



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Nasiali (Criminal Case E004 of 2021)  
[2024] KEHC 3948 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3948 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E004 OF 2021  
SC CHIRCHIR, J  
APRIL 18, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**LAMECK AKHONYA NASIALI ..... ACCUSED**

**JUDGMENT**

1. Lameck Akhonya Nasiali ( The Accused ) was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.
2. The particulars of the offence are that on the 24<sup>th</sup> day of December 2020 at Seyende area at Shiswa sub-location, Murhanda location of Kakamega East Sub-county within Kakamega county murdered one Claries Alusa(Deceased)
3. The accused denied the charges and the matter went to full trial.

**The Evidence.**

4. PW1 was the deceased's father. He recalled that on 31/12/2020, when he got home, he was informed that his daughter, the deceased was missing. He was given directions on where she may be found. He went there and found her bleeding. She heard her say she was attacked by Akhonya( the Accused ) and Isiaho. He informed the sub- chief and rushed the deceased to kakamega county hospital ,then Mukumu hospital. All this time the deceased kept on saying she had been attacked by the accused and one Isiaho. The deceased died at midnight. She had cuts on the hand legs and thighs. He was present during post mortem examination, together with one Nicholas Shisundu.
5. He was not aware of any prior disagreement between the deceased and the accused.
6. PW2 told the court that on the material day he was called by pw1 at about 7pm, and informed about the incident. He went to the scene . The deceased stated that she had been attacked by Akhonya and Isiaho.



- They took the deceased to kakamega county hospital then to mukumu. The doctors at Mukumu recommended a transfer to Kisumu but she died before she could be transferred. He was present during postmortem. He never saw the accused and Isiaho at the scene.
7. He told the court that the accused was his neighbors and that he was not aware of any bad blood between the accused and the deceased. On being asked if the deceased reported having been attacked together with his sister Cynthia, he responded in the negative.
  8. PW3 recalled that on 31/12/2020 he was on his way home at 7.00 p.m. when he was attacked by the accused Akhonya and his brother Isiaho at the tea zone. He stated that he saw them well since it was not dark. The accused cut him and took his wallet, ID card and cell phone. He stated that they went to the hospital at Mukumu and later reported the incident at Shikoti Police station.
  9. He identified the accused as the person who attacked him and that he later heard the deceased scream and saw that Akhonya and Isiaho were cutting her. On cross-examination he told the court that, he heard the deceased scream about 3 metres away and at an interval of 5 minutes after he was attacked. He said his National identity card (ID) was stolen. He reported the incident to the police but he was not given the OB number and could not recall his ID number.
  10. PW4 testified that on 31/12/2020, she was with her sisters Cynthia Mbaya and the deceased. They were on their way home. On nearing a junction, they were joined by two men who threatened them. She and Cynthia fled. The two got hold of the deceased and the deceased began to scream. They went home and informed their father. On coming back to where the deceased was, they found she had been cut badly and she kept saying Akhonya, the accused and Isiaho had attacked her. She further told the court that she identified the accused as there was moonlight.
  11. PW5 testified that the deceased was her sister and that the accused was their neighbor. She recalled that on 31/12/2020 at 7.00 p.m. they were on their way home from serende shops when they came across Akhonya and Isiaho. The two had pangas. They started cutting the deceased. They ran home and informed their father (PW1). They went back to the scene and found the deceased lying on the ground. She was bleeding and she kept saying that Akhonya and Isiaho were the ones who had cut her. It took them two minutes to come back to the scene, and that they did not find the accused or Isiaho.
  12. PW6 was the pathologist. He did the autopsy on 6.1.2021. He was of the opinion that 6 days had passed since the attack. On examination, he found that there were two deep cut wounds on the left hand, and extending all the way to the elbow measuring 20x4cm., cut wound on the right forearm measuring 6x1 cm, cut wounds on the left thigh measuring 20x6cm, fractures alcerus and arch bones and severed blood vessels on both wrists and lower limbs. He concluded that the cause of death was severe blood loss due to sharp force trauma, following assault. He produced the post mortem report ( PExb No. 1.)
  13. He told the court that two people identified the body though he could not recall their names.
  14. PW7 was the investigating officer. He recalled that he interrogated the suspect and recorded statements. He was present when the post mortem was being conducted at kakamega Referral hospital. He visited the crime scene. He testified that the accused later presented himself for fear of being attacked by the members of the public.
  15. During cross examination, he stated that there was a lot of commotion on the scene when he arrived. He did not recover the weapon of attack. He told the court that the incident was reported by PW1. He avers that no other person was charged with the offence and that he did not record the accused statement or the statements of the other witnesses other than the prosecution witnesses since he was not able to trace them. He did not record the accused's confession since he was not qualified to do so.



16. At the close of the prosecution's case the Accused was placed on his defence.
17. DW1, testified on oath. He stated that on the material date he had attended a football match where he was playing for Tarino club. At about 6.20pm, it started raining and the crowd began to disperse. He told the court that he left the field with one Shikami, on his motorcycle, and headed to his father's house .After that he went to drink changaa ( a local brew). It was after he left the changaa den that he met the deceased on the road. The deceased was drunk, he says. The deceased requested him to take her to the home of one philiph. At the Mr. Philip's gate he asked her to hike a motor-bike, to get home , but she refused. They parted ways. He added however that he had seen a group of people ahead. He went home, only for him to later hear the deceased mother screaming and saying the accused had killed her daughter. He went and hid in the forest for fear of being attacked but his cousin later advised him to go to the police station as the situation was tense. The members of the public had also burnt down his house.
18. He told the court that he had no disagreement with the deceased; that there was no identification parade to identify him as the person who killed the deceased. He insisted that all the prosecution witnesses lied about him.
19. During cross examination, he stated that the deceased was one of his best friends, a fan and a relative. They were also drinking buddies He stated that he was with the deceased until 9p.m. He also told the court that he knew the deceased's sisters well (PW 4 and PW5) and he could not understand why they would lie against him. He could not also tell why the deceased would name him as the one who attacked him. He stated his brother, who is alleged to have been with him was not present that day.

### Determination

**a) The offence of murder is defined in section 203 of the penal code as follows: "any person who of malice a forethought causes death of another person by an unlawful act or omission is guilty of murder."**

20. For the prosecution to sustain a conviction, all the ingredients contained in section 203 of the penal code must be proved beyond reasonable doubt.
21. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the ingredients of the offence of murder were expounded as follows:
  - (a) the death of the deceased occurred;
  - (b) that the accused committed the unlawful act which caused the death of the deceased; and
  - (c) that the accused had malice aforethought.
22. On the death of the deceased, the pathologist ( PW6) concluded that the deceased died of severe blood loss due to sharp force trauma , following an assault. PW1 and PW2, told the court that they attended the postmortem and identified the deceased's body. Thus, the fact of the deceased's death, and its cause was proved.

### Did the accused caused the death of the deceased?

23. It was the evidence of PW1 that when he was called to where the deceased was, the deceased kept saying that the accused and his brother Isiaho had attacked her. He recalled that he noticed was cut on the hands, legs and thighs. This is description is consistent with the one given by the pathologist on the injuries sustained by the deceased.



24. PW3 in his testimony told the court that he was attacked by the accused and his brother but managed to escape. He later heard screams and saw the accused and his brother cutting the deceased. He stated that he could identify the accused, as there was moonlight.
25. The deceased's two sisters, pw4 and pw5 testified of being in the company of the deceased when they were attacked by the accused and one Isiaho. They managed to escape but the deceased was attacked. PW5 told the court that she knew the accused and Isiaho because they were neighbours and could identify them as there was moonlight and the time was about 7pm
26. The accused has argued that there was no identification parade held to identify him. However, the identification parade was not necessary in this case as the parties knew each other. It was also the accused's evidence that he knew the deceased's sisters well. The accused also told the court that he could see a group of people approaching. If that be the case, then it follows that there was not only enough illumination for him to be able to tell that there were people approaching but also for PW3, PW4 and PW5 to see and identify him.
27. The totality of the pw4, pw5 and pw3 make me conclude that the accused was positively identified as the person who attacked the deceased .
28. I have considered the accused's defence. He admits that he was with the deceased's that night; that the deceased refused to board a motorbike and at that instance they parted ways. He however added that he had seen a group of people ahead. I take it that this last piece of evidence was meant to suggest that the deceased could have fallen victim to this unidentified group of people. However the accused told the court that the deceased was a friend , a relative and his drinking buddy. If the two had such close relationship, it beats reason why he would leave her to go alone , on foot, at about 9pm and having noted that there were some group of people ahead. The accused also testified that the deceased was drunk, but the autopsy examination did not find any alcoholic content in her body.
29. Am satisfied that the deceased was positively identified as the person who attacked the deceased causing her fatal injuries
30. Further , pw1, pw2 pw4 and pw5 told the court that the deceased told them that it was the Accused and one Isiaho who attacked her. The deceased did not die immediately. she was moved from kakamega county hospital to Mukumu, and according to the 4 witnesses the deceased kept on repeating that the accused and Isaiho are the ones who had attacked her.
31. The deceased statement is what the law of Evidence calls a dying declaration. It is an exception to the rule against the admissibility of hearsay evidence. Section 33 (a) of the [Evidence Act](#) states as follows: statements, written or oral, of admissible facts made by a person who is dead are themselves admissible in the following cases:
  - a). when the statement is made by a person as to the cause of 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 the nature of the proceedings in which the cause of his death come into .
32. The principles governing dying declaration were set out by the court of Appeal in the case of [Philip Nzaka Watu vs Republic](#)(2016)E KLR where the court held : Under section 33 of the [Evidence Act](#) , a dying declaration 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 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.

Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that the 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 a trial court must proceed with caution and to get the necessary assurance that a conviction founded on a dying declaration is indeed safe. This court expressed itself as follows in *Choge vs Republic* “ 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 the point of death and the mind is induced by the most powerful consideration to tell the truth. . In Kenya however, the admissibility of a 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 reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person”

33. Thus Philips’s case ( supra) provides elaborate guidelines on what the court should consider before basing a conviction on a dying declaration. It calls for caution inter alia especially where there is no corroboration.
34. In the present case, PW1, PW2, PW4 and PW5 arrived in the scene shortly after the attack. They all told the court that the deceased told them that she had been attacked by Akhonya( Accused ) and Isiaho. She repeated this while in hospital.
35. This repeated declarations was corroborated by the testimony of PW3 . He told the court as he made his escape from the attack he saw the deceased and one Isiaho attacking the deceased. Further PW4 and PW5 were also with the deceased when attack started, they managed to run away and informed their father( PW1), and they all came back to the scene. PW5 told the court that he identified the Accused and Isiaho, as there was moonlight and knew them as neighbours.
36. Consequently based on the dying declaration of the deceased and the testimonies of PW3, PW4 and PW5 Am satisfied that the prosecution has succeeded in proving that the Accused herein was one of those who attacked the deceased.
37. The next element for consideration is malice aforethought. Section 206 of the *Penal Code* defines malice aforethought as “the intentional killing of the deceased or to do grievous harm to any person whether that person is the person actually killed or not or knowledge that the act or omission will result into the death of a human being.” .
38. The section gives the instances when malice aforethought shall be deemed to have been established. It provides as follows:-

“ 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.”

39. In the case of *Hyam v DPP* {1974} A.C. the Court held interalia that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.” ( Emphasis added)

40. Further clarity was provided by the court of Appeal in the case of *Daniel Muthee v Republic* Criminal Appeal No. 218 of 2005 (UR) where the court held:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”( Emphasis added)

41. According to the pathologists the deceased sustained injuries as follows: that there were two deep cut wounds on the left hand, and extending all the way to the elbow measuring 20x4cm., cut wound on the right forearm measuring 6x1 cm, cut wounds on the left thigh measuring 20x6cm, fractures alcerus and arch bones and severed blood vessels on both wrists and lower limbs. He concluded that the cause of death was severe blood loss due to sharp force trauma, following assault.

42. This was indeed a vicious attack on the deceased. The Accused must have known that the injuries were going to cause grievous harm or cause fatal injuries to the deceased.

43. In conclusion, the prosecution has proved all the elements of murder beyond reasonable doubt. I hereby find the accused guilty of murder pursuant to section 203 as read way section 204 of the *penal code* and I convict him accordingly.

**DATED SIGNED AND DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 18<sup>TH</sup> DAY OF APRIL 2024.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Godwin- Court Assistant

Accused- present



No appearance by the DPP

