



**Republic v Nkunja & 2 others (Criminal Case 60 of 2015)
[2024] KEHC 9549 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 60 OF 2015
EM MURIITHI, J
JULY 18, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH KIMATHI KAMURU 1ST ACCUSED

STANLEY MUGAMBI NKUNJA 2ND ACCUSED

EZEKIEL NTONGAI RWATA 3RD ACCUSED

JUDGMENT

1. The accused were charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code* with the particulars that “on the night of 9th August 2015 at Kithetu Village, Naathu Location in Igembe North Sub-County within Meru County jointly with others not before the Court murdered Julius Muroki.”
2. The trial concluded on 4/11/2021 and the matter was placed for typing of proceedings to facilitate filing of final submissions by the Prosecution and Counsel for the Accused. When typing was completed, Counsel for the DPP filed submissions dated 25/5/2022. The Counsel instructed for all the 3 accused sought several adjournments to take instructions for the accused to file submissions. During this period the 3rd accused failed to attend Court and a warrant of arrest was issued on 13/12/2022, and the accused is still at large. The matter was severally mentioned awaiting arrest of the 3rd accused.
3. On 25/1/2024, Counsel for the Accused informed the court that the accused persons had declined to give him instructions to enable him proceed to file submissions. In the interest of justice on the request of the accused who had been in custody all the while having been unable to raise bond, the Court discharged the said Counsel who had been instructed in the matter by the accused and directed the Deputy Registrar to appoint new Counsel for the 3 accused persons so that the matter could be



progressed to closing. Counsel for the 2nd accused filed submissions while counsel for the 1st and 3rd accused indicated that they would not file submissions in the matter.

The Evidence

4. The evidence in the case was given by 5 prosecution witnesses and 5 defence witnesses, the Prosecution principally relying on a dying declaration and identification evidence of PW2 and PW3, and the defence raising alibi defences, as follows.

5. PW1 Julius Kainga testified as follows:

“I recall on 9/8/2015 at about 10pm. I was at Kithetu Market. I was from watching a football match. When going home, on the road to Mutwati I found Julius Muloki. He was lying beside the road. He had been beaten and left there.

When I was passing on the road, I heard a branch shaking beside the road. I flashed my torch to that direction. I was about 5 metres to where the branch was shaking. On flashing my torch, I saw Muloki lying beside the road. He was shaking on the ground. He was throwing his legs because he was in pain. He was trying to stand but he could not. I went to his home and found his mother and father, Tabitha Kariene and M’Thirari M’ Mbogori respectively his home was about 300 mtrs from the scene. I returned with the mother to the scene. We carried him home. I checked him and he had no visible injuries. There were no signs of any blood in his body. The whole body was full of dust everywhere. When we reached home, the mother washed him with warm water. I went and look for a vehicle to take him to hospital. I went to Mwirigi’s home whom I did not find. As a result, we slept up to the following morning. At about 8:00 am was taken to hospital. On the same day at 6pm, he passed on.

I did not find anyone at the scene. The torch enabled me to see well the scene.

6. On cross-examination by Mr. Gitonga, he said:

“I never saw any injuries no the deceased’s body. I know his wife as Rachel Kanyiri. I did not see her that night. I know the deceased well. She had quarreled him and had gone to her home. The distance between where the deceased was lying is nearer to his fathers home then from the scene to Rachel Kanyiri’s home. I know the accused. They are from my area. They were Miraa harvesters. I do not know of any grudge between the deceased and the accused.

I know that the 3rd accused had been employed by the deceased on his boda boda. I did not know if the deceased had another wife other than Rachel Kanyiri. I left the deceased to go and call his parents because he was heavy and I could not carry him.

There were homesteads around the scene. If anyone screamed from the scene, no one could hear as it was far from the surrounding homesteads”.

7. On re-examination he confirmed that he had been alone when he met the deceased on his way home.

8. PW2 Patrick Kaburu testified that:

“[O]n 9/8/2015 at about 10pm. I was in my home sleeping. I received a call from Mwirigi Gituta a neighbor who informed me that I was being called by my mother. That my brother had been injured badly. I should go and take him to hospital.

I rushed to my mother’s house. I found my brother lying on the floor complaining of stomach pains. I spoke to him and he told me that he had quarreled with Ezekiel Ntongai,



Joseph Komu and Stanley Mugambi (I have forgotten his name) He is the 1st accused, points at 1st Accused, the other are 2nd and 3rd accused, respectively.

I knew them before the incident since their childhood.

The deceased told me that they were quarrelling on the radio of the motor cycle belonging to him. It was KMDN 620L. The 3rd accused had gone with the Motor Cycle for 3 days and returned it without its radio. The 3rd accused was the deceased's rider for his motor cycle. He told me that 3rd accused told him that he had gone to bring the radio to him at Kithetu. The deceased waited for 3rd accused upto 10 pm. When going home as the 3rd accused had not come to Kithetu, he found Ntongai, Joseph Komu and Stanley Mugambi on the way. They then beat him up.

It is then I left the deceased with my mother to go and look for a vehicle. I did not find the vehicle we slept over.

The following day, we took him to Maua General Hospital but did not have the scan to identify an internal injuries. We transferred him to Meru Level 5.

After scanning, he was told that there was some internal injury. He was to undergo a surgery. I went home and left him undergo a surgery. I went home and left him undergoing medication. When I returned the following morning, I found that he had passed on.”

9. On cross-examination, he said -

The deceased was living in the same homestead with my father. He was married to Rachel Kanyiri. They had separated as at the date of the incident. The deceased was living with their children. Rachel was living at her home. I received a call at about 11:00pm. The person who called me informed me that my brother had been beaten unconscious. That I should go to my parents to take him to hospital.

I walked home which took me 30 minutes. I did not consult any of my neighbours to accompany me to any mother's home. The distance is 500 metres. I found my mother, father, Martin Mutura, and Mwirigi Gituta, who had called me.

Mwirigi Gituta had a vehicle at the time. A Probox KBT It was not at home at the time. We used it the following morning. It had taken someone to hospital on that date, Gituta did not tell me the person it had taken to hospital.

The deceased did not have blood on his body.

When the deceased talked to me, my mother my father, Gituta Mwirigi and Martini Mutura were there. They heard him talk to me. They never recorded any statements.

Gituta called me from his home. When I arrived home. I found him at my mother's home.

[Statement read to him]

It was recorded on 20/8/2015. I signed it. I stated that I found the deceased lying in the kitchen. I asked him what had happened. He told me that he was accosted by a group of persons namely Stanley Mugambi Nkunja and Joseph Koomu Kamuru who seriously beat him until he fell unconscious.

That is what I to the police. I also stated that I left him under the care of my mother and proceeded home. I told the police that they beat him because of the motor cycle but they did not indicate it in my statement.



I went back to Kamukunji to look for a vehicle which I did not find.

I mentioned Ezekiel Ntongai to the police but it seems that they did not include it. I signed this statement.

On that night, I did not meet Rachel Kanyiri. Between Rachel Kanyiri and our home. Our home is nearer to the scene than Rachel Kanyiri's.

When I arrived, my mother told me that the deceased had been brought by Julius Kainga. That he had fetched him on the road. That when he was brought, the deceased could talk. Gituta had informed me that the deceased was unconscious.

I did not see any injury on the deceased only that the stomach was bloated.

I know the accused.

I have never heard any grudge between accused 1 and deceased. I have never heard of any grudge between accused 2 and deceased.

I do not know if the deceased had reported the theft of his radio to the police. I went to the Motor Cycle and found that it did not surrender the vehicle to the police.

Rachel Kanyiri was living at her home during the time the husband was killed.

10. On re-examination, he said:

“When I arrived home, I found the deceased conscious. I spoke to him.

He informed me that Ezekiel Ntongai, Joseph Koomu and Stanley Mugambi had beaten him.

He told me that they beat him because he had demanded the radio to his motor cycle from Ezekiel Ntongai.

I do not know if my mother had administered any first aid on the deceased before I arrived.

Rachel Kanyiri was a wife of the deceased. I do not know if they had differences”.

11. PW 3 Rachel Kanyiri testified that –

“I recall 9/8/2015 at about 10pm. I was from Kithetu market headed home. I met Stanley Mugambi, (1st) Joseph Koome (2) and Ntongai (3) with others who are not here. Those not here are Kimathi, I cannot recall the name of the other. The five had pinned someone to the ground. They were about six. They were beating someone who was on the ground. I switched off my torch and started to go back to where I was coming from. I run back and sought a different route home. I did not identify then who was being beaten. The following day I discovered that it was Julius Muroki. I run away to my house. The following day I heard that he had been taken to hospital. I first told the police when I went there. I did not tell anyone.

The accused are our neighbours. I know them. The deceased was my husband but we had separated for 7 months at the time.

I did not know why they killed him. They were using sticks (fimbos). I never had any grudge with the accused.



The first is Stanley Nkunja second is Joseph Koome. The 3rd is Ntongai (points at the 3 accuseds)”.

12. On cross examination by Mr. Gitonga, he said:

“I made my statement to the police. I told them what I have told the court. I did not tell the police the deceased was my husband. I said he was a neighbor as I was at our home and he was in his parents’ home.

I did not tell the police. We had 4 children together as no one asked me.

I was selling food at the market I cannot tell the shop belonged to who. I was selling vegetables and onions. I was with Kendi and Nkatha. I did not name them. I was not carrying anything on that day.

After we separated with the deceased, I went to live with my sister in Nairobi. I came back after a month.

The council does not charge us any tax at that market.

When I arrived at the scene, I stopped at about 25 metres away. (By approximation from the court house). I flashed my torch at the people who were in front of me. I saw five people.

I saw the 1st accused. I did not identify the clothing he had. The other two are at large”.

[Statement read to witness.]

I told the police I saw 4 people. It is the following day 10th that I came to know who was being beaten.

I met the son of the deceased the following day who told me that his father had been injured and was in hospital. It is his brother PW1 who went to see him in hospital. I met the brother on 12th. I did not talk to anyone about the incident.

The incident occurred near some homesteads. I did not seek any assistance that night as I did not know who was being beaten.

There was a case at Maua (criminal) where my sister had assaulted the deceased. There was a serious disagreement between our family and the deceased.

It is my son, a son to the deceased, who came to tell me the following day that his father had been injured.

On the morning of 10th, I discovered who had been injured.

The deceased was a friend to the 1st accused. I do not know if the two had a miraa business together.

I don’t know how the 2nd accused related with the deceased. I had heard no differences between the 2nd and 3rd accused with the deceased.

The mother of the deceased called for me after the deceased died.

Cannot tell where any of the accused hit the deceased. They saw me. I can tell because I saw them. They had torches. They did not chase me.



I did not see any other person at the scene. I did not see Kainga (PW1). I found the deceased on a road to his home. The distance between our home and the deceased's home is a 20 minutes' walk.

13. On re-examination, she said-

“I used a torch to identify the accused. They were never bothered with me. They continued with their business. They were very annoyed. I say so because I saw them beat him.”

14. PW 4 Dr. Paul Wambugu, the examining doctor testified that:

“I recall having conducted the post mortem for the body of one Julius Muroki on 20/8/2015 at Meru Level 5 hospital at about 12 noon.

The body was well preserved and embalmed. It was of an African male of 31 years of good nutrition status of 167 cm height.

The abdomen was distended and there was Echinosis (superficial bleeding - discoloration of the skin) on the left sub-costal area (below the ribs).

Internally, the spleen was ruptured with intra-abdominal bleeding. The cause of death was concluded to be massive bleeding due to blunt trauma to the abdomen.

I issued death cert. No. 0023614. I signed and stamped the Report with the Hospital Stamp. I wish to produce it as an exhibit. Post mortem report dated 20/8/2015 produced as PExh 1.”

15. On cross-examination, he said:

There were no other injuries in the body. There were other injuries in the other parts of the body but they were inconsequential.

I did not indicate them because there is post mortem changes that occur during transportation and storage of the body. (post-mortem is after death).

There is a section that I am supposed to indicate the general appearance of the body.

I now state that I can't remember if I saw any other injuries on the body

My testimony is that it is only this one injury that I have indicated that caused the death of the deceased.”

16. PW5 NO 81513 CPL Alex Kesses one of the investigating officers in this case testified as follows:

“I recall on 11/8/2015, I was at the station when at about 16.32 hrs that a report was made at the station by one Patrick Kaburuga.

He alleged that on 9/8/2015 at about 22.00 hrs. His brother Julius Muroki, the deceased had been seriously assaulted whereby on 10/8/2015 he took him to Meru Level 5. That he later succumbed to the injuries he had suffered on 9/8/2015.

The reportee alleged that the deceased had informed him that he had been assaulted by amongst others, Stanley Mugambi Nkunjia and Joseph Koomu Kamuru.

We then commenced investigations with IP Bashir. We visited the scene where the deceased was said to have been assaulted.



On arrival at the scene, the reportee pointed us the point where the deceased was found writhing with pain. The scene had already been tampered with as the road was dusty and still under construction.

We looked for witnesses at the scene but we could not get them immediately. We later recorded statements when the witnesses showed up at the station.

From the witnesses, I established that the four accused are the one who committed the crime. It is then that I preferred the charges against the accused.

In the course of my investigation, I established that the cause of death was due to abdominal injury.

I established that the deceased was assaulted by the accused. The deceased had disagreed with the accused at the market. It is the accused in court who were implicated in the murder. I had not seen them before the incident.

No weapons were recovered.

It is not me who received the report. I did the investigations with Inspector Bashir. I recorded the witness statement of Rachel Kanini. The reportee did not witness the assault. He gave the names of two suspects. He only gave the name of the witness who reported the incident to the parents.

He never gave any name of a witness of the incident. The deceased was found at the scene by Julius Kaenga. He did not find any other person at the scene.

I recorded the witness of Rachel Kanyiri. She did not disclose that she was the wife of the deceased. She volunteered herself to come and give a statement. She was doing business.

She never disclosed that she had long separated with the deceased. She never disclosed that there had been a case in Maua involving her sister who had assaulted the deceased.

I did not establish if there was any bad blood between the parents of the wife and the deceased.

When I visited the scene, I was shown the home of Kanyiri it is visible from the scene. I was shown the home of the parents of the deceased. It was beyond 300 metres from the scene.

I did not investigate who had disagreed with the deceased. It was not disclosed the type of disagreement. I got information from volunteers and not the witness. None of the witnesses stated about the disagreement.

I did not establish existence of any relationship between the deceased and the accused. I never established that Kanyiri moved to Nairobi to stay with her sister after disagreeing with the deceased.”

17. On re-examination, the Investigating Officer said:

“The volunteers who disclosed the disagreement between the deceased and the accused refused to record their statements with the police. I did not find anything to link Rachel Kanyiri’s sister with the murder. During the statement recording I asked Rachel Kanyiri if she had any relationship with the deceased. She told me that she was just a village mate and I believed her.”



Defences

18. The accused were placed on their defence. The three Accused persons raised alibi defences, with the 1st and 3rd accused calling witnesses as follows.

19. DW1 Stanley Mugambi, the 1st Accused said -

On 9/6/2015, I was from my shamba at Ziliwa. I went to the shamba at Ziliwa. In the morning at 8:00 am. I came back at 7:00 pm on the evening. I was with Flora Kanyua. Flora Kanyua is my wife. I come with her from his shamba. We had gone to the shamba. From 7:00 pm to 10:00am I was at home. It is a distance from my home to the place where the incident said to have occurred. It is about 2 km away. It is just a frame-up. I was arrested about 3 days by the Chief Kithia. He told me that I would be told the reason of arrest later.

My house is at my fathers' shamba. I live with my wife Flora Kinyua. PW 3 Rachel is the wife of the deceased.... Rachel Kanyiri mentioned me. I did not know the reason [as] I never had a fight to disagreement with the deceased.”

20. On cross-examination by DPP, he said:

“I knew the deceased ... for about 15 years since I was small child.

I knew Rachel Kanyiri. She was a wife to deceased. Kanyiri was schooling with me at school. I knew her for 15 years. We were together in Primary School. On 9/8/2015 I went back home at 7:00 pm with Flora. Between 7:00pm and 11:00am I just ate and slept”.

21. DW2 Flora Kanyua testified to confirm Accused 1's story as follows:

“Stanley Mugambi is my husband. In August 2015, we were still husband and wife. Our home is at Kithetu. I knew the deceased. He is Muroki. I did not know his place. On 9/8/2015, I was with Stanley. We went to his shamba in the morning. In the evening he was not able to go out. We ate and slept. The accused cannot have been involved in the killing as we were with his him throughout the night”.

22. On cross examination, she said:

“In August 2015, I worked at the hotel. The hotel is mene. It is called Kithetu hotel. I am the one who makes the food. I make beans, ugali and rice. I work at the hotel every day.

On 9/8/2015, it was on a Friday. I do not work at the hotel on Saturdays and Friday. I went to the shamba. The shamba is at Lavanda. We had gone to gather stones on the shamba to prepare for planting. The shamba belongs to his father.

Apart from the two of us there was no one else at the shamba.

We came back to the house at 6:00pm in the evening from the shamba. There are two house near where our house with my husband is, the house is at the fathers' there is only one house belongs to his mother.

His brothers have established houses on the shamba.

We slept at 9:00pm. He had been tired and after I made food he ate and slept. We slept on the same bed. He did not leave the bed. I would have known if he had left”.



23. DW 3 Accused 2 Joseph Kimathi Kamuru testified as follows:

“I am charged with my co-accused for killing, Muroki. On 9/8/2015, It is not true that we killed Muroki. I used to see him at Kithetu market. He used to operate a boda boda cycle. I am not related to Muroki in any way. I knew Muroki’s home. It is from a neighboring village. It takes 40 minutes to walk from our home to Muroki’s home. It is a public road. On 9/8/2015 at 10:00 pm, I was at home. I came home at 8:00 pm. I was drunk so I just slept. I was with my wife. I am not able to call her as she got married when I was arrested. I stayed in the house until the following day. I know accused 2 he was my classmate in primary and their shamba is adjacent to ours. We did not do any business together. I never met him on that day.

I knew accused 2 as a boda boda operator. We did not do any business with him. We never had any meeting in September 2015 with the accused.

I knew Rachel Kanyiri as wife of Muroki. I saw her that August. She had gone to be employed in town. I did not see her on the date Muroki was killed. It is not true that she could have seen me that night as I was at home”.

24. On cross examination by Ms. Nandwa , he said:

I got home at 8:30pm on 9/8/2015, I came home drunk.... It is not true that we were together on 9/8/2015. I do not have anyone to show that I was at home on the night of 9/8/2015. I knew Rachel Kanyiri she was also our classmate. I knew her and the deceased well. I knew the deceased as a boda bod operator.

25. DW4 Accused 3 Ezekiel Ntongai testified that:

I know Stanley Mugambi I have got to know the 2nd accused in prison when I was arrested, I did not find him at the police station. I knew his father Kamundi. I never have any business relations with my co-accused. I knew the deceased. I knew him in 2014. I had come from shamba with my brother, their house is a mud house. I got him when he was being cut by his wife Rachel Kanyiri and his brothers. This was in 2014. I was not involved. We were coming from Maua with my brother. I was sent to call for help to get Muroki to hospital. Stanley came with a car and my brother recorded a statement my brother is Julius Meme.

Rachel Kanyiri had been accused in that case. Our house from Rachael’s house is near. Muroki’s house is about 800 metres from our shamba and 2 km from our house. When Muroki was killed we were not in any business with Muroki. Evidence of Patrick Kaburu PW 2. It is not true that Muroki had employed me as cycle rider. It is not true that I had taken a radio from his motor bike. It is not true that I had relations with Muroki. I had not taken any motor bike from Muroki. I never had any dispute with Muroki.

On 9/8/2015 at 10:00pm. I was never with any Co-accused. I never saw them that day. I got to meet Stanley and Joseph at prison. I knew Stanley before the incident.

On 9/8/2015 at 10:00pm I was at home. I was not married. I used to live with my father’s brother. I slept in the room where his children slept. The house had several rooms. I used to sleep in the same room with one young child The owner of the house is Gedion Mithega. I had come into the home in the evening. His wife Flora was present, the child and the husband. We came together with the husband. I never left the home from 7:00 pm. I ate and later slept. There is the main door. It is the owner of the house who had key to the main door. I never left the house.



I got to know that Muroki had been killed. Gedion Muthiga came in the morning. He asked me to help the people remove Miraa leaves. He shortly said that he had been told that Muroki had been killed.

I was arrested from the house by police from Kamwathiria Mutuati Police Station. They said I was a suspect in the killing of Muroki. I told them where I had been.

Rachel Kanyiri PW 3. I got to know her during the 2014 incident. The case of cutting Muroki had not been completed she had ran away to Nairobi. It is not true that she saw me, as I was not there. I was asleep.

I think it is because I was said to go and call for help from Kamathia to help the deceased when they were cutting the deceased in 2014. Julius Meme was an accused in that case. I deny the charge”.

26. On cross examination by Ms. Nandwa for DPP, he said:

“I recall the evidence PW1 Julius said the deceased had employed me as a rider from his boda boda. It is not true.

In 2015, I was working a Miraa broker in buying and selling Miraa. I operated from Kithentu market. I have people who can state that I was operating miraa business. Even now I am in selling miraa.

On 9/8/2015, I was at home. I was in my father’s house Gideon. On the night I was with 2 children in the room where I slept. In the whole house there five people, my father, his wife and his 2 children. I Slept with one of the children. I had the children in the same room.

It is my uncle who locked the house. The main door was locked by a padlock. There was another in the kitchen. There are 2 doors The table door was locked by the wife. It was also locked by padlock. Gideon can testify that I was in the house. The children were small. My uncle could know that I was in house as it’s him who used to lock the door”.

27. DW5 Gideon Mithega M’Amanga testified for the 3rd accused and said:

“I know the 3rd accused. His father and I are brothers. I am his uncle. In 2015 his mother and father were not alive. He was living with me. He used to live with us. He slept in a house in separate room where my child slept.

[Witness is anticipating question whether accused left the night of killing]

He slept in a room where if you went in there could be on coming out. My son with whom he slept was Kimathi aged 14 years.

I knew Muroki. I knew Muroki’s home. It is about 2 km. In the morning, I heard people talking and saying Muroki had been killed.

[Killing at 9/8/2015 at 10:00pm]

I know the 3rd accused was in my house and we ate supper and we went to sleep at 8:00pm. Its my wife and I who has the key. If one left from the children room I would hear if he left by the Kitchen door I would also hear.

He never left that night.

Was the 3rd accused employed as boda boda ?



He never used to ride the deceased's boda boda. He worked as a Miraa dealer/picker.”

28. On cross-examination, the witness said:

“Ezekiel worked in 2015 as a picker of miraa. He did sell Miraa. People would come from even other villages and they would call for casual workers to pick miraa. Picking miraa would not be available all the time. When there was no miraa picking. We could get other work. I would not know if we got other casual labour including boda boda.

He came at 7:00pm. I was with him coming from playing soccer. I played from united against Kigito.

He ate and went to sleep. He slept in a room with one of my child, Kimathi. There is another child who slept in another room.... I could tell if someone went out. It is my wife or I who could lock the door. It has a padlock. There is only one door to the outside. There is another door into the rooms, but there was 2nd other door to the outside of the house. There is no way one could get out without me hearing.”

Submissions

29. The Counsel for the DPP, Ms. Nandwa, filed submissions urging that the Prosecution proved its case against the three accused persons for the offence of murder. She relied on [Antony Ndegwa Ngari v R](#) [2014] eKLR on the ingredients of the offence of murder c/s 203 of the [Penal Code](#) and urged that all the elements of the offence had been proved. As regards the second element that the “accused committed the unlawful act which caused the death of the deceased”, counsel urged that there was evidence of corroboration of the dying declaration as follows:

“The second element was also proven by the Prosecution. PW3 Rachel Kanyiri the eyewitness did state that she saw the three accused persons hitting the deceased with wooden hoes. This evidence is corroborated by that of PW2 who states that when he went to see the deceased at their mother's home he spoke to him and the deceased was able to reveal the persons who attacked him that is he mentioned the 1st and 2nd accused persons. Therefore, the deceased did make a dying declaration to PW2 which evidence is corroborated by that of PW3 Rachel Kanyiri.

....

It is quite that the prosecution did in fact prove the second element. The evidence of PW3 is corroborated by that of PW2 with regard to the unlawful act by the three accused persons. In addition, PW2 did testify that upon looking at the deceased he noted that the deceased's stomach was swollen as well as the head. The evidence of the doctor was also consistent with the type of injuries which the deceased sustained and which PW2 observed on the deceased body.”

30. She relied on the principles of dying declaration as set out in section 33(a) of the [Evidence Act](#) and two decisions of [Philip Nzaka Watu v R](#) [2016] eKLR and [Moses Wanjala Ngaira v R](#) [2019] eKLR. In [Moses Wanjala Ngaira](#), supra, the Court of Appeal found the dying declaration to be sufficiently corroborated as follows:

“(27) In this case, the appellant was found on a foot path with serious injuries shortly before he died. Five witnesses, that is, Rose, Waswa, Josphat, Roselyn and Beatrice all testified that they each talked to the deceased before he



died, inquiring who had assaulted him, and that the deceased responded to each that it was a person whom he identified as “Musungu”. All the witnesses maintained that “Musungu” was an alias name for the appellant. Both the appellant and the deceased were well known to all the witnesses. More specifically Rose appeared to have had a special relationship with the appellant, which was admitted by the appellant as the appellant had gone to her place to do manual work. According to Rose, she was from the same village with the appellant and they were also neighbours. Therefore, they were likely to be familiar with the appellant’s alias name. Moreover, the deceased also identified his assailant to Rose by name using the appellant’s full name Moses Wanjala Ngaira and also the alias “Musungu”. Therefore, it was clear that the deceased was referring to the appellant as the person who had assaulted him. The dying declaration having been consistently repeated to several witnesses, and it being clear that the appellant was identified as the person who assaulted the deceased, and the appellant on his own free will having informed Rose that he had assaulted the deceased, the dying declaration was sufficiently corroborated and was safe to rely upon.”

31. The DPP urged that there was common intention within the meaning of section 21 of the *Penal Code* for their action in assaulting the deceased, which they knew will probably cause the death of the deceased in terms of the definition of malice aforethought under section 206 (b) of the *Penal Code*. Counsel relied on the Court of Appeal decision in *Stephen Ariga & Another v R* {2018} eKLR citing *Eunice Musenya Ndui v R* Criminal Appeal NO. 534 of 2010 [2011] eKLR, where the ingredients of common intention were urged as follows:

“The ingredients of common intention were enunciated in *Eunice Musenya Ndui versus Republic*, Criminal Appeal No. 534 of 2010 (2011) eKLR as follows:-

- (1) There must be two or more persons;
- (2) The persons must form a common intention;
- (3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
- (4) An offence must be committed in the process;
- (5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.”

32. While accepting that the accused’s alibi defence did not place any burden on them to prove their innocence, Counsel for the DPP relied on *Eric Otieno Meda v. R* [2019] eKLR where the Court of Appeal held as regards alibi evidence that:

“23. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:

- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
- (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.



- (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
 - (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mblungu v S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014).”
33. For the accused, only the Counsel for the 2nd Accused, Ms. Njoki Thuo filed submissions. Counsel for the 1st Accused Mr. Sandi indicated that he would not be filing submissions. Counsel for the 3rd Accused, Mr. Ng’entu also indicated that he would not be filing submissions.
34. For the 2nd Accused it was urged that the prosecution had failed to prove the charges against the accused. Citing *R. v. Turnbull & others* [1973] 3 ALL ER 549, *Kiarie v R* (1984) KLR 739, *Wamunga v. R* (1989) KLR 426 and *Nzaro v. R* 1991) KAR 212 urged that the visual identification of the accused persons by the PW3, made in difficult night time circumstances was not corroborated as required under section 124 of the *Evidence Act* .
35. As regards circumstantial evidence adduced by the prosecution, it was urged relying on *R. v. Kipkering arap Koskei* (1949) 16 EACA 135 and *Erick Odhiambo Okumu v. R* [2015] eKLR that the prosecution had not adduced sufficient cogent evidence on the alleged dispute over the motor cycle radio that would support the presumption of guilt based on circumstantial evidence, and malice aforethought had not been established on the part of the 2nd accused. In the end, counsel blamed the prosecution for inadequate investigation into how the deceased had been killed and any involvement of the accused, conceding that the death and cause of death had been established.

Issues For Determination

36. The court has to consider on the evidence and submissions by the Counsel for the DPP and the defence whether the prosecution had proved the charge of murder against the 3 accused persons. In so doing, the court will consider whether the evidence adduced establishes the ingredients of the offence of murder against the principles on law regarding conviction upon dying declaration and circumstantial evidence. Issues of principles that apply to identification and alibi defence also arise from the defence evidence.

Determination

Ingredient of the offence of murder

37. The formulation by Etyang, J. in *R. v. Nyambura & 4 Others* (2001) KLR 355, and approved by the Court of Appeal in *Antony Ndegwa Ngari v. R* [2014] eKLR as to the ingredients of the offence of murder is as follows:

“There are three ingredients of murder which the prosecution must prove beyond reasonable doubt so as to earn a conviction, namely:

- a. The death of the deceased, and cause of death
- b. That the accused committed the unlawful act which cause the deceased’s death; and
- c. That the accused had malice aforethought.



The issue for determination in this case is whether these three ingredients of murder have been proved by the prosecution beyond reasonable doubt.”

38. It was conceded by Counsel for the defence (2nd Accused) that the Prosecution had proved the death of the deceased by the evidence of PW1, PW2, PW3 and the cause of death by PW4 as internal bleeding as a result of trauma to the abdomen.
39. It is convenient to consider the prosecution’s case against each of the accused persons together as the claim by PW2 was that their involvement is alleged to have been by dying declaration implicating all the three and by identification by an eye-witness (PW3) who claimed to have seen all three together with one or two others beating a person who she later learnt was the deceased in this case.

Dying declaration

40. In *Aluta v. R* (1985) KLR 543, 547 the Court of Appeal discussed the general principle of the law on dying declaration as follows:

“In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial judge to put forward a theory not canvassed in evidence of in Counsels’ speeches. A trial judge should approach the evidence of the dying declaration with necessary circumspection. It is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. *Okale and Others v. Republic* [1965] EA 555.”

41. The Court of Appeal in *Kihara v. R* (1986) KLR 473, 476-7 similarly held as follows:

“Though there is no rule that dying declaration must be corroborated, court needs to caution itself that in order to obtain conviction on dying declaration, it must be satisfactorily corroborated, *R v. Said Abdulla* (1945) 12 EACA 67, *R v. Mgundulwa s/o Jalu and Others* (1946) 13EACA 1167 at 171. Particular caution must be exercised as to when and where the attack took place and also about the identification of the assailant and the weapon used. It may be that the dying person could not remember all that and may not be telling the truth. In *Ramazani bin Mirandu* (1934) 1 EACA 107 it was stated:

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

See also *Choge v. R* (1985) KLR 1.

42. Commenting on need for caution on dealing with dying declarations in circumstances similar to this case in *Pius Jasango s/o Akumu v. R* (1954) 21 EACA 331, 332, which is cited in *Choge v. R*, supra, the Court of Appeal for Eastern Africa said:

“Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (*R v. Ramazan bin Mirandu* (supra); *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 90; *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 to 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).”

43. The principle of caution and corroboration of dying declaration is reiterated by Philip Nzaka Watu, *supra*, cited by counsel for the DPP. The decision cited *Kihara v R* and *Choge v. R*, *supra*, and in the complete relevant passages held as follows:

“Decisions of this Court abound on admission and reliance on a dying declaration. Suffice to mention only two, *Choge V. Republic* [1985] Klr1, *Kihara V. Republic* [1986] Klr 473 And *Nelson Julius Karanja Irungu V. Republic*, CR. APP. NO. 24 of 2008. 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.

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*):

“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.”

44. The court will cautiously seek corroboration of the alleged dying declaration in this case. The evidence does not disclose that the deceased had a torch to enable him see and identify his attackers or by what means he recognized the attackers so that he could later in a dying declaration disclose them to PW2.



45. The first responder PW1 who found the deceased by the road having been beaten does not state that the deceased could talk at all. Yet PW2 the brother of the deceased who was called after deceased had been carried home states that the deceased told him the details as to how he quarreled with the 3rd accused over a radio on his motor cycle which the 3rd accused was operating as the deceased's rider, leading to him being waylaid and beaten on his way home by the accused person.
46. PW2 on cross-examination mentioned only two people as the attackers, excepting the 3rd accused and he confirmed that the fact of beating by the accused because of the motor cycle radio was not recorded in the statement. The explanation that the witness PW2 stated to the police who neglected to include the important fact of the involvement of Ezekiel Ntongai is unlikely.
47. The evidence of dying declaration is also problematic in view of the inconsistencies as to the deceased's state of consciousness and ability to talk: PW1 said the accused did not talk, PW2 said the person who called him to go to attend to his brother said his brother was unconscious but PW2 said that when he got home, the deceased was able to speak to him and tell him, to great detail, the circumstances surrounding his disagreement with the 3rd accused and the ambush and beating by the three accused persons while on his way home.

Identification

48. The eye witness PW3 who could not identify her husband with whom she had 4 children who was being beaten, could clearly identify the attackers as the three accused persons together with another or two others by use of torch light which she flashed once and then switched off while running back from whence she came. It is incredible.
49. Moreover, the conditions at the difficult circumstances of night time of the incident was not conducive to positive identification over only a brief period when the witness shone her torch before switching it off and running away. No wonder the witness could not describe how the attackers were dressed.
50. PW3 said that the attackers were using "sticks (fimbos)" to beat her husband. While these sticks (fimbos or clubs) were not recovered, the medical evidence which indicated no visible physical injuries appears to belie the beating with clubs.
51. *R v. Turnbull* principle, or Turnbull Guidelines as sometimes called, has been adopted in Kenya in the leading cases of *Abdalla bin Wendo and Another v. R* (1953) 20 EACA 166, 168 requires corroboration before a conviction based on identification by a single witness as follows:

"Subject to certain well-known exceptions it is trite that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can be safely accepted as free from possibility of error."

See also *Roria v. R* (1967) EA 583.

52. The evidence of the single identifying witness PW3 required corroboration.



Corroboration

53. By the principle in *R. v. Turnbull*, supra, the court is required to warn itself of the danger of convicting on the evidence of identification by a single witness and to seek corroboration therefor. Similarly, a dying declaration evidence also requires corroboration as rationalized in *Kihara v R* (1986) KLR 473 and *Choge v. R* (1985) KLR 44-5.
54. The evidence of PW2 as to the dying declaration by the deceased cannot be corroborated by the alleged identification evidence of PW3 who claimed to have seen the accused persons beating someone who turned out to be the deceased, and vice versa. Both dying declarations and identification evidence of single witnesses require corroboration.
55. Evidence which itself requires corroboration cannot be corroboration of other evidence!

Circumstantial evidence?

56. As held in *Kariuki Karanja v. R* (1986) KLR 190, 193 citing *R. v. Kipkering arap Koskei*, supra, the foundational requirements for the application of circumstantial evidence to justify a conviction are as follows:

“Circumstantial evidence to sustain a conviction must point irresistibly to the accused. In order to justify, 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 hypothesis than that of guilt. The burden of proving facts which justify the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts: *Rex v. Kipkering Arap Koskei*, 16 EACA 135. An aggregation of separate facts inconclusive because they are as consistent with innocence as with guilt is not good enough evidence.”

57. There is no evidence of sufficient cogency of any facts that point to an irresistible inference that the accused committed the offence, which is inconsistent with the accused’s innocence and inexplicable on any other hypothesis other than that of their guilt.
58. It has not been established that by cogent proof, contrary to their alibis, that accused were at the scene of alleged beating the deceased and inflicting the fatal injury as alleged. No recoveries were made which may have supported the prosecution’s case by circumstantial evidence.

Inconsistencies

59. There were multiple inconsistencies and contradictions in the evidence. As to who brought the deceased home, PW1 stating that he went for the mother to help him bring the deceased home and PW2 the brother stating that he was told by the mother that the deceased had been brought in by PW1; whether the deceased was conscious and could talk, PW2 stating his mother had told him deceased could talk when he was brought home and Gituta who called PW2 to come and take his brother to hospital stating that he was unconscious and the witness PW2 claiming that the deceased had talked to him at length when he came home and found him conscious.
60. Incredulously as testified by PW1 and PW2 that the deceased had no blood on him and no visible external injuries yet he was beaten by three people according to the dying declaration to PW2 and eye witness testimony of PW3 that the deceased was beaten by four to six people who were armed with sticks.



61. All three witnesses PW1, PW2 and PW3 and the medical evidence of PW4 did not disclose any visible physical injuries on the body of the deceased, yet PW3 the identifying eye – witness and estranged wife of the deceased claimed to have seen 4-6 attackers, three of whom she identified as the accused, using clubs (“sticks or Fimbos”) to beat a man who was down and who she did not immediately identify to be her husband.
62. Contrary to the submission by the DPP, which might have been embellished from statements not produced in court, the observations of the PW2 on the deceased body were as follows:

“I did not see any injury on the deceased only that the stomach was bloated.”
63. Nothing about swollen head, and the absence of injuries from the fimbos used to hit the deceased as testified by the PW3 is curious. And, in any event, corroboration on the injuries go the cause of death, not identification of the accused persons as the attackers.

Defences

64. The accused did not assume any responsibility to prove their alibi defences. It was the Prosecution’s evidence to disprove the alibis. However implausible the alibi defences were given that the accused could well have gone out of their homes in the night unknown to the witnesses who purported to support their respective alibis, the Prosecution evidence did not disprove them. Weighed as a whole, the evidence before the court adduced by the Prosecution and the defence did not prove the charge against the accused persons.

Conclusion

65. The Prosecution’s case was based on two pieces of evidence of a dying declaration and identification by a single witness. Each piece of evidence required corroboration. No corroborative evidence was availed, and the two pieces of evidence, which require corroboration, could not on their own corroborate each other, unless the one corroborating is itself established by other independent supporting evidence. The Court finds that it is unsafe to convict the accused persons on the basis of the uncorroborated dying declaration and identification evidence of a single witness.
66. The investigation and prosecution of this case left much to be desired. The investigating Officer could not account for the failure to secure the evidence of the persons who informed him of the circumstances surrounding the alleged assault. In cross-examination by Mr. H. Gitonga, PW5 said significantly that:

“The volunteers who disclosed the disagreement between the deceased and the accused refused to record their statements with the police.”

Orders

67. Accordingly, for the reasons set out above, the Court finds pursuant to 322 of the Criminal Procedure Code that the Prosecution has not proved its case against the three accused persons for the charge of murder contrary to sections 203 as read with 204 of the Penal Code and they are each acquitted of the offence.
68. There shall, therefore, be an order for the immediate release of the two accused who are in custody, and for the discharge of the sureties and return of any security, which has not already been forfeited, deposited for their attendance in court.

Order accordingly.



DATED AND DELIVERED ON THIS 18TH DAY OF JULY 2024.

EDWARD M. MURIITHI

JUDGE

Apperances:

Ms. Nandwa Prosecution Counsel for the DPP.

Mr. H. Gitonga, Mr. Sandi, Ms. Thuo and Mr. Ng'entu for the Accused persons.

