



## CRIMINAL LAW

- **How to consider a dying declaration.**

### REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA

#### AT MERU

#### CRIMINAL CASE NO. 83 OF 2007

REPUBLIC..... PROSECUTOR

VERSUS

JOSHUA KAIRITHIA M'INAGWA.....1<sup>ST</sup> ACCUSED

RAPHAEL KINOTI BUNDI.....2<sup>ND</sup> ACCUSED

JAMES MURANGIRI STEPHEN.....3<sup>RD</sup> ACCUSED

### JUDGMENT

The three appellants were charged before this court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were as follows:-

**1. JOSHUA KAIRITHIA M'INAGWA 2. RAPHAEL KINOTI BUNDI 3. JAMES MURANGIRI STEPHEN: On the 5<sup>th</sup> day of December 2007 at Ruanyange Sub-Location, within Meru Central District in Eastern Province jointly with others not before court murdered Edward Kiogora.**

The three accused on 21<sup>st</sup> January 2008 pleaded not guilty to that offence. Ruth Nkatha, PW1 was a sister to the deceased. She said that the 1<sup>st</sup> accused was their father. She knew the 2<sup>nd</sup> and 3<sup>rd</sup> accused who she described as neighbours. On 1<sup>st</sup> December 2007, she got a report that the deceased is unwell from her neighbours who were passing by. She went to see the deceased on that day and found him sleeping in bed. The deceased was living in the same compound with the 1<sup>st</sup> accused but was having his own house. The deceased could not speak with a loud voice. PW1 stated in evidence that due to his injuries he was unable to project his voice. PW1 then went on to state what the deceased said to her. The deceased said that he met young men at night. They told him that he had abused his father. They took him to the

river where he was beaten by a mob of people. They then returned him home. The deceased said that the people who beat him were a mob. He mentioned the names of Raphael Kinoti Bundi the 2<sup>nd</sup> accused person and the name of James Murangiri Stephen, the 3<sup>rd</sup> accused as being amongst those who attacked him. PW1 then stated in evidence:-

***“He, (deceased) said James, Raphael and others took him to the place where he was assaulted.”***

The deceased said that the mob stepped on his stomach and chest. He complained of pain in the chest. On the following day, the deceased was taken to Meru General Hospital. He died two days later. It was PW1 who identified the body of the deceased for the purposes of post mortem. PW1 confirmed that the deceased said he was attacked by a mob when cross examined. She however said that the deceased did not say that the 1<sup>st</sup> accused attacked him. PW2 is an assistant chief of Ruanyange sub location in Meru. He said that the three accused come from his area of jurisdiction. On 3<sup>rd</sup> December 2007, he met a retired doctor called Sophia Mutiga who he said runs a clinic in the area. Sophia told him that the deceased had been taken to her clinic but she refused to treat him and instead directed the family to take him to the general hospital. This she said was because the deceased had serious injuries. Sophia told the assistant chief that the following day she learnt that the deceased had died. On receiving that information, PW2 went to the 1<sup>st</sup> accused house. When he arrived at the house, he found the 1<sup>st</sup> accused's children. As he talked with the children, the 1<sup>st</sup> accused arrived. When questioned about the death of the deceased the 1<sup>st</sup> accused told PW2 that the deceased was attacked by a mob. That it was Raphael the 2<sup>nd</sup> accused who informed him of the injuries of the deceased. PW2 confirmed that the three accused were arrested. The doctor who did the post mortem on 21<sup>st</sup> December 2007, PW3, stated that the deceased was 23 years old. He found that there were bruises on the back of the deceased skull which were partially healed. He noted that the accused fractured the 2<sup>nd</sup> and 3<sup>rd</sup> rib. He also had a fracture on the left side of the skull. He noted that there were signs of internal bleeding in the brain. He formed the opinion that death was caused by head injuries. PW4 the investigating officer was mandated by the officer in charge of his police station to deal with the OB report made by the deceased. He noted that the OB stated that the deceased had reported that he was assaulted by people known to him but he did not name the people. On making that report, the deceased was given a note which he took to the general hospital. The investigating officer in his investigation found that the deceased had named the three accused persons as being amongst the people who assaulted him. The other people who assaulted the deceased had fled from the area and to date have not been arrested. The accused were put to their defences. The 1<sup>st</sup> accused denied the offence and stated in his defence that he was not near when the deceased was assaulted. He denied that he had sent people to discipline the deceased. He said that he did not know who assaulted the deceased. On the 1<sup>st</sup> December 2007 at 7pm whilst he was in his house, the 2<sup>nd</sup> accused came to his house and told him that the deceased was lying on the ground near his house. When the 1<sup>st</sup> accused went to where the deceased was said to be, he found him lying down. The deceased told him that he had been beaten by three boys namely, Riungu George, Tomas, Wilson and Boniface. With the assistance of the 2<sup>nd</sup> accused the carried they deceased to the house. The 1<sup>st</sup> accused noted that the deceased was severely injured and they decided to take him to the clinic which was run by Sophia. Due to the severity of his injuries, Sophia declined to treat him. The next day they were able to get a taxi and took the deceased to hospital. However, before they went to the hospital, they went to the police station and the deceased who was by then still able to talk made a report of his assault. That report was recorded in the O.B. The 2<sup>nd</sup> accused in his defence stated that he comes from the same village as the 1<sup>st</sup> accused. On that day, he was on his way home from his business which he carries out in Meru town. He had closed his business at 8.30pm. As he walked home, he saw somebody lying on the ground. With the aid of a torch he saw that it was the deceased, the son of the 1<sup>st</sup> accused. He went to the 1<sup>st</sup> accused house and reported what he had seen. He concluded his evidence by saying that it was his pity on the deceased that had caused him to be involved in this case. The 3<sup>rd</sup> accused is also a neighbour of the 1<sup>st</sup> and 2<sup>nd</sup> accused. He however stated that at that time in question although he was working in Ruanyange area he resided at Meru town. He therefore stated that on

the material night he was at Meru town. The evidence that the prosecution relies on is essentially the dying declaration of the deceased. Under section 33 (a) of the Evidence Act, such a declaration is admissible in evidence. That section provides as follows:-

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

The Court of Appeal in the case **Karisa Wara Vs. Republic** Criminal Appeal Case No. 267 of 2006 stated that such evidence although admissible required corroboration. This is what the court said in part:-

***“The deceased having told the assistant chief (PW4) the same thing, passed away. This is what is being complained of as hearsay, but that evidence clearly amounted to a dying declaration and was admissible under section 33 (a) of the Evidence Act, chapter 80 of the Laws of Kenya. The dying declaration required corroboration but it was amply corroborated by the presence of the appellant at the scene of the stabbing which not only involved the deceased but Charo as well.”***

The test of the admissibility of the evidence of a dying declaration was well stated in the case **R Vs. Andrews** [1987] AC 281 where Lord Ackner gave 5 tests for admission of such evidence:-

1. ***Can the possibility of concoction or distortion be disregarded?***
  
2. ***To answer this, ask if the event was so unusual, startling or dramatic that it dominated the thought of the victim causing an instinctive reaction without the chance of reasoned reflection, in conditions of approximate but not necessarily exact, contemporaneity.***
  
3. ***To be sufficiently spontaneous the statement must be closely connected with the event causing it.***
  
4. ***There must be no specific features making concoction or distortion likely.***
  
5. ***There must be no special features likely to result in error, for example, drunkenness.***

What I need to consider in respect of the evidence in our case is whether the dying declaration meets the tests required. The dying declaration was only made to PW1. Although the deceased made a report at police station before his admission to hospital, he did not disclose the names of those that attacked him. It should therefore be noted that there is no corroboration of PW1’s evidence that the deceased stated who assaulted him. There is also the possibility of error in that statement because even according to the evidence of PW1 as well as the other witnesses, the assault took place at night. The deceased said that he met young men who took him to the river where he was assaulted. He did not name the young men. He also informed PW1 that he was attacked by a mob. There is the likelihood of error in his declaration and with that his identification of the 2<sup>nd</sup> and 3<sup>rd</sup> accused because the incident occurred at night and because he was attacked by a mob of people. The prosecution did not lead evidence on whether the 2<sup>nd</sup> and 3<sup>rd</sup> accused were known to the deceased. I would fault the prosecution’s case for failing to lead evidence on the exact words that were spoken by the deceased to PW1. That would have assisted the court to know

whether the statement was repeated exactly as it was reported to PW1. In the case **Mande vs. Republic** (Crabbe J.A.) [1965] E.A. the Court of Appeal stated in that case the following passage which is relevant to this case:-

***“The attack in this case took place at night in a room lit by a feeble light, and in our view, where the identification of the assailant was a narrow issue between the prosecution and the appellant, a particular caution must be exercised and the evidence for the prosecution must be so cogent as to exclude any possibility of a doubt.”***

In my view, there is a high likelihood of error of the deceased identification of the 2<sup>nd</sup> and 3<sup>rd</sup> accused. It should be noted that the 1<sup>st</sup> accused was not mentioned by the deceased. Even though the 2<sup>nd</sup> and 3<sup>rd</sup> accused were mentioned by the deceased, when PW1 gave evidence in chief she stated that the deceased told her that they were among the people who attacked the deceased. It was not until she was cross examined that she changed her testimony to say that the 2<sup>nd</sup> and 3<sup>rd</sup> accused were involved in the assault of the deceased. With all those inconsistencies and the likelihood of error of the dying declaration, I find the prosecution failed to meet the required criminal standard of proving the charges against the accused beyond reasonable doubt. I therefore proceed to acquit the accused of the charge of murder and I order the accused to be set free unless they are otherwise lawfully held.

***Dated, signed and delivered at Meru this 17<sup>th</sup> day of February 2011.***

**MARY KASANGO**  
**JUDGE**