



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
Criminal Case 121 of 2008**

**REPUBLIC.....PROSECUTOR
VERSUS**

SAMUEL MACHARIA JOHN.....1ST ACCUSED

GEORGE NJOROGE NGANGA.....2ND ACCUSED

JUDGMENT

The two accused persons are charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

It was the prosecution case that on 5th November, 2008, the deceased, Duncan Nganga had a drink at Amani Bar in Ndeffo Trading Centre until 10p.m. when he decided to return home. Also drinking in the same bar were the two accused persons who were his neighbors and friends. It is alleged that the two accused persons left the bar ahead of the deceased and lay in wait for him and attacked him.

When he arrived home in the morning with multiple injuries including burns on the feet, he told his wife, Beth Wairimu, his father, Duncan Nganga a sister-in-law and his brother, Charles Njenga that on his way home, the accused attacked him. He was rushed to the hospital and a report made to the police.

He died on 16th November, 2008. On 21st November, 2008, the 1st accused went to the police station with injuries to make a report that he had been assault by his father in-law in protest against an earlier incident where he had found the 1st accused and his (1st accused person's) mother in-law drinking chang'aa together. Because of an earlier report of assault recorded at the police station by the deceased against the 1st accused person, the latter was arrested as he made a report of his assault by the father in-law. The 2nd accused person was later on arrested on 25th November, 2008. According to the doctor who performed postmortem examination, the deceased died as a result of severe head injury due to blunt force trauma.

The accused persons were subsequently charged as explained earlier.

In his sworn defence, the 1st accused person confirmed that indeed he was in the company of the 2nd accused person on the night in question at Imani Bar. It was his evidence that the deceased too was at the bar and that in fact the deceased bought for him a drink. He, however, left the deceased in the bar and passed by his in laws on his way home. At his in-law's home, his father in law wanted to know what he was doing at a chang'aa den with his mother in-law. At that stage, his father in-law attacked him. He reported the attack to the police and was issued with a P3 form. Later he was arrested. In his opinion, it was his father's in-law who instigated his arrest.

For his part, the 2nd accused person similarly confirmed that he was in Imani Bar where he saw the

deceased. The 2nd accused person left the deceased in the main bar as he went into a room to watch television. He dozed off and was woken up when the bar was closing. He did not see the deceased when he woke up. He paid his bill and left for his home. The next day, he learnt that the deceased had been attacked. He visited him at home where the deceased explained to him that the previous night he was too drunk and strayed to Matarakwa Primary School; that he could not tell how or wherefrom he got the injuries.

According to 2nd accused person, the deceased appeared to have recovered, except for occasional headaches. This is what he told the 2nd accused person on 13th November, 2008, when they met at the trading centre. Four days after this meeting, the deceased died. The 2nd accused person testified that he took part in the funeral preparation and the burial. After the burial, he was arrested for allegedly being involved in the death of the deceased.

From the foregoing evidence, it is clear that there was no eye witness to the attack on the deceased. The prosecution case is premised purely on circumstantial evidence; the evidence of dying declaration. In terms of **Section 33** of the **Evidence Act**, statements made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, are admissible in proceedings in which the cause of his death comes into question.

It has been established by case law that the court must exercise caution before convicting on the evidence of a dying declaration. The law was comprehensively stated by the Court of Appeal in the case of **Pius Jasanga s/o Akumu V. Republic** (1954) 21 EACA 331 as follows:

“The question of caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has been repeatedly been cited with approval:

The caution with which this kind of testimony should be received has been commented upon. The test of cross-examination may be wholly wanting and..... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed..... The deceased may have stated his inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them, (Ramazani bin Mirandu** (1934) 1EACA 107; **Republic V. Okulu s/o Eloku** (1938) 5 EACA 39; **Republic V. Muyovya bin Msuma** (supra). **The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case; it is not guarantee for accuracy.****

It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration Republic V. Elign s/o Odel and Another (1943) 10 EACA 9: Re Guruswani (1940 Mad 158) and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. But 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.”

(Emphasis added)

Although the deceased told several people that he had been attacked by the accused persons, who, according to him, way laid him, it must be borne in mind that the attack was at night, after 10p.m. It must also be remembered that the deceased had been drinking and in fact he told his sister in-law, Esther Njeri, that when he was attacked, he was drunk.

Thirdly, the deceased did not explain why he thought those who attacked him were the accused persons, apart from the evidence of his brother Charles Njenga Mbugua that he (the deceased) recognized the accused persons by their voices.

Again there is no evidence as to what the attackers said when the deceased recognized their voices. The evidence of Esther Njeri is of interest. She said that the deceased person at first could not talk because of the injuries in his mouth; that when they made a report to the police, they recorded that the deceased was attacked by unknown people and that when the deceased was able to talk, he told Esther Njeri that he could only recognize one of the attackers, the 2nd accused person. P.C. Ronald Nyangau of Ndeffo Police Post recalled that when the incident was first reported, the deceased told him that he had been assaulted by the 1st accused person. But in cross-examination the witness simply said that the deceased did not say who had assaulted him.

From the foregoing and in consideration of the totality of the evidence presented to support the prosecution case, I come to the conclusion that the circumstances for invoking the doctrine of dying declaration were not favourable. There was no independent evidence to corroborate the claim that the deceased identified the accused persons as having attacked him, or that indeed the accused persons left before the deceased and laid ambush.

In the result, I find no evidence against the accused persons who I accordingly acquit and order to be set at liberty forthwith unless lawfully held.

Dated, Signed and Delivered at Nakuru this 27th day of July, 2012.

W. OUKO

JUDGE