceased. He stated that he remembered the day he was arrested, 07/09/2010, and the previous evening also. He did not meet the Deceased that evening. He had left his shamba where he had been working the whole day and passed through the local trading centre, ***Ichagaki Shopping Centre***, on his way home. He also denied that he ever had a previous altercation or grudge with the Deceased. Finally, he said that he had seen the Deceased last about 2 years before he was arrested.

35. In cross-examination the Accused stated that the Deceased was not his friend as such but an acquaintance, and that for the 5 years he had known him he had seen him only about 3 or 4 times. He further stated that he had spent the day of 06/09/2010 in his shamba until about 6.30 p.m. when he went home. He never left his home that evening where he was with his sister called May Wanjiru Kamande.

36. The only evidence tending to connect the Accused to the Deceased's death is his alleged dying declaration testified to by P3, PW6 and PW7. The statutory law pertaining to admission in evidence of dying declarations is **section 33(a)** of the ***Evidence Act, Cap 80***, under which 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 will be admissible whether the person who made them was or was not expecting death when he made the statements. It is not material whether or not the deceased was under expectation of death when he made the dying declaration.

37. As for case law pertaining to the reliance to be placed upon dying declarations, there are many decisions of the ***High Court*** and the ***Court of the Appeal***. The thread that runs throughout those cases is that the evidence of a dying declaration must be treated with caution because –

(a) The dying declaration is not subject to the test of cross-examination; and

(b) Circumstances leading to the death of the deceased, such as acts of violence, may have occasioned him confusion and surprise, such as to render his perception questionable.

38. Ordinarily, 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 must have assurance that such a conviction will be safe and free from error.

39. In this regard the ***Court of Appeal*** in the case of ***Choge -vs- Republic [1985] KLR 1*** stated as follows –

“The general principle upon which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death, and the mind is induced by the most powerful considerations to tell the truth. In Kenya however, the admissibility of a dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent 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.”

40. See also the cases of ***Kihara -vs- Republic [1986] KLR 473*** and ***Nelson Julius Karanja Irungu -vs- Republic, Court of Appeal, Criminal Application No. 24 of 2008***.

41. Let us now examine the circumstances pertaining to our case. The Deceased was attacked at night at about 8 p.m. on a public road. There is no evidence of any light available that would have enabled him to see his attacker sufficient to identify him. He never told PW3, PW6 or PW7 that his attacker spoke to

him, or indeed by what means he identified him at night. The alleged previous incident where the Accused had allegedly similarly attacked him in the course of a similar robbery was dismissed by the local assistant chief as both had been drunk.

42. Nobody ever saw the Accused anywhere near the place where the Deceased was attacked at the material time, not even at the nearby shopping centre. The Accused's own testimony under oath was that, that entire night he was at home with his sister on the opposite side of the shopping centre from the Deceased's home, and that he never left the home. The law relating to *alibi* in criminal trials is that the accused has no obligation to prove the *alibi*; he need only put it forward. It is the prosecution's burden to disprove such *alibi* by evidence.

43. This is a case where the Deceased's dying declaration clearly required corroboration by some other credible and independent evidence. There was no such evidence. The very great possibility that the Deceased was mistaken in the identity of his attacker looms large.

44. Murder under section 203 of the Penal Code is committed when any person, of *malice aforethought*, causes the death of another person by an unlawful act or omission. Malice aforethought is defined in **section 206** of the Code. As it has not been proved beyond reasonable doubt that the Deceased's attacker was the Accused, it is not necessary to examine if malice aforethought was proved beyond reasonable doubt.

45. In the result I find that the prosecution has not proved its case against the Accused beyond reasonable doubt. He is hereby acquitted, and shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT MURANG'A THIS 23RD DAY OF JUNE 2017

H P G WAWERU

JUDGE