



**REPUBLIC OF KENYA**

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

**H.C. CRIMINAL CASE NO. 5 OF 2014**

**REPUBLIC----- PROSECUTOR**

**VERSUS**

**GERALD EBU EGESA alias GRAIDO ----- ACCUSED**

**JUDGMENT**

1. On 9<sup>th</sup> February 2014, Francis Odau (the Deceased) succumbed to a head injury. Gerald Ebu Egesa alias Graido (the Accused) is charged with his murder. The particulars being that on 8<sup>th</sup> February 2014 at Omoloi Village, Asinge Location within Busia County he murdered the Deceased.

2. The Prosecution theory, substantially hinges on a Dying Declaration allegedly made by the Deceased to his wife Christine Etyang (PW1). On the evening of 8<sup>th</sup> February 2014, at about 8.00 p.m., a boy by the name Fred informed PW1 that her (PW1's) husband had been assaulted. Reacting to this information, she visited Asinge shopping center where she found a crowd of people around her husband. The Deceased had injuries to the left side of his neck. First Aid was administered to the Deceased by amongst others Henry Osolimong (PW2). PW2 took the Deceased to Alupe Hospital where he met his death at about 12.00 midnight.

3. Before his death, and while at the hospital, the Deceased was able to converse with PW1. It was the evidence of PW1 that he asked the Deceased what had happened to him. That the Deceased told her that Graido and one Munywa had assaulted him and had taken some Kshs. 15000/- from him. It was the evidence of PW1 that her son Bernard Pata was present when the Deceased told her these. Bernard was not called by the Prosecution as a witness and this attracted some negative comment from the Defence. More shall be said of this later in this Decision.

4. Justus Baraza Omugara (PW3) is the Assistant Chief of Asinge Sub location. On receiving the information about the assault of the Deceased, he took steps so as to arrest the suspect. It being said that the suspect was one Graido. On the morning of 9<sup>th</sup> February 2014, he received information that the suspect had been seen at Amongura location. PW3 then requested the Chief of that location to help in his arrest. He later learnt that a successful arrest had been effected after a chase into a river. Inspector Gakinya(PW7) and Police Constable Solomon Melita (PW6) re-arrested the Accused person from members of the public.

5. Under escort of PW6, the body of the Deceased was sent for post mortem examination by Dr. Kenrick Muganda. That body was identified to the Doctor by Charles Etyang and Julius Oile (PW4). The document reporting the findings was produced by Dr. Patson Kubuta (PW5) as Dr. Muganda was not available to testify. On the external appearance of the body, the Doctor noted that the Deceased had a bruise on the left knee joint measuring about 1.5 x 0.2 cm and blotted blood on both hands. Internally, the

Doctor noted the following;

**“Periorbital haemartoma but not involving the skull. Temporal (left) haemartoma about 7cm x 5 cm but also not involving the skull also” (no fracture to skull).**

The Doctor returned an opinion that the cause of death was **“Head Injury”**

6. PW7 investigated the circumstances surrounding the death of the Deceased. It was his evidence that PW1 informed him that the Deceased had told her that one Graido and Munywa had assaulted and injured him. The Investigating Officer later established that Graido’s other name is Gerald. It was also his evidence, that in the course of investigation, he established that the Deceased and the Accused were amongst other people drinking the popular changaa drink when a quarrel broke out between the two. The quarrel, unfortunately, escalated into a fatal physical fight. That in the course of the fight Graido pushed the Deceased against a wall whereupon the Deceased sustained a head injury and passed out. At that juncture, Graido fled.

7. In his short unsworn statement the Accused denied the offence. That on 8<sup>th</sup> February 2014, he woke up at 8.00 a.m. and went about his usual business of selling pork. He returned home at 7.00 p.m. took a bath, ate dinner and retired to bed. On the morning of 9<sup>th</sup> February 2014 he went to fetch a pig from his sister Margaret and while on his way a mob of people surrounded him and beat him up on allegation that he had killed the Deceased. He was later rescued by police and charged.

8. The success or failure of the Prosecution turns on whether this Court accepts that a Dying Declaration was made by the Deceased to his wife and if so the weight to be placed on it. Section 33(a) of the Evidence Act provides:-

**33) Statements, written or oral, 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. 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 proceedings in which the cause of his death comes into question;**

Generally speaking, it is **“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 a satisfactory corroboration” (Pius Jasunga s/o Akumu v R (1954) 1 EACA 331.**

9. The evidence by PW1 is that when she saw her husband on 8<sup>th</sup> February 2014 at about 8.00 p.m. at Asinge Shopping Center, he was in a critical condition. According to the witness the Deceased had injuries to the left side of his head and his eye had “popped out” The severity of his injuries was also alluded to by PW2 who saw the Deceased lying on the ground and bleeding from his ears, mouth and left side of the head. This severely wounded man was to succumb to his injuries four hours later at about 12.00 midnight.

10. If it is accepted that while at the Alupe Hospital, the Deceased told his wife who had inflicted the injuries on him then this Court accepts, the Deceased’s statement as a Dying Declaration as in his critical condition, death would have been imminent to him. He would have been in immediate expectation of death. Indeed, that damned expectation was to turn true in less than four (4) hours later!

11. What then is it that the Deceased told his wife? The evidence of PW1 is that the Deceased told her that Graido and Munywa had assaulted him because he had some money. In clarifying her testimony in

re-examination, she states;

**“The names the Deceased mentioned were Graido and Munywa”**

So who is Graido and Munywa? According to this witness Graido is the Accused person who is a neighbour to them. She conceded that she later came to learn that Graido was a nickname to a person known as Gerald Ebu Egesa, the Accused herein. Because the Deceased did not give the full name or indeed the actual name of the Assailant and because the Deceased did not describe Graido in any other way, it would be unsafe to rely on his statement to his wife without corroboration.

12. There is also another reason why there would be need for that statement to be corroborated. PW1's evidence was that the Dying Declaration was made in the presence of their child called Bernard Pata. Bernard is said to be 14 years old. For some reason, not explained, the Prosecution failed to call him as a witness. The Defence criticized the Prosecution for failing to call the young man as his evidence would corroborate the Dying Declaration. The Defence are right. A Dying Declaration is often weak evidence and if it was made in the presence of more than one person it can only be strengthened if more than just one person gives evidence about it. Never mind, the provisions of Section 143 of The Evidence Act that the Prosecution is not obliged to call any particular number of witnesses.

13. This Court has given two reasons why the Dying Declaration must be corroborated. Where, if any, is the corroboration? The conduct of the Accused after the incident occurred could point to his culpability. The evidence of PW2 is that at 10.00 a.m. on 9<sup>th</sup> February 2014, the Accused was spotted at Amongora location on the Kenya/Uganda border having left his home. After a chase, the Accused was arrested by members of the Public as he unsuccessfully attempted to cross a river. That he had been first arrested by members of the public was corroborated by PW6 and PW7 who are the Police Officers who re-arrested him. In his unsworn Defence the Accused person set up an alibi Defence and on his arrest he testified;

**“I went to fetch a pig from my sister Margaret Idionyi. On my way there I was surrounded by a mob who beat me. Later police came and arrested me.”**

This Court believes the version of PW2, which found support in the evidence of PW6 and PW7. In addition, PW3 who is the Assistant Chief of Asinge Location told Court how he requested the help of the chief of Amongora Location in arresting the Accused. This Court believes the Prosecution theory that the Accused person was arrested at Amongora Location on the Uganda/Kenya Boarder as he made a bid to escape. The River conspired against him and his bid failed!

14. The Decision in Malowa vs The Republic (1980) KLR 110 gives me the confidence to hold that the conduct of the Accused can found corroboration to the Prosecution case. There the Court of Appeal remarked,

**“The judge held, on the authority of Terikabi vs Uganda (1975) EA 60, that corroboration of the evidence of Paulina and of the dying declarations Blazio was provided by the conduct of Malowa, in disappearing from his home immediately after the murder to avoid arrest, and in remaining absent for six months; and he was left with no reasonable doubt that Malowa was guilty of murder of Blazio. We see no reason to differ; the evidence in this case leaves us with no reasonable doubt that the appellatant was properly convicted.”**

15. This Court finds that the Accused person either by himself or with another, inflicted the fatal injuries to the Deceased person. What the Prosecution may have failed to prove was the element of malice aforethought. PW7, the Investigating Officer, told Court that his investigation revealed that while indulging themselves in some alcohol, the Deceased and the Accused quarreled and a fight broke out. The Accused pushed the Deceased against a wall whereupon the Deceased sustained some injuries. Indeed in the Police Form 23A(The Post-mortem form) the police described the circumstances of the Death as follows;

**“The Deceased picked a quarrel (sic) with another person and got injured on the head and rushed**

**to Alupe Hospital and died while undergoing treatment”**

That may reveal the true circumstances under which the Deceased sustained the injuries. I am unable to find any malice aforethought.

16. Ultimately, I find and hold that the Accused person Gerald Ebu Egesa alias Graido is guilty of the lesser offence of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code and convict him accordingly.

Dated, signed and delivered at Busia this 22<sup>nd</sup> day of October 2015

**F. TUIYOTT**

**J U D G E**

In the Presence of :-

Oile – Court Assistant

Owiti - for State

Juma Advocate - for Accused