



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO.8 OF 2005**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ABDI ABALONI KILIFO.....ACCUSED**

**RULING**

The accused, Abdi Abaloni Kilifo is charged with murder contrary to Section 203 of read with section 204 of the Penal Code. The prosecution called 8 witnesses.

From the prosecution evidence the deceased went to PW 3's home on 4<sup>th</sup> August 2004 at about 6 pm. He made his intention of the visit clear by declaring that he was waiting to talk to PW 2, who was at the time talking to the accused, her former husband. After waiting for sometime, the deceased bid PW 3 good night at about 7.30 pm but promised that he would hang around until he had a chance also to talk to PW 2 (Halima Abdula). According to PW 2 the deceased visited their house on this fateful night at about 7 pm – presumably after bidding good night to PW 3. He remained at the house of PW 2 until about 8 pm when he left. Shortly after he left, PW 2 heard screams from outside. She did not get to confirm what had happened until the following day when she learnt that the deceased had been stabbed to death. PW 3 (Kuigi Charo) on hearing the screams rushed to the scene where he found a crowd and the deceased lying down with a knife stuck on the head. When he asked the deceased what had happened he answered that the person who was talking to PW 2 had stabbed him.

The deceased person's screams attracted two brothers who were coming from church and also happened to belong to the same clan as the deceased – Cosmos Kazungu Dzombo (PW 4) and Maurice Katana Dzombo (PW5). According to the two when they got to where the deceased was lying with a knife on his head he was calling out for people from his clan – and thereafter he went into a coma and did not speak again.

Dr. Arnold Obenjo (PW1) performed post-mortem examination on the body of the deceased. He observed a stab wound on the left temporal region which in his opinion was the cause of the death.

P.C. Daniel Otieno (PW 8) investigated the case. I have considered this evidence as well as submissions by the Counsel for the accused and state.

At this stage the prosecution is duty-bound to establish a prima facie case against the accused. That is the prosecution must adduce evidence which is strong enough to be able to base a conviction on if the accused choose to say nothing in defence. Is the evidence adduced by the 8 prosecution witnesses such evidence?

The only evidence linking the accused with the death of the deceased is an alleged dying declaration by the deceased to PW 3. PW 3 alleged that the deceased told him that the person who was standing with PW 2 had stabbed him. In PW 3's view the only person who was standing with PW 2 was the accused. This evidence is sharply contradicted by that of PW 4 and PW 5.

PW 3 told the Court that he met PW 4 at the scene. Yet PW 4 did not hear the dying declaration in question.

Generally speaking dying declaration is evidence which must be received with utmost caution as it is made in the absence of the accused persons and not subjected to cross-examination.

In Aluta V. Republic (1985) KLR 543, it was held at page 5 & 7 this

**“In every criminal trial a conviction can only be based on the weight of the actual evidence adduced..... A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of an deceased person made in the absence of an accused and not subjected to cross-examination, unless there is satisfactory corroboration”**

I find no corroboration to the evidence of PW 3. It would be unsafe to call upon the accused to make his defence based on the contradictory prosecution evidence.

The accused is acquitted and set free under Section 306 of the Criminal Procedure Code forthwith unless for any lawful reason detained.

Dated and delivered this 28<sup>th</sup> day of July 2005 at Malindi.

**W.OUKO**

**JUDGE**

28.7.2005

**W.OUKO**

**JUDGE**

Mr.Lughanje for accused.

Mr.Ogoti for the state

CC.Gladys.

Accused present

All assessors present.

**W. OUKO**

**JUDGE**

Court: pay assessors.

**W.OUKO**

**JUDGE**