



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CR CASE NO. 79 OF 09

REPUBLICPROSECUTOR

VERSUS

PATRICK MWIRIGI.....ACCUSED

RULING

1. The accused Patrick Mwirigi is charged with murder contrary to section 203 of the Penal Code. The particulars of the offence are that on the 29th day of August 2009 at Muruguma Village of Kiiroa Location in Buuri District, within Eastern Province, murdered Nathan Nchebere.
2. The prosecution called five witnesses. In brief PW1, Grace Kinanu, a neighbour of the accused stated that she was woken up at 6am on 29th August, 2009, by the wife of the accused. She accompanied her to their home where she found deceased on the floor with bleeding on the mouth and nose. The deceased told her that her son had beaten him. He gave the name Patrick which PW1 took to mean the accused.
3. PW2 was sub-Area to whom PW1 reported what she had found. PW2 helped involve the police and to have deceased taken to hospital. PW2 also said that deceased had informed him that his son Patrick Mwirigi, the accused, had assaulted him.
4. PW3 was son in-law of deceased and he received report of deceased attack from his sister in-law, Ruth Kinoti. Ruth was not called as a witness.
5. PW4 Dr. Kihumba, produced the post mortem Report on the deceased. The post mortem was carried out by Dr. Mwendu. The doctor, after the examination formed the opinion that the cause of death was a head injury. The Doctor stated that internal findings on examination were that the deceased had a compound fracture on the right temporal region extending to the temporal parietal region and the mastoid area of the right side.
6. PW5 Mr. Munyalo investigated this case from 13th September, 2009. He explained that the initial report to the police was that of assault and had been made on 29th April, 2009 when deceased, who was the complainant, died. The case changed to that of murder. PW5 said that after investigations he established that the motive for the attack was a land dispute between the accused and deceased.
7. Counsel for accused reserved submission in this case.
8. The prosecutor had the burden of proof in this case, to prove that the accused attacked the deceased with an intention of causing either death or grievous harm to him, and that the deceased died as a result of that attack. The prosecutor had to prove its case beyond any reasonable doubt.
9. In this case we have the evidence of one witness who received the report of the deceased having

- been injured. That report was made by one Rose Nkirote, said to be a wife of the accused. She is not a compellable witness and was not called as a witness. PW1 discovered, on visiting the deceased home that the deceased had been assaulted and left for dead.
10. Both PW1 and PW2 testified that after inquiring from the deceased, he informed them that his son had beaten him. To PW1 he said his son Patrick assaulted him. To PW2, one hour after he told PW1, the deceased informed him that it was Patrick Mwirigi who beat him.
 11. The question is whether the statement the deceased made to PW1 and later to PW2 can be treated as a dying declaration. Several cases have dealt with this issue. I will quote one of them. **Choge v. Republic [1985] KLR 1** where the court of appeal discussing the principal on which dying declaration is admitted in evidence observed as follows

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent 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. See Choge v. R. [1985] KLR 1.”

12. In regard to whether the statement implicating the accused was made when the deceased death was imminent and therefore at a time it could be regarded to have been made truthfully and without malice. The statement was made on day deceased was attacked, that is on 29th August 2009. The deceased died on 12th September, 2009, about 3 weeks later.
13. There are other difficulties regarding the dying declaration which must be addressed. The deceased spoke to PW1 at 6 am. PW1 does not in her evidence state whether she knew the time of the alleged attack or the circumstances under which it occurred. Since PW1 got the information about the injury on deceased at 6am, there is a possibility the deceased was attacked either earlier or during the night before. Whether earlier than 6 am in during the night before, it is a fact that there is likelihood the attack took place at a time when visibility is an issue.
14. What the visibility issue presents is a doubt as to whether the conditions of light at the time and place of attack could have enabled positive identification. That is a critical issue as it creates doubt in the courts mind whether the deceased clearly saw who attacked him.
15. Regarding the dying declaration, without clarification or other evidence, it was made 3 weeks before death and therefore the lapse of time between the attack and death far removed as to disqualify the deceased alleged statement from being regarded as a dying declaration.
16. Even if the statement could have been accepted as a dying declaration, there was a further complication regarding the deceased ability to positively identify his attacker. In the circumstances the dying declaration could not have sustained a conviction without other evidence which was adduced, which implicated the accused with the offence.
17. There was no other evidence to show how the deceased died. The only evidence availed is that of PW1 and 2, both who received the report of the attack on the deceased from others, mostly not called as witnesses.
18. A prime facie case is one which, if the accused opted to say nothing in his defence, may result in a conviction. In this case, there was no iota of evidence against the accused. The statement by the deceased that it was the accused who inflicted the fatal injuries on him do not suffice to convict, based on my findings on identification as explained in this ruling.
19. I find that the prosecution has failed to establish the charge against the accused to warrant the court to place him on his defence. For that reason I decline to place the accused on his defence.
20. I give the accused the benefit of doubt at this stage and acquit him under section 306 of the Criminal Procedure Code.

DATED AT MERU THIS 9TH DAY OF APRIL, 2014

LESIT, J

JUDGE