



REPUBLIC.....RESPONDENT

- Versus -

SULEIMAN HASSAN NASORO.....ACCUSED

J U D G M E N T

Suleiman Hassan Nasoro (the Accused) is charged with murdering **Katana Mapenzi** (the Deceased) on 4th October 2010 contrary to Section 203 as read with Section 204 of The Penal Code.

To prove its case, the prosecution lined up a total of six witnesses.

Awal Hassan Abdi (PW1) is a member of a Community Police Unit based at Magongo. He was on night patrol on the nights of 3rd October 2010 – 4th October 2010. At about 1.00am on 4th October 2010 while near a café called Ananas he heard a commotion. As it was wont to, this drew his attention and so he went to the source of the noise. There he says, he found the accused person, a person known to him, kicking the deceased on the chest and ribs. The deceased was down on the ground and the accused stood over him. The Deceased was pleading for mercy. PW1 told Court that he implored upon the accused to stop beating the deceased but this fell on deaf ears. PW1 left the scene as the beating continued.

Later on the same day (4th October 2010) the deceased made a report to the police. His complaint was that the accused had assaulted him. This complaint was entered in the Occurrence Book as 5/4/10/2010 by a P.C Idris. The deceased had, earlier and before the report, told Issa Keah Chaka (PW2) about the alleged assault. PW2 gave the deceased Kshs. 150/- to enable him seek medical treatment. The Deceased told PW2 that the accused hit him on the chest and he was suffering pain on the chest and ribs.

Although the deceased obtained some medical treatment, he succumbed and died on 5th October 2010. Tangai Mdoe (PW3) and others who included PW2 arrested the accused and took him to Changamwe Police Station where he was re-arrested by the police. The accused was arrested at the house of the deceased where the accused had been duped into visiting.

P.C. Edward Chepsergon (PW4) received the accused person from PW2 & PW3 and remanded him into custody. Later, in the company of Insp. Andrew Sora (PW6), visited the deceased's house where his body lay. Photographs of the body were taken. Both witnesses noticed that there was blood oozing from the deceased's mouth and there was blood on the floor of the room. The body was then taken to a Morgue at Coast General Hospital.

Dr. Francis Otieno (PW5) performed a postmortem on the body of the deceased and formed the opinion that the cause of death was cardio- respiratory arrest due to head injury following an assault.

When put on his defence, the accused person chose to give evidence on his own behalf but did not call any witness. The accused admits having seen the deceased in the early hours of 4th October 2010. That the Deceased appeared drunk, was staggering and kept falling as he past the place where the accused was guarding. The accused denies assaulting the deceased and that to the contrary he helped the deceased by leading him away. At one point the deceased fell and hit a sewer line. The accused person and PW2

visited the deceased later on that day and gave him water and Panadol (medicine) as he was in pain.

That, in brief, is the evidence presented to this Court. PW2 gave evidence of a conversation he had with the Deceased at about 9.00am on 4th October 2010. This would be about 24 hours before the death of the deceased. Shortly after that conversation the Deceased filed a complaint with the police. On both occasions the Deceased complained that he had been assaulted by the accused person.

Are these dying declarations? Section 33(a) of The Evidence Act is on admissibility of such statements and provides:-

“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 proceeding in which the cause of his death comes into question.”

While there is no time limit set between when a statement is made and when the death occurs for the statement to qualify as a dying declaration, its evidential value is lessened when made at a time when the expectation of death is not imminent. The compulsion to speak the truth may not be as strong as in the stark solemnity of a dying moment. In this matter, the deceased sought financial assistance from PW2 to enable him pay for the medical attention. He visited a hospital and sometime in the course of the day lodged a complaint with the police. It was a complaint on an assault. He died about 24 hours after the conversation with PW2. It does not seem to me that the thought of death was on the mind of the deceased when he had the conversation with the witness or when he made the report to the police. This was a man who had been issued with a P3 form that would enable a medical assessment be carried on him in preparation of assault proceedings. At this time he was able to move around on his own and must have hoped that he will have his day in court against the accused.

Considering the circumstances under which the statements were made this Court would be slow in placing much weight on them without other evidence. It matters not that the deceased had twice pointed an accusing finger at the accused. This could be evidence of consistency in his allegation but not the accuracy or correctness thereof. On this occasion the Court would require corroboration of those statements and would heed the words of the Court of Appeal in **Musili –Vs- Republic [1991]KLR 322 at page 326-**

“However, it has always been stressed by the Court of Appeal that although there is no rule of law that to support a conviction there must be corroboration of a dying declaration, but it is generally unsafe to base a conviction solely on an uncorroborated dying declaration, and that too great weight should not be attached to dying statements which should be received in evidence with caution.”

PW2 says that the deceased told him that the accused had hit him on the chest and ribs. This would seem consistent with what PW1 says he witnessed. The medical evidence adduced however casts a shadow of doubt on the evidence of PW1 and the allegation made by the deceased. In the postmortem report, PW5 (the doctor), gave the following opinion as the cause of death-

“cardio respiratory arrest due to head injury following an assault.”

The Doctor, on examining the body of the Deceased, noted the following on its external appearance;

“Bruise @ thigh laterally ≈ 2cm diameter otherwise no major external wounds.”

Answering questions fielded in cross-examination, PW5 was unequivocal that there were no other external injuries. He specifically testified that he did not notice any injury, external or internal, to the deceased chest. In addition, those injuries caused by stamping of boots would have been visible. All these would seem to discount PW1’s evidence that the accused repeatedly kicked and stamped the deceased’s ribs and chest with boots. The medical evidence destroys any value of PW1’s evidence and the dying

statements.

The prosecution case is not helped, in my view, by the failure to call one Rashid who is said to have been in the company of PW1 and who, together with PW1, is said to have seen the accused assault the deceased. Rashid's evidence would be critical in testing the credibility of PW1's testimony, the only direct evidence.

So the conclusion that I would draw from the evidence is that the deceased died of a head injury. There is no evidence, direct or circumstantial that it is the accused who caused that head injury. From the medical evidence, it seems doubtful that the accused assaulted the deceased by kicking and stamping him on the chest and ribs. This doubt must be resolved in favour of the accused with the result that I do not find him guilty of killing Katana Mapenzi. I hereby acquit the accused, Suleiman Hassan Nasoro, of the said offence. He is hereby set at liberty unless detained for some other lawful reason.

Dated and delivered at Mombasa this 22nd day of August, 2012.

F. TUIYOTT

JUDGE

**Dated and delivered in open court in the presence of:-
Gioche for the State
Tarus for accused person
Court clerk - Moriasi**

F. TUIYOTT

JUDGE