



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL CASE 9 OF 2005**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**EDWARD KINYUA KARIMI ..... ACCUSED**

**RULING**

Edward Kinyua Karimi hereinafter referred to as the Accused is arraigned before this court charged with the murder of Kenneth Kimani Mwangi (hereinafter referred to as the deceased).

The prosecution has closed its case after calling a total of 7 witnesses. The gist of the prosecution case is that on the night of 31st December 2004, the deceased and Erastus Mwai Muriithi (P.W.1) were operating a Bar known as Imani Bar at Kiamaina village.

One Muteru went to the Bar at around 8.00 p.m. He was already drunk and created a disturbance asking other patrons at the Bar to buy him alcohol. The deceased ordered Muteru out of the Bar and Muteru left only to come back again after about an hour.

Muteru was again sent out for disturbing customers. He went away, but came back, was kicked out again and came back yet a fourth time at around 10.00 p.m. This time round P.W.1 got hold of Muteru and pushed him outside. P.W.1 noticed the Accused and 3 others standing outside the Bar. As P.W.1 was about 12 metres outside the Bar still arguing with Muteru telling him to go away. He saw the deceased come out of the Bar.

He then heard the deceased shout to him that he had been hit. P.W.1 asked the deceased who had hit him and the deceased responded that it was the Accused. The Accused then went where Muteru was and they all left in a group together with three others. P.W.1 and the deceased went back into the Bar and the deceased informed P.W.1 that he had been hit on the head with a whip. The deceased had a cut on the head but refused to go to Hospital. They closed down the Bar and then each proceeded to his home.

Hillary Mugo Mwangi (P.W.3) the deceased's younger brother, heard the deceased arrive home sometime between 1.00 a.m. and 2.00 a.m.

The next morning at around 8.00 a.m. P.W.3 went to wake up the deceased. He knocked at his door but the deceased did not respond forcing P.W.3 to break into the house through a window. P.W.3 found the deceased lying on the bed unconscious. The deceased was bleeding heavily from the head where he had a deep wound.

P.W.3 called P.W.2 and together they looked for a vehicle and took the deceased to Kibingo nursing home accompanied by the deceased's mother Beth Nyambura Mwangi (P.W.4). The deceased was however pronounced dead shortly after arriving at the hospital.

On 2nd January 2005 P.W.3 went to Kiamaina village where he found the Accused. He struck a conversation with the Accused and as a result of what P.W.3 learnt from the Accused, he convinced the Accused to accompany him to P.W.4. After repeating the same conversation P.W.3 and 4 convinced the Accused to accompany them to Kerugoya police station where the Accused was re-arrested by P.C. Vincent Schihemi (P.W.5) after he learnt that the deceased had died after being involved in a fight with the Accused.

On 7th January 2005 P.W.3 & 4 identified the body of the deceased to Dr. Duncan Kiligo (P.W.1) who performed a postmortem examination. Dr. Kiligo observed that there was dry clot of blood on the left parietal region and that internally there was inter cranial bleeding on the left parietal region with compression of the left cerebral hemisphere. Dr. Kiligo concluded that the cause of death was head injury with intra cranial bleeding which resulted in a clot in the brain causing compression on the left cerebral hemisphere.

The Accused was subsequently escorted to a Doctor who examined him and filled a P3 form certifying him to be physically and mentally normal. The Accused was thereafter charged.

From the above it is evident that although it was alleged that there were many customers present at the bar at the time of this incident, there is only the evidence of P.W.2 as to what transpired. It is obvious that P.W.2's attention was focused on Muteru who had been creating a nuisance in the Bar and whom P.W.2 was trying to get rid off.

In fact P.W.2 testified that he was actually struggling with Muteru whom he was pushing out of the bar telling him to go away, but who in turn was holding P.W.2's clothes telling him he must have a drink. P.W.2 did not therefore see exactly what happened to the deceased. His attention was only drawn to the deceased when the deceased yelled out to him that he had been hit. At that point P.W.2 testified that he saw the Accused come to where he was struggling with Muteru, and the Accused, Muteru and three others left in a group. P.W.2 cannot therefore state with certainty that it was the Accused who hit the deceased.

It is obvious that the injury suffered by the deceased that night is what led to his death as revealed by the postmortem examination carried out by Dr. Duncan Kiligo. What the deceased stated to P.W.2 regarding this injury is admissible in evidence under section 33(a) of the Evidence Act as it is a statement relating to the circumstances resulting in the deceased's death. In short it qualifies to be what is generally referred to as a dying declaration.

The question then is what exactly did the deceased state in this dying declaration? In his evidence in chief, P.W.2 stated that he heard the deceased call out to him "Mwai I have been hit" and he asked him who had hit him and the deceased said it was Edward.

This implies that this conversation was taking place outside the bar where the deceased was hit. However under cross examination P.W.2 stated that he asked the deceased who had hit him when they went back into the Bar and it was then that the deceased mentioned the Accused. There is therefore lack of consistency.

It is apparent that P.W.2 did not actually see the Accused assault the deceased. The evidence implicating the Accused is therefore the dying declaration. However there is doubt as to whether the deceased did actually mention the accused as his assailant and at what point he did so.

In the case of Choge v/s Republic [1985] KLR 1, the court of appeal held as follows:

"though there need not be corroboration in order for a dying declaration to support a conviction, the

exercise of caution is necessary in the reception into evidence of such a declaration and it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

This position was again restated by the court of appeal in the case of Kihara v/s Republic [1986] KLR 473 when their lordships held that:

“Even though there is no rule that a dying declaration must be corroborated, a court needs to caution itself that in order to obtain a conviction upon a dying declaration, it must be satisfactorily corroborated and particular caution must be exercised as to when the attack took place, the identification of the assailant and the weapon used.”

In this case, even if I were to accept that the deceased did mention the Accused, there were many people who were said to be outside the bar at the material time. In fact according to the evidence of P.W.2 Muteru was in the company of 4 other people including the Accused. Any of the 4 persons could therefore have been responsible for inflicting the injury on the deceased.

In the case of Aluta v/s Republic [1985] KLR 543 it was held that: “the fact that the deceased in his dying declaration said that the Accused killed him was evidence of his belief and not guarantee of accuracy.”

It is evident from the above that the deceased may not have been accurate as to who actually attacked him. It is evident that the police had some information relating to what the Accused is alleged to have told P.W.3 & P.W.4 which may have influenced their decision to charge the accused. That evidence was however not admissible as same was not made in accordance with section 25A of the Evidence Act (as amended by Act No. 5 of 2003)

The upshot of the above is that there is no evidence providing corroboration to the dying declaration alleged to have been made by the deceased.

This means that the evidence adduced by the prosecution is insufficient to prove that the Accused person assaulted the deceased. Moreover there is no evidence at all as to any malice aforethought on the part of the Accused. Needless to state that the evidence of the prosecution as it stands is not sufficient to establish a prima facie case against the Accused as laid down in the case of Ramanlal T. Bhatt v/s Republic [1957] E.A. 332. I therefore find the Accused not guilty and acquit him of the charge under section 306 (1) of the Criminal Procedure Code.

**Dated signed and delivered this 7th day of December 2005**

**H. M. OKWENGU**

**JUDGE**