



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 127 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JACKSON KIPKEMOI.....ACCUSED**

**RULING**

The accused **JACKSON KIPKEMOI** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

***“On the 13<sup>th</sup> day of December, 2014 at Katorogot Village in Motogio Sub-County within Nakuru County, murdered HABIBA NAKUNJA”.***

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced before me on 10/3/2016. The prosecution called a total of five (5) witnesses in support of their case.

**PW3 ABONG LOKWAU** is the mother to the deceased. She told the court that on 13/12/2014 at 10.00pm she was inside her house. She heard the deceased call out to her. **PW3** rushed outside to find the deceased bleeding from a stab wound to her chest. The deceased staggered and fell down to the ground saying ‘**Master ameniua**’ ie ‘**Master has killed me**’. **PW3** phoned her son.

**PW2 ROBERT EKIRU** is a son to **PW3** and a brother to the deceased. He told the court that on 13/12/2014 at about 10.15 pm he was in his house with his family. His mother phoned to inform **PW3** that his sister ‘**Habiba**’ had been stabbed. **PW2** rushed to his mother’s home. He found the deceased lying dead outside the house with blood flowing from a wound to her chest. **PW2** went to search for accused to his house but failed to find him. They then went and reported the matter to the police.

Later the accused surrendered himself to the police station. He was arrested and charged with this offence.

The prosecution having closed its case this court must now analyze the evidence on record with a view to determining whether a *prima facie* case has been established. In **RAMANLAL T. BHATT Vs REPUBLIC [1957]** it was held that

***“It may not be easy to define what is meant by a ‘prima facie case’ but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and evidence could convict if no explanation is offered by the defence”.***

In this case the fact of the deceased’s death is not in any doubt. **PW2** the brother to the deceased and **PW3** the deceased’s mother both testified that deceased fell and died outside her house from a stab wound to the chest.

**PW4 INSPECTOR MARINGA** was a gazetted scenes of crime officer who took photographs of the body of the deceased which photographs were as exhibits **P. exb 2**. They clearly depict an adult African woman lying dead with a puncture wound to the right side of her chest. The two witnesses who knew the deceased well identify her as ‘**Habiba Nakunja**’.

**PW1 DR. TITUS NGULUNGU** a consultant pathologist based at the Nakuru PGH told the court that he conducted an autopsy on the body of the deceased. **PW1** noted a deep stab wound to the upper right side of the chest of deceased. Upon an internal examination of the body **PW1** noted that the lung had collapsed. Based on his observations **PW1** opined that the cause of death was ‘**severe chest injury due to a single stab wound to the right chest attended by lung collapse and haemathorax due to sharp injury to right chest in keeping with**

**homicide'**. **PW1** filled and signed the post-mortem report which he produced in court as an exhibit **P.exb1**.

Having proved the fact and cause of death of the deceased the prosecution is required to go further and prove that it was the accused who unlawfully stabbed and killed the deceased.

No witness saw the accused stab the deceased. **PW2** was called to the scene **after** the fact. He arrived to find his sister already lying dead outside her house. **PW3** the deceased's mother told the court that she was inside her house when the deceased was stabbed. She too did not witness anything she only heard the deceased call out to her '**Mama**'. By the time she rushed out in response, **PW3** found the deceased staggering having already been stabbed. **PW3** did not see any one near her daughter at the time and she certainly did not see the accused nearby.

**PW3** told the court that before the deceased breathed her last she said '**Master amenuia**' ie '**Master has killed me**'. By this the deceased was identifying the person who stabbed her. **PW3** identifies the accused as the person known as '**Master**' Section 33 of the **Evidence Act Cap 80 Laws of Kenya** provides a statement made before death in which the deceased identified the person or cause of his death is admissible in evidence. This is what is commonly referred to as a '**dying declaration**'.

However a dying declaration cannot on its own suffice as proof of the guilt of an accused person. In practice the courts will require that a dying declaration be supported by other independent evidence. In **ORIALE Vs REPUBLIC [1965] E. A 555** it was held that

***"A trial judge should approach the evidence of a dying declaration with necessary circumspection. 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".***

Does there exist any independent evidence to satisfactorily corroborate this dying declaration of the deceased. The answer is an emphatic '**No**'.

**PW5 CORPORAL JACKSON KELI** who was the investigating officer told the court that the accused voluntarily went to the police station and the OCS one '**INSPECTOR GITHINJI**' recorded the accused's statement in which the accused confessed to the murder. Unfortunately this '**Inspector Githinji**' was not called as a witness in this case and the statement allegedly recorded from the accused was not produced as an exhibit – Section 25 A of the Evidence Act is very clear regarding the circumstances under which a confession may be admitted as evidence against the accused. A mere declaration by the investigating officer that the accused confessed to the crime is not enough. Failure to produce that recorded confession and failure to call the officer (who must be of or above the rank of Inspector) who recorded that statement renders this evidence inadmissible.

**PW5** went on to give the court a long story about how his investigations revealed that the accused had on the material night gone to the deceased's house and purchased changaa worth 20/=. The two later disagreed over the amount due leading to the stabbing of the deceased. **PW5** was not himself at the scene. He had not named those who gave him this detailed account of events. No witness has been called to confirm the truth of this tale. This remains hearsay evidence and is not admissible as against the accused. Based on the foregoing I find that aside from the purported dying declaration, no evidence has been presented to link the accused to the murder of the deceased. To call upon the accused to defend the charge would be tantamount to calling upon the accused to fill in the gaps in the prosecution case. In law the onus lies strictly on the prosecution to prove its case beyond reasonable doubt. The accused had no duty to explain anything at all. I find that no prima facie case has been proved. I enter a verdict of '**Not Guilty**' and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered this 3<sup>rd</sup> day of August, 2017**

Mr. Chigiti for DPP.

**Maureen A. Odero**

**Judge**