



**Republic v Chege alias ‘Rasta’ (Criminal Case 18 of 2019)
[2025] KEHC 1549 (KLR) (12 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 18 OF 2019
SM MOHOCHI, J
FEBRUARY 12, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMUEL CHEGE ALIAS ‘RASTA’ ACCUSED

JUDGMENT

1. The Samuel Chege alias ‘Rasta’ was on the 25th April 2019 arraigned before court and charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that, on the 4th of March, 2019 at Belbur village in Njoro Sub-County within Nakuru county, jointly with others not before court, murdered Zacharia Aminga. The accused person pleaded “not guilty” to the charge.

Prosecution’s Case

2. PW1-Vincent Kipkoge Bett. Testified that on the 4th March, 2019 around 9 p.m, he was at Ngundu trading centre playing pool with Christine Gitago Gatonye and Late Zacharia Aminga and Gitonga and Chege alias Rasta. Zacharia and Chege alias Rasta started quarrelling. Zacharia was telling Chege, that, “he had gotten used to him so much”. Rasta on his part asked what will you do? They went out and he followed them out, he found Chege with a group of his friends. The deceased Zacharia was standing in their middle and he complained of his back. PW1 moved him to the side abit, they moved him to where there was light. PW1 checked the deceased back and realized there was a hole in his shirt. It was on the right side. The deceased lay down and PW1 saw a hole on his back. He was injured. PW1 realized that the deceased had been stabbed raising alarm of the same.
3. That he came with his friends and found Zacharia chini. He heard someone say, we have stabbed him? What will you do? PW1 put Zacharia on a motor bike. Gitonga called Isaac to take Zacharia to Benmark



Clinic. He was referred to Njoro Sub-County Hospital. They learnt that he died and they took him to Egerton Mortuary. Shortly one of the boda boda operators came with a knife used to stab Zacharia.

That he had known Chege alias Rasta as he used to sell wall papers and the witness identified the accused in the dock.

4. In cross-examination the witness admitted that;
 - i. He never knew if the deceased and accused were friends.
 - ii. The incident occurred at 9p.m.
 - iii. It occurred at Ngongu Trading Centre.
 - iv. There was security light where the incident occurred.
 - v. He never identified the person who said “we have stabbed him what will you do” as it had become dark.
 - vi. He heard the accused’s voice as they played in the pool. he cannot identify his voice very well. That they were about 4 or 5 people and one of them said, we have stabbed him what will you do. PW1 never identified the person who said that.
 - vii. He never witnessed knife being removed from accused.
5. PW2-Christpine Gitonga Karanja recalled in testimony how on 4/3/2019, around 9 p.m they were playing pool at Ngongu Centre. he was with friends Gatonye, Vincent Bett, late Zacharia Aminga, and Rasta Chege with his friends. It was Rasta who told the deceased that “you have gotten used to me”. That Rasta and his friends left. The deceased followed them to a building called Zajendo a place that was a bit dark.
6. That Vincent Bett followed them and shortly returned and told them that their friend had been stabbed. Deceased lay down facing the ground. There was electricity light which was from a bulb in zajendo; that to see properly they used a torch and saw him bleeding from the back chest.
7. That they took him to a clinic in Ngongu called Besmark and were told to take him to Njoro Sub-County Hospital from whence the deceased was declared dead. They reported at Njoro Police Station. That PW2 used to see Chege/Rasta selling wall charts and positively undertook a dock identification. That when Vincent came back he said Zacharia had been stabbed and that they go and help him.
8. In cross-examination, stated that, after exchanging in pool, Rasta left with his friends and the deceased followed. That he was called by Vincent who never told them who stabbed the deceased. That the deceased only said he had been stabbed with a knife. That, outside where deceased lay the lighting was not very clear. It required additional lighting.
9. PW3 -David Mwangi a bodaboda operator, recalled how on 4th March, 2019 he was taking a customer at around 9 p.m. when he reached Zagendo he heard a voice say, “Chege had stabbed me with a knife”. He stopped, that the voice was the deceased’s and he was lying down.
10. PW3 asked Gatonye what had happened? Gatonye’s response was that Chege had stabbed Zacharia with a knife. PW3 was told to carry deceased with his motor cycle which he didn’t but followed them from behind.
11. That, at Besmark Hospital the doctor tried to do first aid but it was difficult and the deceased was transferred to Njoro. The witness futher went back to the deceased home and notified them and upon



return to Njoro Hospital with deceased family members they found that, the deceased had succumbed to his injuries.

12. That PW3 went to Egerton university gate and found a crowd together with which they embarked on a search of Chege (motor rider). That they found him with a person called Mokona and when he saw them, he removed a knife and threatened them to move close to him saying he would stab them. But one person managed get hold of him, they put him on the motor bike while People started beating him.
13. That, Papa took the knife from him. Papa is called Robinson. Robinson took the knife from him and gave police. Its mkamba who told them he had seen accused at route II road. That PW3 had known Chege who used to sell wall charts whom he identified on the dock.
14. That, the deceased had a stab wound at the back-right side and had said “Chege has stabbed me with a knife” and kept quiet.
15. In cross-examination, stated that, the deceased was about 2 metres away from him when he said he had been stabbed with a knife. There were other people there. He was in pain and saying “Chege has stabbed me with a knife”. PW3 was in the group of those who arrested accused. The knife had a plastic handle. It was like a Somali sword. It had blood. The accused was with Mukona when they arrested him. They were only two and PW3 denied that they met Gatonye and Chege Rasta when going with deceased father. That part of his statement was wrongly recorded but was to be corrected.
16. PW4- Samwel Ondiek Amunga. The deceased father recalled how on the 4/3/2019, while at home at around 9 to 10 p.m. he received a motor cyclist carrying Mwalimu Nyasani who told him that his son had been injured and had been taken to Njoro. He was requested to join them to Njoro whom they found dead upon their arrival, the nurse told him it was a police case. he identified the body. PW4 observed that the deceased had been stabbed with a knife from behind, right side (back).
17. He was told to take the body to police station and with help of good Samaritan took the body to police station where they were asked to take it to the mortuary, they took the body to Egerton. Postmortem was done. He identified the body and witnessed postmortem which was done after 3 days. While in the mortuary, they saw a young man come with a knife which they showed police. And the witness identified the knife in court.
18. PW5 the deceased mother testimony was identical to PW4’s testimony save that, she never went to the hospital on the fateful night.
19. PW6- Titus Ngulungu the government Pathologist testified how he conducted a post mortem on the body of Zacharia Aminga Ondieki at the Egerton University Funeral Home on 8/3/2019 at 10.30a.m. a request from DCI Njoro.
20. PW6 was told the deceased body was alleged to have been stabbed by a known person. Body was identified by Samwel Ondieki Aminga and Kwamboka Ondieki.
21. He proceeded to examine the body. Body had dark blue t-shirt, blue jeans, red leather boot and on scalp was rasta hair. A male African aged early 20s that is 23 years. Nutritional status good, medium physic, height 170 cm. Body was refrigerated and frozen.

External Appearance

- i. Had features of blood loss/pallar
- ii. Lack of clean air/synosis.



22. He documented the injuries on the back of surface of stab wound on back of the chest oriented vertically allocated 80-millimeter below the red scapular and 80-millimeter lateral from the mid line. The stab wound was on back measuring 30-millimeter Convex located 80-millimeter below right scapular and right lateral of midline. Other areas had no injuries.

Internal Injuries

- i. Right lung was collapsed. It was floating on 2 litres of blood that was clothing and the lung had a stab wound on the back and located on middle limb measuring 25mm through substance of the lung. There was a slit incision between the 4th and 5th rib that indicated entry of objector blade that caused the injury.
 - ii. On the brain it showed it was swollen due to lack of oxygen before death. Other systems were normal.
23. He formed opinion that cause of death was, lung injury with massive blood loss, described as haematorax due to stab injury through back of the chest also involving right lung in keeping with homicide.
24. He took sample of blood for matching or DNA Match and signed postmortem report which he produced as exhibit 1.
25. PW7- Isaac Murithi Gandu the deceased employer recalled the fateful night at 5pm the deceased and the accused engaged in a quarrel, he never knew the reason of the quarrel and left immediately thereafter he was called later and informed of the stabbing of the deceased, found them at the dispensary, rushed to the police station only to return and find the deceased had succumbed, and visited the mortuary where he viewed the body as well as he identified accused as well as the knife he had. That the search party had seen the accused with the knife.
26. In cross-examination, the witness conceded that, he was not present when the incident occurred, he found deceased at the dispensary. That, the deceased and the accused had a quarrel and it ended. The deceased was his employee and he saw the weapon with boda boda riders who went to arrest the accused and that he saw the weapon in the land cruiser, he never saw the accused with the weapon.
27. PW8- George Kinyanjui Mungai, recalled that on the 4/3/2019 at 10.00 p.m. he was 'Kwa Right', Generation club taking alcohol when the accused came and asked the witness to buy him a glass of alcohol. The accused was drunk and the witness told him he did not have money and was taking his last drink to go home. The accused requested the witness if they could go together. PW8 said he was going to Njokerio. He and the accused entered club by name Mzee moja and found his colleague and was offered a drink, the accused sat briefly before leaving with a certain lady. Then a boda boda person came and told them that, Chege had been caught and beaten (ameshikwa na amepigwa). It was about 11.00 p.m.
28. That the boda boda person told them that Chege had caused a death and had been beaten. PW8 Asked the boda boda person to take him home where told his parents. That his parents told him to wait for what would happen. That PW8 stayed home for two (2) days before resuming his normal duties. That ten (10) days after the incident he was arrested and told to record a statement.
29. The witness attributed his arrest to having been with the accused on the material night, that PW8 did not see the accused cause the death. That he heard that one young man was killed at Ng'onde he did not know his name. that, Ng'onde is about 1km from Njokerio. He knew the accused who was his neighbor.



30. In cross-examination the witness stated that the accused was drunk that night, that the incident happened at Ng' Ondu and he was not there with the accused who found him at 'Kwa Right'
31. That to walk from Njokerio to Ng' Ondu is about 20 – 30 minutes. If you are sober, if you are drunk, maybe 1 hour. And that the accused was not very drunk he could walk.
32. PW9- Henry Kiptoo Sang, the government analyst, undertook a DNA analysis on samples from the deceased, the alleged murder weapon and the accused, to determine and state only relationships through DNA analysis.
33. According to the DNA profiles, he concluded that, the blood on the dagger had same DNA as the one from the deceased Zacharia Amunga (Deceased) he made the report, signed it, and produced it as P. Exhibit 2(a). Exhibit memo (P. Exhibit 2(b)).
34. PW10 P.C. Nickson Okwiri stationed was the investigating officer having taken over this matter on 17/8/21 when the former investigating officer Cpl. Mary Angasia retired.
35. That he collected exhibits a blood-stained knife which was murder weapon, he has been trying to reach the retired investigating officer in vain. Some witnesses have testified but there are some which he was unable to reach and he produced the knife as evidence as Exhibit3. Surprisingly he was not cross-examined.

Prosecution Submissions

36. The state submitted thru the filed written submissions by Ms. Jackline Kisoo Snr Prosecution Counsel dated 2nd August 2024, submitting that they had demonstrated to the required standard that there was death of the deceased, that PW1 & PW2 responded to the scene seeing the deceased had been stabbed, and that the deceased made a credible dying declaration at the scene as heard by PW3, the body of the deceased was identified by PW4 and PW5 and a post mortem was conducted by PW6 confirming the cause of death to be lung injury with massive blood loss, described as haematorax due to stab injury through back of the chest also involving right lung in keeping with homicide.
37. As to whether the death was unlawful, the state placed reliance upon the case of Uganda v Lydia Draru alia Atim HCT-00-CR-SC-0404 High Court of the Republic of Uganda, Her Lordship Hon. Lady Justice Monica K. Mugenyi (as she then was) held that;

“The legal position on the legality of death (or lack thereof) is that every homicide is presumed to be unlawful unless circumstances make it excusable... In homicide cases death is always presumed unlawfully caused unless it was accidentally caused in the circumstances which make it excusable”.
38. That the instant case, no evidence was presented to indicate that the deceased's death and/or cause of death was excusable nor that the deceased died of natural causes. From the testimony of the prosecution witnesses, the findings in the post mortem report and the stab wound on body of the deceased was deliberately inflicted without justification and therefore unlawfully so.



39. The state maintains in submission that, proof of participation of a suspect is crucial as it enables the court to determine who to attach criminal responsibility to, placing reliance upon the case of Republic- vs-Mohammed Dadi Kokane & 7 others (2014) eKLR Lady Justice M. Odero holding that;
- “Having sufficiently proved the fact as well as the cause of death of the deceased the prosecution is under a duty to prove that the accused persons before the court are criminally culpable for the act leading to the death of the deceased.”
40. The state submits that the participation of the accused was prone on circumstantial evidence and that the same can be deduced from the evidence presented and that the conditions for its admission was satisfied;
41. That, the circumstantial evidence deduced from the circumstances of each individual case is often the best evidence available and can be sufficient if the conditions for its admission are satisfied as was held in PON v Republic [2019] eKLR, the Court of Appeal cited with approval the case of Rex Kipkerring Koske (1949) where the principles for admission of circumstantial evidence as a basis for conviction was laid down.
- “In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”
42. That, PW1, PW2 and PW7 were at the pool shop in Ngongdu Trading Centre, Njoro and they all witnessed the accused quarrelling with the deceased. PW1 and PW2 then saw the accused leave the premises with his friends and the deceased also left soon after. PW1 followed the two but when he went out he realised the deceased had been stabbed at the back. As PW3 was on his way, he saw the deceased lying on the ground and heard him say that, the accused had stabbed him with a knife. The deceased was escorted to Besmark Clinic and was referred to Njoro Hospital where he was pronounced dead. His body was taken to Egerton Mortuary for preservation and a post mortem was later conducted by the pathologist who drew a sample of blood from the deceased for DNA analysis.
43. That, PW3 together with others searched for the accused on the material night of the incident and when he was traced, PW3 testified that the accused brandished a blood-stained knife threatening to stab anyone who went near him. They nevertheless managed to subdue him, handed him over to the police together with the blood-stained knife.
44. It was confirmed by PW9 the Government Analyst that the DNA from the blood on the knife matched that of the deceased. This led to the conclusive proof that the murder weapon was the knife that was recovered from the accused person.
45. That, the evidence of PW3 and the Government Analyst PW9 corroborated the dying declaration made by the deceased when he mentioned prior to his death that it was the accused who had injured him and the weapon that was used to attack him. The statement made by the deceased was clear, relevant and is admissible under section 33 (a) of the *Evidence Act*.



46. That Section 33 (a) of the *Evidence Act* (Cap 80) states that: -

“Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, are themselves admissible in the following cases-

- (a) Relating to cause of death 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. 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;.....”

47. The state submits that, the above evidence by the prosecution as to the time, the place and circumstances surrounding the killing of the deceased and the dying declaration made by the deceased taken cumulatively leads to the inescapable conclusion that the accused was the perpetrator of the heinous offence.

48. As to whether the accused had malice aforethought it is submitted that the prosecution proved the same as deemed from looking at the weapon used, body parts targeted and injured urging that in this instant the same is proven against facts.

49. The state submits that it has its obligation and proven beyond reasonable doubt without any discredits by the accused warranting the conviction of the accused which they so pray.

Defence Case

50. The Accused gave sworn testimony that he is a resident of Njokerio, he worked as a hawker, never knew the deceased. He recalled that on the 04/03/19 he found deceased at pool table sitting down PW1 and PW2 were there, he never knew their names. That his nickname is “magic” There was Chege “rasta” and he is not him, that he is Chege Magic.

51. That he went to pool table played one game and left for market center, to “generation pub” met his friend PW9-George Mungai who is a neighbor.

52. PW9 bought the accused alcohol and after sometime they left and headed home.

53. While on the way, George received a call by a friend both of them went “Mzee Moja” pub where PW9 met his friend who he had received call from.

54. They started imbibing and Accused had had enough, he left them and went home.

55. On his way home at 10 p.m., he was attacked, robbed and beaten to unconsciousness, finding himself in Nakuru Level 5 Hospital admitted with multiple injuries on his face.

- i. That, while being treated on 08/03/20 at 3p.m. he was discharged and arrested taken to Njoro Police.
- ii. That he left deceased at pool table and had no differences with deceased.
- iii. That he does not know of knife
- iv. The knife is not his.



- v. The knife was never recovered on him
56. In cross-examination the accused stated that he had no disagreement with deceased at pool table next to which the Deceased was seated.
57. That PW1 and PW2 were present. That he had left the pool when he heard that, the deceased died within the center and not at pool table.
58. That, he left first he the accused was never arrested in possession of the knife as he had been robbed, that he was with George Mungai who should be his witness but the witness has never called George to testify.

Defence Submissions

59. Counsel Ms. Chepchieng for the accused submits that, the accused had an argument with deceased in the pool table room, got out of the room and headed home and according to PW1, he claims that he followed them after some minutes in the dark near Zajendo building and saw a group among them the accused beside the deceased who was unconscious and bleeding profusely. How could he have been able to recognize the accused in the dark?
60. That, it can be presumed that he was not sure if it was really the accused among the group, he probably saw figures of people in the dark, PW1 couldn't recognize one of the boys who shouted from the darkness "Tumemdunga mtafanya nini?". Other Prosecution witnesses indeed confirmed that the area where the incident happened was dark and it couldn't be ease to identify someone. This scenario cast doubt on how the accused was identified.
61. Further the statement "Tumemdunga mtafanya nini" confirms more than one person was involved which tally's with the accused defense statement that fight erupted among many people outside the pool and that he was just a spectator in the same.
62. That Oliver Wamalwa Matee, in his statement, claims that one Robinson Gachaja Thuku had recovered the murder weapon from the accused who was being beaten by the angry mob. Upon cross-examination, Robinson counterclaims that, he was given the weapon by someone. He was unable to identify who gave it to him during cross-examination. In his statement to the police, he claimed to have seen the accused with the knife aboard a boda boda. In addition, he claims to have recovered the knife using tissue paper and took it to the police.
63. That the evidence presented had material contradictions by the witnesses which raised doubts in their testimony. The recovery of the knife from the accused isn't sufficiently proven by the prosecution. My assumption is that the knife may have been sneaked in during the pandemonium so that the act in question will eventually point to the accused.
64. That the Defense evidence was that the government analyst received the knife, the accused's blood sample and deceased blood sample to generate DNA. He confirmed to court that none of the items knife specifically contained accused DNA. However, prosecution failed to have the fingerprints of the accused taken to verify if the accused had gotten in contact with the said exhibit (knife).
65. Ms Chepchieng argues that all gaps, doubts emerging in trial bust benefit the accused and that the burden of proof remained constant during the trial, she submits that the case falls short of the standard of proof beyond reasonable doubt warranting the forthwith acquittal of the accused.



Determination

66. I have carefully considered all the evidence availed before court and the only issue in question in this case is whether the prosecution have proved whether the accused person caused the death of the deceased persons and was there actual malice?
67. The offence and punishment for murder is provided for under Section 203 and 204 of the [Penal Code](#). The said provisions provide that;
- “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
204. Any person who is convicted of murder shall be sentenced to death.”
68. To establish the offence of murder, the prosecution is required to prove beyond reasonable doubt, proof of death, proof that the death was caused by the accused, by an unlawful act or omission and that, the unlawful act or omission was through malice aforethought.
69. Section 206 of the [Penal Code](#) defines Malice aforethought as follows:
- “206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused
 - (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

Proof of Death

70. PW1, PW2 and PW7 testified in proof of the deceased being injured and succumbing to the injuries and the death was documented in the postmortem produced as P-Exh 1 and the DNA analysis confirming a match of the deceased blood on the knife recovered P-Exh 2.

Whether the death was caused by an unlawful act or omission

71. There was no eye-witness account of the stabbing by the accused and the prosecution's case was anchored on a dying declaration from where circumstantial evidence could be inferred.
72. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR, summed up the elements of the offence of murder as follows: -



- (a) the death of the deceased and its cause;
- (b) that the accused committed the unlawful act which caused the death of the deceased; and
- (c) that the accused had malice aforethought

73. Laws of Kenya provides as follows: -

33. Statements, written or oral or of electronically recorded of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases:

a. Relating to cause of death:

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.

From the foregoing, the following elements of dying declarations arise; that is: -

The statement must have been made by the deceased.

- i. The statement must refer to the accused.
- ii. The statement must relate to the cause of one's death, or as to any of the circumstances of the transaction which resulted in one's death.
- iii. Whereas there is no standing rule on the need for corroboration of a dying declaration, extreme caution must be taken in assessing the weight to be attached to a dying declaration.

74. In applying the above to the case at hand, it was the evidence of PW1 that, Zacharia was standing in their middle and he complained of his back. and PW2 stated in cross examination that, he was called by Vincent who never told them who stabbed the deceased PW3 on his part stated that the deceased was about 2 metres away from him when he said he had been stabbed with a knife. There were other people there. He was in pain and saying "Chege has stabbed me with a knife".

75. That they embarked on a search of Chege (motor rider). That they found him with a person called Mokona and when he saw them, he removed a knife and threatened them to move close to him saying he would stab them. But one person managed get hold of him, they put him on the motor bike while People started beating him. That, Papa took the knife from him. Papa is called Robinson. Robinson took the knife from him and gave police.

76. PW4 on his part stated that, while in the mortuary, they saw a young man come with a knife which they showed police.

77. The corroboration which should be looked for is, as laid down in the case of R v Baskerville [1916] 2 KB 658, some additional evidence rendering it probable that the story of the accomplice is true and



- that it is reasonably safe to act upon it. It must be independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.
78. In this instance it was not cogent evidence how the knife was recovered from the accused and that the extra corroboration of the murder weapon was expected from the DNA profiling.
79. The law on dying declarations in Kenya was laid down in the case of Pius Jasunga s/o Akumu v R (1954) 21 EACA 331 which was cited with approval in the case of Okale v Republic [1965] EA 556 relied on by the appellants counsel. The case Okale v R (supra) was in turn followed in Aluta v Republic [1985] KLR 543 where it was held at page 547 paragraphs 5-10 thus:
- “In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in counsels’ speeches. 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 a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration”.
80. The Dying declaration herein remains uncorroborated in the absence of eye witnesses and infact the collective and general nature of the message heard by PW1 and stated in cross examination that, he never identified the person who said “we have stabbed him what will you do” as it had become dark, is indicative that it was from a collective a group in whose company was and which group had surrounded the deceased.
81. In the case of Pius arap Maina –v- Republic (2013) eKLR (Criminal Appeal No.247/2011) the court noted that;
- “It is gainsaid that the prosecution must prove a criminal charge beyond any reasonable doubts. As a corollary, an evidential gap in the prosecution’s case raising material doubts must be in favour of the accused.”
82. Further the recovered murder weapon produced as exhibit was subjected to DNA profiling against samples obtained from the accused with negative result yielding
83. Nothing justifies taking the life of any human being. The right to life is provided for under Article 26(3) of *the constitution*. The right to a fair trial is provided for in *the constitution* under Article 50. The rights of the accused persons have to be considered and those right cannot be deprived unless there is legal justification. It goes without saying that an accused person under Article 50 (2) (a) of *the constitution* is presumed innocent until the state proves beyond reasonable doubt to the contrary.
84. The prosecution has some glaring gaps and inconclusive evidence in their case, that the accused person was the one who did the act or omission that caused the deceased death, there is legal no basis for inferring guilt on his part. The burden does not shift on the accused person.
85. There was no positive match for the DNA sample “B3” from the accused and no explanation is offered by the prosecution.
86. Papa was never called to testify how he recovered the knife
87. “Robinson” was never called to testify as to how he knew it was the deceased who committed the offence and his whereabouts and was never called to testify



88. The “mkamba” who led the search party to the accused at route II road was never called to testify.
89. The recovery of the Knife from the accused is further suspect as the witness who actually did this recovery, and this court considers the accused was subjected to mob violence hence the members of the mob might have recovered or altogether planted the knife on the accused
90. In totality, having considered the evidence adduced in this case I do find that the prosecution has not proved the case of murder against the accused person beyond reasonable doubt. In that regard the court has to accord the benefit of doubt to the accused person and he is hereby acquitted of the said offence.
91. The Accused persons shall forthwith be set free unless otherwise lawfully held.

It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED AT NAKURU THIS 12TH DAY OF FEBRUARY, 2025

Mohochi. S. M.

JUDGE

