



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 12 OF 2003**

**REPUBLIC ..... PROSECUTOR**

**Versus**

**M G ..... ACCUSED**

**J U D G M E N T**

Mdoe Gwede, the Accused in this case, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on 23rd day of February 2001 at about 10.30 p.m. in Kwale District within the Coast Province the Accused murdered G L.

The prosecution case is that on the 23rd February 2001 at about 10.30 p.m., while in his house, D W heard his father, the deceased, scream. He rushed out to find out why and found the deceased lying down outside his (deceased's) house. On enquiring from him what had happened the deceased told him that he had been cut by the Accused. As it was dark that night he went and fetched a lamp from his house and returned to the scene. He saw that the deceased had several cut wounds all over the body. He called other people including a neighbour and his wife who also heard the deceased repeat that he had been assaulted by the Accused. They unsuccessfully tried to rush the deceased to hospital. He died on the way.

It was also the prosecution case that before that date the Accused who had alleged that his late father and some members of his family had conspired to cause Accused's wife to run away had threatened to stop that conspiracy by doing something. The threat was however not directed to any particular person but it would appear the deceased thought he was the target.

The only alleged eye witness was P.W.3 M W a child of about 15 years old who was said to have been with the deceased on the fateful night and saw Accused attack the deceased. On voir dire examination I formed the opinion that she did not understand the significance of an oath and she gave an unsworn statement. The statement amounted to no evidence at all as she simply could not answer some questions put to her. Contrary to what other adult witnesses said she alleged that there was moonlight that night which enabled her to see the Accused attack the deceased. The little girl also contradicted herself in that what she said in court is not what she told police. This case therefore hangs on the dying declaration made by the deceased and on circumstantial evidence. I would like to first consider the circumstantial evidence.

Circumstantial evidence is very often the best evidence. It is evidence of the surrounding circumstances which, by intensified examination, is capable of proving a case conclusively. It should not be regarded as weaker evidence. In **R Vs Taylor, Weaner and Donovan (1928), 21 CA.APP. R. 20** it was held that circumstantial evidence is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with mathematical accuracy and it is no derogation of evidence to say that it is circumstantial.

Circumstantial evidence must, however, be thoroughly examined as it is the kind of evidence that can be

fabricated to cast suspicion. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. To justify a conviction on circumstantial evidence, however, the facts and the surrounding circumstances must irresistibly point to the guilty of the Accused person – **Kariuki Karanja Vs Republic [1986] KLR 190** - and the inculpatory facts must point to the guilt of the accused person and be incompatible with his innocence and incapable of explanation upon any other reasonable hypothesis than that of his guilt. - **Kipkering Arap Koske Vs Rex (1949) 16 EACA 135**.

To find out if there is any circumstantial evidence which can justify a conviction in this case I now wish to consider in detail the evidence adduced in this case.

As I have already stated the main witness in this case is D W P.W.1. He is a son to the deceased and a step brother to the Accused. He testified that on fateful night at about 10.30 p.m. he heard his father, the deceased, scream and he rushed to his house to find out why. He found the deceased lying down out of his (deceased's) house and on enquiring what had happened to him the deceased said he had been attacked by the Accused. He went to Accused's house and called him but he did not respond. As that was a dark night he fetched a lamp from his house and returned to where the deceased laid. On observation he saw that the deceased had several cut wounds all over the body. He called his elder brother T W P.W.2 and other people in whose presence the deceased repeated that he had been attacked by the Accused. The deceased did not say anything else. They tried to rush him to hospital but died on the way. They took the body back home.

The witness also said that the Accused joined them later when they were taking the deceased to hospital but he did not ask him why he had assaulted the deceased. Later in the company of the Accused his uncle and a neighbour the witness reported the matter to police but he did not tell the police of the deceased's dying declaration. It is the uncle who did that resulting in the arrest of the Accused. He further stated that while at the police station the Accused was sweating and appeared shaken.

It was the further testimony of P.W.1 that earlier on his brother T W P.W.2 had been ordered by the village elders to pay compensation to the Accused for seducing Accused's wife. But the Accused apparently not satisfied with that had alleged that the deceased, P.W.2 and P.W.2's mother had conspired to cause his wife to run away and that he (the accused) was going to stop that conspiracy by doing something within 10 days. He was, however, not able to say to whom that threat was directed.

The testimony of T W L P.W.2 was basically the same as that of his brother D W, P.W.1. He also said he heard the deceased name the Accused as his attacker. He further stated that the following day on 24th February 2001 they (he did not say with who else) saw blood on the Accused's door but police did not see it as he thinks Accused's brother hid the door. In cross-examination he said he did not know if the deceased was sure of the identity of his attacker.

This witness conceded that he seduced the Accused's wife and was ordered by the elders to pay the Accused compensation which he did.

O B M P.W.4 is a neighbour of the deceased. He went to the deceased's house on hearing screams and also heard the deceased make the dying declaration. Thereafter he did what everybody else did to take the deceased to hospital but he died on the way and they took the body back home. He also said that 23/2/2001 was a dark night.

I have already commented on the evidence of P.W.4.

The testimony of M C P.W.5 and that of P.W.8 is on the elders meeting which ordered P.W.2 to pay compensation to Accused for seducing his wife. This witness P.W.5 said that on a day he could not remember he was called to attend the elders meeting on the matter but as P.W.2 was not present the meeting was postponed.. He said that on that day he heard the Accused allege that the deceased had approved the seduction of his wife by P.W.2. The meeting was reconvened after four days and P.W.2 was ordered to pay the Accused compensation.

P.W.6 M W is one of the deceased's widows as well as the mother of P.W.1 and P.W.2 and a step mother to the Accused. She was away on 23/2/2001 attending a funeral.

She got information about the deceased's having been attacked but when she arrived at her house she found the deceased already dead.

It was the testimony of P.W.6 that the deceased and the Accused did not get along well. The Accused had earlier on alleged that the deceased and the witness had sold his (Accused's) family's cattle. That coupled with the seduction of Accused's wife by her son P.W.2 made her and the deceased to run away from home for sometime as the Accused threatened to cause harm to them. The matter was, however, later discussed and resolved and they returned to their house.

The testimony of P.W.7, M M, was that in 2001 he accommodated the deceased and his wife P.W.6 at his home for about a week. They told him they had run away from their house for fear of being attacked by the Accused. The police who investigated this case were IP Thomas Kimuyu P.W.9 and PC Peter Mboti P.W.11. When the matter was reported to P.W.11 on 24/2/2001 at about 5.40 a.m. he booked the report and arrested the Accused. With other police officers the two later that day went to the scene and moved the body to the mortuary. They did not recover any murder weapon but after investigations they charged the Accused with this offence. P.W.11 took the Accused to a psychiatrist who confirmed that the Accused was mentally fit to stand trial. He produced the psychiatrist's report on that.

Dr. Mwaura David P.W.10 produced the post mortem report which had been prepared and signed by his colleague Dr. Omullo now deceased. He said he was familiar with his handwriting and signature. According to that report the deceased had several deep cut wounds. The cause of death was cardio pulmonary arrest secondary to massive haemorrhage due to trauma sustained.

Upon being called to defend himself the Accused testified on oath but did not call any witnesses. He denied killing his father. He said that on 23/2/2001 at about 11.30 p.m. while asleep in his house with his wife he heard someone call him. As he was in deep sleep he did not recognise the voice of the person who called him. When he went out he did not see anyone but he saw light outside his father's house. He went there and found his father lying down. He called him but he did not respond. Shortly thereafter neighbours came and they tried to rush him to hospital but he died on the way. He said he had no problem with his father and that he lived peacefully with him.

The person he had a problem with, he said, was his step-brother T G, P.W.2, whom he had found with his wife in his house late at night.

In cross examination by the State Counsel he denied issuing any threats to anyone. He said he was among the people who went to report the matter to police and that when he was named as his father's killer he did not say anything as he was not given a chance. He was immediately arrested and placed in cells.

Both counsel made short submissions. Mr. Kiema the defence lawyer submitted that the prosecution has failed to prove the case against the Accused beyond reasonable doubt as required by law. He said the only evidence against the Accused was the dying declaration which cannot be relied on as is ambiguous, the deceased's exact words having not been stated. Besides that he said that the fateful night was dark and that the deceased could not have been able to see his assailant. Even the prosecution witnesses, he said, were not convinced of the truth of the deceased's dying declaration and that that is why they did not arrest him. He cited the cases of **Tuwamoi Vs Uganda [1967] EA 8** and **Mande Vs Republic [1965] EA 193** in support of his submission.

As regards the threats allegedly made by the Accused, Mr. Kiema submitted that if they were made at all then they were not directed to the deceased .

On his part Mr. Monda, learned State Counsel, submitted that the prosecution had, by circumstantial evidence proved the case against the Accused beyond reasonable doubt. He said that the deceased made a dying declaration twice and that the Accused issued threats which caused the deceased fear resulting in

his running away from home for some time.

As I said earlier one assessor had earlier on been discharged for failure to attend the proceedings. The remaining two assessors gave their opinion that the Accused is guilty of the murder of the deceased.

The assessor Mr. Nathaniel Muhia relied on the dying declaration which the deceased gave to more than two people and the Accused's door which had blood but which went missing. While on the way to hospital, he said, the Accused was lagging behind instead of being active to save his father's life and that at the police station the Accused was seen sweating and shaking. Accused had also issued threats. Taking all that into account he was of the opinion that the Accused was guilty of murder. The Assessor Christine Salaash said that after taking into account all the evidence adduced in this case she was also of the opinion that the Accused is guilty of the murder of the deceased. She said that although the Accused had been paid compensation for the seduction of his wife he threatened to do something within 10 days and the deceased was killed on the 8th day.

I have anxiously considered the opinion of the assessors and the whole evidence adduced in this case. The prosecution case is mainly based on circumstantial evidence and the dying declaration made by the deceased.

The circumstantial evidence to be gleaned from the evidence of these 11 witnesses is the alleged threats by the Accused. The threats were however not directed to anybody in particular. It would appear that because the Accused alleged that the deceased approved the seduction of his wife by P.W.2 the deceased felt that the threats were directed to him and that even made him run away from home for some time. There is however no direct evidence that the Accused threatened to kill or do harm to the deceased.

As I have already stated P.W.2 conceded that he seduced the Accused's wife and paid compensation to him immediately on being ordered to. Naturally the Accused was offended by that and may have threatened to cause harm. As the threats were not directed to anyone in particular one would have expected P.W.2 and not the deceased to be most worried of them. Nonetheless it was the deceased who feared he was the target but there is no evidence in support of that fear.

Without taking into account the deceased's dying declaration, which I will consider presently, does the circumstantial evidence irresistibly point to the guilt of the accused? The answer to that in my view is in the negative. There are no inculpatory facts which are incompatible with the Accused's innocence and incapable of explanation upon any other hypothesis than that of his guilt.

That leaves us with the dying declaration made by the deceased which I would now like to consider. Before I analyse the dying declaration given in this case, I wish to state the law on the subject as I understand it. Though a conviction can be based on the sole evidence of a dying declaration it is generally speaking very unsafe to do so and the court should warn itself of the danger before acting on it without corroboration. Stating the law on the point in **Kihara Vs Republic [1986] KLR 473** the Court of Appeal delivered itself in the following terms:-

**“Though there is no rule that dying declarations must be corroborated, [the] court needs to caution itself that in order to obtain a conviction on a dying declaration, it must be satisfactorily corroborated, Republic Vs Said Abdalla (1945) 12 EACA 67, Republic Vs Mugundulwa s/o Jalu & Others (1946) 13 EACA 167 at 171. Particular caution must be exercised as to when and where the attack took place and also about the identification of the assailant and the weapon used. It may be that the dying person may not remember all that and may not be telling the truth.” At P.476 to 477.**

In **Aluta Vs Republic [1985] KLR 543** the Court of Appeal states thus at P.547:-

**“A trial judge should approach the evidence of the dying declaration with necessary circumspection. It is, generally speaking, very unsafe to base a conviction solely on the dying declaration made in the absence of the accused and not subject to cross-examination, unless**

**there is satisfactory corroboration. - Okale & Others Vs Republic [1965] EA 55” See also Choge Vs Republic [1985] KLR 1.**

Applying these principles to this case, is it safe to base the conviction of the Accused on the sole evidence of the deceased’s dying declaration having already found that there is no other evidence against the Accused?

As I have already stated there is no evidence that the Accused threatened to assault leave alone kill the deceased. The Accused’s threats were general and not directed to any particular person. For unexplained reason it appears to me that the Accused held a phobia that they were directed at him and that made him run away from home.

Coming to the fateful night, several prosecution witnesses testified that it was pitch-dark. There is no evidence of there being a lamp or any other source of light in the deceased’s house. We are not told that the deceased’s assailant talked with him and he was able to know who it was that brutally assaulted him? How then did the deceased know that it was the Accused who assaulted him? I find the caution given by the Court of Appeal in the above cited case of Kihara Vs Republic that “particular caution must be exercised as to when and where the arrack took place and also about the identification of the assailant ...” quite opposite here. In giving their opinion the Assessors did not touch on this aspect of the evidence.

I am on my part, however, satisfied and I hold that due to the phobia the deceased held he assumed that his assailant was the Accused. True, he repeated the accusation twice but that is only evidence of the consistent view he held. Dealing with a similar situation in **Republic Vs Ramazani bin Mirandu (1934) 1 EACA 107** the Court of Appeal for Eastern Africa stated:-

**“The fact [that] the deceased told different persons that the appellant was the assailant is evidence of consistency of his belief that such was the case, it is no guarantee of accuracy.”**

For these reasons I am afraid I have had to differ with the Assessors whose views I otherwise respect.

In the circumstances I find and hold that the prosecution has failed to prove beyond reasonable doubt that it was the Accused who killed the deceased. Consequently I acquit the Accused of the charge of murdering G L and order his immediate release unless otherwise lawfully held.

DATED and delivered this 7th day of December 2004.

**D.K. Maraga**

**Ag. JUDGE**