



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 24 OF 2012**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**GUNI MWAGUNI JUMA .....ACCUSED**

**JUDGMENT**

The accused above mentioned is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars are that:-

***“On the night of 7th and 8th day of May, 2012 at Mgone reserve in Kwale County, he murdered GAMWEDE DZILA MUHINDI”.***

In this case none of the prosecution Witnesses testified to have seen the Accused beat and kill the Deceased.

**PW 3 MALIMU JEFFA** did testify that on the 8th day of May, 2012 he was asleep in his house and that at about 7:00 am he heard children say that there was a man who was walking while bend and he had fallen at a nearby path. He decided to go and check. The man told him that he was hungry and drunk and that he had been beaten by his in law by the name of **NGUNI MWAGUNI**. He took him to his house and had him served with tea and porridge.

Later he went and reported the matter to **MZEE SULUBU** a relative of the Deceased. **SULUBU NGALA (PW 4)** did testify to the effect that upon interrogation the Deceased, he said that he had been beaten by the Accused.

The evidence against the Accused amounts to a dying declaration as provided under Section 3(a) of the Evidence Act as admissible evidence in the following manner,

***“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 persons 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 the expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question”.***

The Court of Appeal in the case of **Olale & Others –Vs- Republic 1965 EA 555** held,

***“A trial Judge should approach the evidence off the 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 Accused and not subject to cross-examination, unless there is satisfactory corroboration”.***

In the present case, what the prosecution Witness told the Court is simply that the Deceased told them that it was the Accused who had beaten him.

The Accused in his sworn statement told the Court that he was in the company of the Deceased on the day preceding his death. They had been drinking from 11:00 am to 4:00 pm. Later they decided to go home. On the way they rested beside the road and later woke up to start the journey home but the Deceased was left behind. The following day in the morning he went to his homestead to find whether he had arrived safely but upon arrival he was arrested by neighbours who were alleging that he was the last to be seen with the Deceased and he must know what had happened to him.

The evidence by the prosecution Witness is that the Deceased was seen in the morning walking in a bend gait and while still drunk. That's why PW 4 decided to offer him tea without milk and porridge. That seems to corroborate the evidence of the Accused when he states that they went home very drunk but he left the Deceased on the way after he refused to walk home. There is no evidence to the effect that it's the Accused who inflicted injuries on him and which later caused the death of the Deceased. As argued Supra the only evidence against the Accused is that of a dying declaration. There is no corroboration to that dying declaration. Any other person could have had the opportunity of inflicting the fatal wounds on the Deceased apart from the Accused. In conclusion, I find that this case has not been proved beyond reasonable doubt and the Accused person is acquitted of the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

He is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **31st** day of **October, 2014**.

.....

**M. MU YA**

**JUDGE**

**31ST OCTOBER, 2014**

**In the presence of:-**

Learned Counsel for the prosecution Jami

learned Counsel for the defence absent

Accused person in person

Court clerk Musundi