Republic v Aboi (Criminal Case E013 of 2022)
[2025] KEHC 1803 (KLR) (3 March 2025) (Judgment)

Neutral citation: [2025] KEHC 1803 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE E013 OF 2022

MS SHARIFF, J

MARCH 3, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

BASIL OMONDI OTIENO ALIAS ABOI ..... ACCUSED

JUDGMENT

1. The Accused person herein, Basil Omondi Otieno alias Aboi, was charged with the offence of murder contrary to Section 203 and 204 of the *Penal Code*. The particulars were that on the 5th day of May 2021, at Kombedu village in Kanyamedha Location, Kisumu West Sub-County, within Kisumu County, murdered Ismael Salle Asman.

2. The Accused persons denied the charge and Prosecution presented Eight (8) witness in support of its case. The defence is represented by Mr. Cheruiyot.

3. At the close of the parties' cases, the Prosecution filed their final written submissions. The same has been considered.

4. This being a charge of murder contrary to Section 203 as read with Section 204 of the penal Code, the following ingredients should be proved by the prosecution beyond reasonable doubt;

    i. The death of the deceased

    ii. The cause of that death;

    iii. That the accused committed the unlawful act which caused the death of the deceased; and,

    iv. The accused had harboured malice aforethought

5. The above ingredients were buttressed by the Court in Republic vs. Mohammed Dadi Kokane & & 7 Others [2014] eKLR where the elements of the offence of murder were listed by M. Odero, J as follows: -

1. The fact of the death of the deceased.
subPARA 2.

The cause of such death.

3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly;

4) Proof that said unlawful act or omission was committed with malice aforethought.

6. On the death of the deceased, it is not disputed that the deceased died on 6th May 2021. The witness account in Court establishes that the deceased indeed died and the cause of death was established by PW3, Dr. Robert Omondi, as severe hemorrhage secondary to penetrative injury to the lung/heart due to assault. He produced in Court the post mortem form filled on 6th May 2021, marked as PEXH.1

7. As to whether the Accused person was responsible for his death, PW4, Nicodemus Oyoo, and PW6, Brian Derrick Omondi, testified that a fight ensued between the deceased herein and the Accused person over a phone they had stolen from a client at a wines and spirits shop. According to them, after they left the wines and spirit they heard the Accused person and deceased arguing about who gets to go with the phone. The deceased suggested they sell the phone and share the proceeds. These two witnesses then heard the deceased saying that the Accused person was threatening him with a knife over the phone. They told the Court that when they left the wines and spirits shop they were all heading the same direction. PW4 told the Court that the deceased kept on shouting and saying that the Accused person was stabbing him over a phone. The Accused person took the phone that had fallen on the ground and ran away. On approaching the deceased, he saw he had a stab wound on his left side of the chest. PW6 on the other hand, testified that the Accused person and the deceased started fighting over the stolen phone and in the process, he saw the Accused person armed with a knife which he used to stab the deceased on the left side of the rib under the armpit. As the deceased struggled with the Accused person holding on to his clothes the Accused person stabbed the deceased, again, on his lower loins (left side) prompting the deceased to scream telling them why were they watching as the Accused stabbed him. The screams of the deceased caught the attention of PW7, Kevin Omondi, who testified that he followed the noise and saw the Accused person and when he saw him he ran away while holding a knife and he noticed the deceased laying on the ground saying how the Accused person had stabbed him..

8. It was the evidence of PW1, Monica Akoth Odongo, that prior to his demise, her son, the deceased herein, told her that it was the Accused person who had stabbed him. As to whether the statement amounts to a dying declaration, a reading of Section 33 (a) of the *Evidence Act* (Cap 80) is vital as the same states that:-

> " 33. 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—
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> (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;....."

9. The Court of Appeal in the case of Philip Nzaka Watu v Republic [2016] eKLR, rendered itself on the principles of dying declarations thus;

> " Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.
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> Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in Choge v. Republic (supra):
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> "The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."

10. The Court reiterated those principles in the case of Charles Njonjo Gituro v Republic [2019] eKLR; and in the case of Moses Wanjala Ngaira v Republic [2019] eKLR where it held inter alia:-

> " 19. The situation in Kenya is, however, different as exemplified in section 33 of the *Evidence Act* (supra). There is a catena of authorities from this Court on the nature and the manner of receiving and considering evidence of dying declaration. We take it from Choge v Republic [1985] KLR 1, citing the predecessor of this Court in Pius Jasanga s/o Akumu R [1954] 21 EACA 331:
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> "In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.
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> In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence*

Act. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (Republic v Muyovya bin Msuma [1939] 6 EACA 128. See also Republic v Premanda [1925] 52 Cal 987.)

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:

"The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed... The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (Ramazani bin Mirandu [1934]1 EACA 107; R v Okulu s/o Eloku [1938] 5 EACA 39; R v Muyovya bin Msuma (supra). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).

It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (R v Eligu s/o Odel and another [1943] 10 EACA 9; Re Guruswani [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in R v Eligu s/o Odel and Epongu s/o Ewunyu [1943] 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (R v Said Abdulla [1945] 12 EACA 67; R v Mgundulwa s/o Jalo [1946] 13 EACA 169, 171)."

See also R v Eligu s/o Odel [1943] 10 EACA 90, Okethi Okalo v Republic [1965] EA 555, Aluta v Republic [1985] KLR 543, and Kihara v Republic [1986] KLR 473.

20. The law in this area is clearly articulated in the case of Nelson Julius Karanja Irungu v Republic [2010] eKLR which was cited to us by learned counsel for the appellant. It is clear however that this case does not support counsel's contention that the deceased's statement does not qualify as a death declaration because she was not under contemplation of imminent death. We do not therefore need to discuss the details as to whether the deceased was in imminent danger of death when she made the statement in question. The statement is clearly admissible in evidence."

11. The statement by the deceased to the PW1 relate to the events that eventually led to his death and I am therefore satisfied that the same amounted to a dying declaration. Whereas a dying declaration does

not require corroboration, the deceased was very consistent in his mentioning of the Accused as one who attacked him and it is my finding that this coupled with the evidence of PW4 and PW6, both of whom I found to be credible and trustworthy witnesses, as they had no reason to lie against the Accused, leaves no doubt that the Accused committed this offence.

12. In his defence the accused person raised an alibi that on the date of the incident he was attending a dowry payment ceremony that occurred from 4th May 2021 to 6th May 2021 thus could not be responsible for the demise of the deceased herein. This alibi defence was not raised during the prosecution's case and the accused person did not call any witness to corroborate his alibi. I find the Accused person's assertion that he does not know who stabbed the deceased incredible as several Prosecution witnesses placed him at the scene and witnessed him stabbing the deceased. I do find that the alibi raised by the accused was but an afterthought and as I have already said herein above, the same was not supported by any probative evidence.

13. An analysis of the above evidence clear reveals that the Accused person and the deceased were together during his assault; and, that several witnesses witnessed his fight with the deceased. PW6 saw him stab the deceased and PW7 saw him fleeing the scene with a knife in hand. I do find that it is the Accused person and no one else that killed the deceased. I find the Accused person's defence incredible and the same does not hold.

14. Concerning malice aforethought, Section 206 of the *Penal Code* specifies that:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
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> 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;
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> 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."

15. In the locus classicus case of Republic vs Tubere S/O Ochen [1945] 12 EACA 63 it was held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

16. In the instant case, the accused person had intended to keep the stolen hand set on grounds that the deceased had in a previous incident declined to share with him the proceeds of a similar incident; theft. The genesis of the disagreement between the accused and the deceased was the stolen hand set. PW4 testified that he heard the deceased person shouting, saying that the Accused person was threatening him with a knife because of a phone while PW6 told the Court that he saw the Accused person fighting with the deceased while threatening him and he eventually removed his knife and stabbed him. It was his testimony that the Accused person further stabbed the deceased on his loins when he held onto his trousers demanding he gives him the phone he stole.

17. It was obvious that the accused person's act of assault on the deceased person was deliberately intended to kill him or cause him grievous harm, so that there can be no question that malice aforethought was established.

18. Consequently, given that the deceased died from severe hemorrhage occasioned by a penetrative injury to the lung/heart due to assault and that the Accused person did not provide any explanation to absolve himself from this death, other than putting forth an unsubstantiated alibi and considering that malice aforethought was established as already found hereinabove, I am satisfied that the Prosecution has proved it's case against the Accused person beyond any reasonable doubt. I do hereby find the accused person guilty of murder of Ismael Salle Asman (deceased).

19. Sentence will be after records and mitigation.

DATED AND DELIVERED AT BUNGOMA THIS 3RD DAY OF MARCH 2025

M.S. SHARIFF

JUDGE

In The Presence Of:

Ms Muema For Prosecution

Mr Cheruiyot For Accused Persons

Diana/juma/david Court Assistants