



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Ogesi alias Brown & 3 others (Criminal Case 3 of 2016)
[2025] KEHC 5651 (KLR) (Crim) (7 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 3 OF 2016**

LN MUTENDE, J

MAY 7, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

ALFRED MARANYA OGESI ALIAS BROWN 1ST ACCUSED

AMANI AKASI ALIAS WASIWASI 2ND ACCUSED

MARIGO PROTUS ALIAS SARARA 3RD ACCUSED

JULIUS OMANYO OCHIENG 4TH ACCUSED

JUDGMENT

1. Alfred Maranya Ogesi alias ‘Brown’, the 1st Accused; Amani Akasi alias ‘Wasiwasi’, the 2nd Accused; Marigo Protus Sarara alias ‘Sarara’, the 3rd Accused; and Julius Omany Ochieng, the 4th Accused respectively, are jointly charged with Murder contrary to section 203 as read with 204 of the [Penal Code](#).
2. The particulars of the offence are that on the 16th day of September, 2013, at around 7:30 pm at Nyam Hotel, along Duruma Road within Nairobi County, jointly murdered Irungu Kamau (Deceased).
3. To prove the case the State called 8 witnesses. PW1 Anne Wairimu Njahira, a hawker within the Nairobi Central Business District (CBD) and wife of the Deceased testified that on the 16/09/2013 she went to Nyamakima, purchased her wares and proceeded to her place of work (Where she used to sell items from) only to find hawkers not selling as per the norm. She met the deceased who told her that people were not working on the material date as they were to attend a funeral of a fellow hawker.
4. A few minutes later, she saw City Council Enforcement Officers; and, the deceased alerted people of their presence and told them to leave. Hawkers dispersed but returned fifteen minutes later and started



- walking towards the place where the funeral was to be held. But, she asked the Deceased to wait for her as she had to keep her wares. While on the way, she encountered Enforcement Officers hence ran towards Duruma Road where she sought refuge.
5. She witnessed as Enforcement Officers chased after hawkers, throwing at them tear gas and heard them call out the deceased name and also his arrest. That while standing on the opposite side of the road from where the Enforcement Officers were, she saw some of them come from Nyam Hotel, cross the road and enter their Motor vehicle and leave in a huff.
 6. She ran to the hotel and encountered a certain old man holding the deceased who had blood stains all over the body. She assisted in getting a vehicle that rushed him to GuruNanak Hospital but since she did not have the Ksh. 60,000/- that they wanted for deposit, they referred them to a private hospital. In the result they took him to Kiambu Hospital where he was to be taken for imaging (X-ray). Prior to taking him to radiology he asked for water and was allowed by the Doctor to drink, then talked to her asking why they wanted to kill him and whom he would leave their children with.
 7. The Deceased then told her that Brown, Wasiwasi, Sarara and Julius are the ones who stabbed him. He had stab wounds on the head and the right hand. As a result of the serious injuries he had sustained, he was admitted to hospital. He continued bleeding. He told her that he was in pain. The Doctor recommended surgery as it was essential. The Deceased was taken to theatre but died an hour later.
 8. Further, she stated that she saw the four Accused, Wasiwasi, Brown, Julius and Sarara come out of the hotel, persons that were well known her. That she saw the Accused holding empty bottles that were later thrown at them.
 9. PW2 Dr. Peter Njuguna was the pathologist who conducted autopsy on the body of the deceased. He opined that the cause of death was exsanguination due to extensive muscular injuries due to blunt force trauma consistent with assault.
 10. PW3 Peter Njuna Wainaina, a manager and hotel supervisor at Nyam Hotel, Duruma Road, testified to have been on duty at the counter on the material date when he saw about 10 people enter the hotel looking for an individual. They were armed with maasai rungus and empty bottles. They pointed out at a person who was in the kitchen. Five of them went into the Kitchen and dragged the person to the corridor that was between the kitchen and toilets.
 11. He heard someone raise an alarm as if he were in distress. After about 10 minutes the people left, going through the door they used to gain entry. While at the counter he saw the victim come out of the kitchen bleeding from left hand.
 12. He spoke telling him that they had finished him. The utterance made him believe he was hurt. He assisted by holding him and took him outside the hotel then gave his dust coat to those who had gone to assist him for the purpose of stopping the bleeding which she used to tie the hand and he went back to the hotel only to find a pool of blood along the corridor. Customers who were at the hotel left and he decided to report the incident to Kamukunji Police Station.
 13. PW4 Edward Kibui Hute, a hawker within River Road stated that they were going for a funeral meeting at KK bar, Nyamakima following the death of a hawker. Upon reaching Duruma road they encountered about 30 city council enforcement officers on their motor vehicle. They fired teargas at them (hawkers) and also threw at them bottles calling them thieves. The deceased who was with them had injuries on the right leg hence could not run fast, therefore, he entered Nyam Hotel. He entered a Mombasa bound vehicle and removed his cap and jacket. Then he alighted the bus and went to Nyam Hotel.



14. He saw the enforcement officers and recognized 'Brown' 'Wasiwasi', 'Sarara' and Julius. That Brown had a panga which he used to cut the deceased on the hand. Sarara who had a club and a knife hit and stabbed him; Wasiwasi and Julius who had knives occasioned injuries on the person of the deceased. He saw them with wines and spirit bottles. That their actions made people scream and run out of the hotel. As a result, the assailants also left the hotel. The deceased was taken out and while at the veranda his wife and brother were called. They assisted him to enter the motor vehicle that rushed him to GuruNanak Hospital. They were ten (10) of them but only five (5) of them went along to hospital. He alluded to have seen injuries on the deceased right hand that was cut and on the back and ribs area (chest).
15. He stated that he has known Brown as a City Council enforcement officer for a period of 10 years. The 2nd accused was nicknamed 'Wasiwasi' by hawkers; He also identified Sarara and Julius as City Council enforcement officers that he had known for ten (10) years. He alluded to having been scared after what happened to their chairperson, hence recorded statements after the accused's arrest.
16. On cross examination the witness stated that previously the deceased had been shot by the police but he could not tell when exactly it happened. He denied having met Sonko or Muhoro when he was Director of CID. Asserting that he witnessed the assault on the person of the deceased he said he could not have shouted because the accused persons would have identified him.
17. PW5 Wilson Kiptanui Too a County Officer in charge of Starehe Sub-County confirmed that all the four (4) accused persons were enforcement officers who worked under him. He alluded to a hawker having been killed a week before the instant incident, in town by the police, and that he learnt of unrest having been there. On cross examination he denied having received a report of any death that occurred. And said that the duty roster is kept by the duty officer who was the one who could confirm who was on duty.
18. PW6 No. 69585 Corporal Vincent Langat one of the investigation officers in the matter stated that the 3rd accused Protus Sarara was arrested on 7th January, 2016 by the flying squad officers. On 8th January, 2016 the 1st and 4th Accused were arrested. On 11th January, 2016 the 3rd Accused was arrested and he escorted them to Nairobi Area Police. On 25th January, 2016, the 2nd accused was arrested following issuance of a warrant of arrest.
19. PW7 Peter Namai Njoroge a hawker was at Nyamakima for a funeral of one of them who had died with the deceased. As they walked towards Nyamakima they encountered the City Council enforcement officers who started throwing at them stones. They ran for their safety. The deceased ran towards Othaya Stage while he ran towards Nuclear Stage. While hiding he learnt from the lady that his friend, the deceased had been injured at Nyam's Hotel. He talked to his wife on phone who informed him that they were at GuruNanak Hospital. He went there to find they had been referred to Kiambu Hospital and they took him to Kiambu Hospital. The deceased complained of having a deep cut wound on the back and when they turned him he had a deep cut wound on the back. He told him that he had been injured by enforcement officers from the Inspectorate whose names he gave as 'Wasiwasi', 'Brown', 'Sarara' and Julius. Then he was wheeled into theatre for the operation. As he waited outside in a friend Kimotho's vehicle he learnt of the sad news.
20. On cross examination he stated that the officers the deceased mentioned were well known to him and he had no grudge with them.
21. PW8 No. 57107 Corporal Richard Ongera stated that on 22nd September, 2013 while attached to DCI Kamukunji he was assigned a murder case that had previously been reported as an assault. That he accompanied the wife of the deceased to Kiambu Level 5 Hospital where he confirmed that the deceased had passed on and the body was in the mortuary. He viewed the body and per his observation



- it had injuries. The father of the deceased went to the station, he filled his part on the post mortem report and they proceeded to Kiambu Hospital where the post mortem was conducted by two (2) doctors, one for the family and the other for the State (Government). Subsequently, the body was released for burial. He visited the scene of the incident and recorded statements from witnesses. When transferred he handed over the matter to Corporal Lagat and Sergeant Judy.
22. On cross examination he stated that he established there was a fight between hawkers, city council enforcement officers and even the police were around, and the deceased ran into the hotel to seek refuge. That the covering report on the matter was written by PC Murumo his co-investigator.
 23. Upon being placed on their defence, the accused opted to give sworn evidence. The 1st Accused stated that he was a County Constable having been appointed in September 1999. His duties entailed enforcement of the by-laws and he was required to ensure that hawkers do not occupy Nairobi Streets. He denied having killed the deceased. He testified that on 16th September, 2013 he reported on duty and his boss Wilson Too told them that they were not going to work because there had been altercations between the police and hawkers the previous day where a police officer and hawker had been killed. They were on standby but did not work as there were 300 police officers deployed in different areas while at the general stores where their offices were, there were 200 police officers. That by 7.30pm he had returned home. He denied knowing the deceased. He also denied having gone to Nyam Hotel, Duruma Road on the material date. He argued that he could not have had a nickname 'Brown' without knowing, but, on cross examination he admitted that his complexion was brown and had worked in Nairobi for 14 years.
 24. The 2nd Accused stated that he was employed by the city council in 1983 as a Constable and he worked in different sectors. His duties entailed controlling illegal structures. He denied either knowing the deceased nor killing him. That hawkers referred to him as Wasiwasi but he did not know.
 25. That on 13th September, 2013 he was out of Nairobi and he returned on 16th September, 2013. He denied having chased the deceased or having moved around with knives. That as an enforcement officers if you have a problem with hawkers you call police officers for reinforcement. That he was required to record a statement in 2014 following allegations that there was an inquest for the case of the deceased. Subsequently, he was charged in 2016.
 26. On cross examination he stated that he used to interact with hawkers in the cause of duties. That hawkers would run away on seeing the enforcement officers but they rarely followed them to get back their wares.
 27. The 3rd accused testified that on 1st March, 2013 he was promoted to the rank of Senior Inspector and his duties entailed enforcement of By-laws. That on 16th September, 2013 he was based at Muoroto. That he reported on duty at 8.00am and their boss Wilson Too briefed them that a hawker had been assaulted the previous week. That hawkers had collected his body and were moving from station to station. Hence, he directed them not to go to work because of chaos. Therefore, they stayed at the general store situated near Mang Hotel, Wakulima Market. At 5.00pm they reported off duty. He denied having assaulted the deceased as he was not on duty. That the allegations were not true as the witnesses did not record their names. That their names came up when Mike Sonko offered Kshs.100,000/- to the persons who would mention the names of purported assailants. That he was popular having disarmed a thug of two (2) pistols. That his name was mentioned by people who wanted money as it came up three (3) years later.
 28. On cross examination he urged that it cannot be true that PW5 assigned all officers duties on the material date.



29. The 4th Accused stated that on 16th September, 2013 he reported to the General Store near Mang Hotel where Wilson Kiptoo was his supervisor. That on the material date he waited for their boss to assign them duties and he told them to be on standby as there were demonstrations by hawkers being dealt with by the police. He denied having worked at Nyam Hotel, Duruma Road or having known the deceased. That PW4 and PW7 could not have seen him as he was not at the scene. It was not until 2016 that he was arrested and taken to DCI – Nairobi Area. He denied having been with the accused at Duruma Road or having been working with them there hence did not understand why he was connected to the case.
30. On cross examination he admitted that they would be in uniform or not while discharging their duties. That whenever they would have tussles with hawkers they would surrender and leave them with their wares.
31. At the close of the defence case submissions were filed by the defence. It is submitted for the 1st and 4th Accused that based on elements of the offence of murder as stated in Republic v Ekaale [2024] KEAC 4405 (KLR) injuries sustained by the deceased were consistent with an assault; what was in question is whether the accused (1 and 4) directly or indirectly caused the death of deceased. That inconsistencies in the prosecution’s case create doubt that should be considered in favour of the 1st and 4th Accused persons whose testimonies were that they were at the office the whole day and only left for home after office hours.
32. That no CCTV camera/footage was adduced in evidence to confirm events that culminated into and during the attack. That evidence of the employees’ reporting and departing time was kept by PW5 but the same was not presented as evidence to controvert the accused’s evidence which was exculpatory evidence. Reliance is placed on the case of Republic v Moses Ngatia & Another [2020] eKLR where it was held that;
- “This honourable court is agreeable with the defence submission that where exculpatory evidence is presented to the Police or Investigating officers in the course of investigation but they deliberately ignore it leads to the inescapable conclusion that the police neglected to make use of the information which was available to them, before instituting proceedings.”
33. On the question of the dying declaration reliance is placed on Section 33(a) of the Evidence Act and the case of Republic v Odhiambo [2024] KEHC 3221 (KLR) where the court held;
- “From the foregoing, the following elements of dying declarations arises; that is:
- i. The statement must have been made by the deceased.
 - ii. The statement must refer to the accused.
 - iii. The statement must relate to the cause of one’s death, or as to any circumstances of the transaction which resulted in one’s death.
 - iv. 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.”
34. It is argued that although PW1 and PW7 said that the deceased made a dying declaration where he named his attackers, they did not mention the allegation to either family or police until three (3) years later.



35. That corroboration of the dying declaration was not corroborated. In this respect reliance is placed on *Aluta v Republic* [1985] KLR 543 where it was stated that;

“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 a satisfactory corroboration.”

36. Ms. Nyang for the 2nd Accused submitted that PW1 did not witness the act to tell who committed it. That having demonstrated that the 2nd Accused was not on duty on the material date contrary evidence is aimed at subverting justice. That PW1 having said that the 2nd Accused previously chased her away but did not assault her, he could not have had a nature of assaulting the deceased.

37. On the question of a dying declaration, that it is not suggested that the deceased was not mistaken as to the identify of his assailants and the allegation was an afterthought and not consistent with the law. Reliance is placed on the case of *Pius Jasunga s/o Akumu v R* [1954] 21 EACA 333;

38. That medical evidence adduced following the post mortem exonerate the 2nd Accused as the perpetrator of the offence. That the 2nd Accused can only be implicated based on a post mortem report that is consistent and corroborated by eye witnesses. Reliance is placed on *Argut v Republic* [2023] KEHC 2690 (KLR) where the court ruled that;

“These contradictions as inconsistencies were material to the case for the prosecution and can will be resolved to the benefit of the appellant.”

39. Witnesses who testified were dismissed as malicious and full of falsehoods. It was pointed out that there were inconsistencies in evidence adduced by PW3 and PW4 as to whether the deceased was covered with a dust coat to stop bleeding which should go to the root of prosecution’s case and be resolved in favour of the defence case.

40. On the issue of dying declaration it is urged that names having not been recorded in the occurrence book witnesses should not be believed. That there are serious doubts as to the cause of death and the perpetrator.

41. It is submitted by Mr. Mogikoya for the 3rd Accused that death of Irungu Kamau did occur. As to whose caused it, it is appreciated that the deceased was a hawker in the CBD of the Nairobi City and the 3rd Accused was employed to enforce the city By-laws and that the deceased died of bleeding due to injuries in the wounds and blood vessels caused by blunt object consistent with assault.

42. That the prosecution witnesses except PW2 alleged that the deceased received fatal injuries on 16th September and that hawkers including the deceased were not selling their wares and given that the 3rd Accused was to enforce By-laws. The prosecution was required to prove that he was present and he fatally attacked the deceased. That given that the 3rd Accused was required to work from 8.00am to 5.00pm it had to be proved beyond reasonable doubt that he was working at 7.30pm evidence that was lacking.

43. That evidence of PW5 confirmed that 3rd Accused with others did not move out of the report office at Mang Hotel confirming what Accused 3 stated. That evidence of PW3 demolished the allegation of



- PW4 that he was able to see what was going on inside the hotel while standing 15 metres away through the glass.
44. On the issue of the dying declaration, it is urged that evidence of PW1 and PW7 on this aspect is shaky, contradicting and mere conjecture. That PW1 did not inform the police of the allegation. She did not disclose in her first statement made in 2013 of the allegation.
45. That the 3rd Accused's evidence on oath rebuts the prosecution's case.
46. I have considered evidence presented by the State, the defence mounted and rival submissions. The accused face the charge of Murder contrary to Section 203 of the *Penal Code* that provides thus;
- Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
47. Ingredients of death were set out in Anthony Ndegwa Ngari v Republic [2014] KECA 424 (KLR) where the Court of Appeal stated that elements of murder are;
- “(a) the death of the deceased and the cause of that death;
- (b) that the accused committed the unlawful act which caused the death of the deceased and
- (c) that the Accused had the malice aforethought. (See Nyambura & Others-vs-Republic, [2001] KLR 355).”
48. With regard to the 1st ingredient, in Chengo Nickson Kalama v Republic [2015] KECA 169 (KLR) the Court of Appeal held that;
- “It is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a postmortem examination report of the deceased.”
49. It is not in dispute that the deceased was injured. According to the precis on the post mortem report, the deceased was assaulted by known persons and rushed to Kiambu General Hospital where he was admitted and later died while undergoing treatment. PW2 the Pathologist who conducted the post mortem on the body of the deceased confirmed the occurrence of death.
50. As to the act that caused the death in question. An assault is an unlawful act as it is prohibited by the law. This calls for the existence of both elements of mens rea and actus reus. The evidence adduced by witnesses clearly state that the assailants acted unlawfully by violently assaulting the deceased physically, therefore the element of actus reus was evident.
51. On the question of the state of mind of the assailants, as to whether the intent existed, the court must focus on the culpability of the individuals. The question to be answered is whether the act was committed with malice aforethought. Section 206 of the *Penal Code* provides;
- 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.

52. In *Nzuki v Republic* [1993] eKLR the Court of Appeal stated that;

“Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

Without an intention of one of these three types, the mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of *Hyam v Director of Public Prosecutions*, [1975] AC 55.”

53. The autopsy conducted revealed serious injuries inflicted on the person of the deceased. Externally the deceased sustained a laceration on the left side of the head (temporo-occipital region) that was 4cm long. A bruise that was unstitched on backside of the head that was 2.5cm, stitched laceration below the right elbow that was 13cm. Right lower arm – antero – medial. Stitched laceration above the wrist forearm 1cm in diameter, stitched laceration anatomical swift box (right) 3.5cm – 35cm. On the head there was subgaleal haematoma on the occipital scalp measuring 12 x 9cm.

54. In the result the doctor formed the opinion that the death was due to extensive muscular injuries due to blunt force trauma consistent with assault.

55. From evidence adduced, the deceased seemed to be one of the leaders of hawkers in the CBD who had been breaking regulations by operating on the streets despite the ban of encroaching on streets including main streets. Although unrestricted hawking activities did cause significant problems, the ones responsible for the wrong doing ought to have been arrested by enforcement officers and arraigned. A decision to assault the victim, to the knowledge of the assailants, the act would result atleast in grievous bodily harm or even death as in the instant case. Therefore, the assailants acted with malice aforethought.



56. The accused deny vehemently having been the assailants who caused the death of the deceased. In *Republic v Gachanja* [2001] KLR 428, it was stated that;

“It is a cardinal principle that the burden of proof of guilt of accused person lies on the prosecution, and that an accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities.”

57. The argument put forth by the accused is that on the material date they reported for duty but were advised to stay at their offices as there were clashes between hawkers and enforcement officers including police officers following protests staged by hawkers; hence they were not at the place where the act was committed.

58. PW1 the wife of the deceased was not an eye witness to the act, but did see some enforcement officers enter the hotel. PW4 asserted that he witnessed and saw the deceased enter into Nyam Hotel. And he also saw the enforcement officers enter the hotel armed with weapons. Having removed the cap and jacket he was wearing he went to the hotel and witnessed each one of the accused assaulting the deceased. He testified that the assailants were individuals he had known for ten (10) years and proceeded to identify them by name. Upon people raising an alarm that is when the assailants ran away. He seized the opportunity to check on the deceased then proceeded to call other hawkers.

59. It was the evidence of PW3 that when the deceased came from the kitchen area where the assault had taken place, he said they had finished him. This could have implied that a fatal blow had been inflicted on his person and the act committed may probably end his life. The statement was made by a person who believed his life was likely to end.

60. Section 33(a) of the *Evidence Act* provides that;

Statements, written or oral, 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. 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.

61. In *Pius s/o Akumu v Republic* [1954] 21 EACA 333 the Eastern Court of Appeal stated that;

“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 on Evidence has repeatedly been cited with approval....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 & Another* (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accusedBut 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 to cross-examination unless there is satisfactory corroboration.”

62. In *Choge & 3 Others v Republic* [1985] [1984] KECA 4 (KLR) the Court stated;

“The general principle on which a dying declaration is admitted in evidence is that in a dying 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 a dying declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

63. PW1 stated that while at the hospital the deceased talked to her. His first concern was why they wanted to kill him. He also posed the question as to whom he would leave his children with; and, proceeded to name his assailants. She stated thus;

“At the X-ray he asked why they wanted to kill him and whom he was going to leave with our children. He told me that ‘Brown’, Wasiwasi, ‘Sarara’ and Julius are the ones who had stabbed him. I assured him that he will not die and that he shall recover and go back home. He had three stab wounds on the head and wound on the right hand. He also had stab wound on the right breast and wrist.”

64. He was taken to theatre and died thereafter.

65. Similarly, PW7 who followed those who had taken the deceased to hospital stated that while there the deceased complained of having a wound on the back and proceeded to say what he had been injured by enforcement officers from the Inspectorate whose names he gave as Wasiwasi, Brown, Sarara and Julius. At that point he was wheeled into the theatre never to return alive.

66. The accused put up an alibi defence, their argument being that they were not at the locus in quo where the crime occurred. Their argument was that they had reported off duty and further that on that particular day they were not assigned duties at the Nyam Hotel area.

67. In *Sekitoleko v Uganda* [1976] EA 53 the court held that;

“As a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else.”

68. In *Victor Mwenda Mulinge v Republic* [2014] eKLR; the Court stated;

“It is now trite law that the burden of proving the falsity, if at all of an accused’s defence of alibi lies on the prosecution. Secondly, that a trial court should bear in mind the stage of the proceedings at which an accused person raises his alibi and determine whether it was raised at the earliest opportunity to afford the prosecution an opportunity to test it and therefore rule out the possibility of an inference being drawn against an accused person, that it was raised only as an afterthought.”

69. With the law in mind, I must weigh the alibi raised against the accounts of the eye witnesses and those who perceived what was stated by the deceased.



70. PW5 the supervisor of the accused persons stated that on the 16th September, 2013 officers were allocated duties and were required where they had been assigned duties. His duty was to do general briefing but the accused persons were required to report to their immediate supervisor for allocation of duties. On cross examination he stated that the duty officer was the one in a position to tell who had reported on duty and where he was allocated duty.
71. Evidence adduced by eye witnesses was that the accused together with other people (about 10 of them) were at Nyam Hotel. Had the purported alibi been raised early enough it could have been verified. Therefore, documentation by the duty officer to support the alibi of the accused alluded to would have substantiated the claim.
72. According to PW1 and PW7 the deceased made a statement believing death was imminent. The assertion regarding circumstances of the impending death was made by the deceased who ultimately died. He must have spoken truthfully as he had no reason to lie. These were people well known to him and at the time of making the statement he did articulate himself clearly despite the pain.
73. For that reason, I do caution myself in admitting the statement that I find and hold to be a dying declaration which is safe to act upon. In the result, I find the alibi given by the Accused persons lacking in quality. Consequently, I find the State having proved the case to the required standard of proof, beyond any reasonable doubt. Therefore, I do convict each and every Accused as charged.
74. It is so ordered.

Dated, signed and delivered virtually this 7th day of May, 2025.

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L.N. MUTENDE

JUDGE

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