



**Republic v Kwamboka & 3 others (Criminal Case E011 of 2022)  
[2024] KEHC 12764 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12764 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL CASE E011 OF 2022  
WA OKWANY, J  
OCTOBER 17, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SUSAN KWAMBOKA ..... 1<sup>ST</sup> ACCUSED**

**THOMAS NYAKONGO ..... 2<sup>ND</sup> ACCUSED**

**WYCLIFFE MOGAKA ..... 3<sup>RD</sup> ACCUSED**

**JOSPHAT OSIEMO ..... 4<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. The Accused persons herein Susan Kwamboka, Thomas Nyakongo, Wycliffe Mogaka and Josphat Osiemo were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the charge were that on the 18<sup>th</sup> day of May 2022 at Kerema village, Mokomoni Sub-location, Bosaragei location in Nyamira North Sub-County within Nyamira County murdered James Mitema Moturi (hereinafter referred to as the deceased.)
2. The accused persons pleaded not guilty to the charges and a trial was conducted in which the prosecution called a total of 6 witnesses.

**The Prosecution’s Case**

3. PW1, John Nyang’au Onyambu, the deceased’s younger brother and a neighbour to the Accused persons, testified that he on 20<sup>th</sup> May 2022 when he received a call from his village elder one George Nyang’au who informed him that his brother (the deceased) had been injured following an attack. PW1 then travelled back home and found that his brother had been taken to Nyamira Hospital. He stated



- that he visited the deceased at the hospital and noted that he had head and ear injuries. He explained that while he was alone with his said brother, he informed him that the 1<sup>st</sup> Accused had called him to her place where he was assaulted by Accused 1, 2 and 3.
4. PW1 testified that it was alleged that the deceased had an affair with Susan (the 1<sup>st</sup> Accused herein) and that one Linnet (PW2) and Miyogo had taken the deceased to hospital. PW1 stated that when the deceased learnt about his grandmother's demise, he went quiet and did not speak again even after they took him to hospital in Eldoret where he died after three days.
  5. PW2, Linnet Kwamboka Makosiri, the deceased's sister testified that she was at her home on 19<sup>th</sup> May 2022 when the deceased's son, one Brian (PW3) called her to go and see what had happened to the deceased. She went to the deceased's house where she found him with injuries on the head, chest and mouth. She stated that the deceased informed her that the 1<sup>st</sup> Accused had invited him to her house where he was beaten by Thomas Nyakango, Wycliffe Mogaka and Josphat Osiemo.
  6. PW2 testified that she instructed Brian to stay with the deceased and give him water after which she left and returned the following day when she found the deceased talking in low tones. She called her brother, Sospeter Miyogo (PW3), who assisted her to take the deceased to Hibo Hospital then to Nyamira Hospital and later to Eldoret Hospital where the deceased died after 3 days on the 24<sup>th</sup> May 2022.
  7. PW3, Sospeter Miyogo Muturi, the deceased younger brother identified the deceased's body during the Post-Mortem examination.
  8. PW4, No. 118301 PC Ali Adan Ibrahim, was the Investigating Officer. He also witnessed the post-mortem examination of the deceased body at Ibara Hospital Mortuary. He testified that he visited the home of the 1<sup>st</sup> Accused but did not find anyone. He recorded witness statements and arrested the 4 suspects on the basis that they were mentioned by the deceased as his assailants before his death.
  9. PW4 also testified that he recovered a pair of shoes allegedly belonging to the deceased from the 1<sup>st</sup> Accused person's house and discovered, from his investigations, that the deceased and Accused 2, 3 and 4 had an affair with the 1<sup>st</sup> Accused. PW4 stated that when they visited the house of the 1<sup>st</sup> Accused where they found that she lived with her 3 children but that she had fled from her home. He also stated that there were signs of struggle in the 1<sup>st</sup> Accused's house.
  10. PW5, Duncan Nyang'au, the deceased's nephew testified that he returned home from school on 19<sup>th</sup> May 2022 and found the deceased's door ajar. He went inside the deceased's house where he found the deceased lying on the bed with blood all over the house. He noted that the deceased had injuries on his head, was bleeding from the mouth and was not talking. He called his aunt Linnet (PW2) who came and took the deceased to the hospital. He also testified that shoes belonging to the deceased were found in the 1<sup>st</sup> Accused's house.
  11. PW6, Dr. Morebu Victor Momanyi, conducted the post-mortem examination on the deceased's body. He established that the cause of death was blunt force injury on the head. He produced the Post Mortem Report (P.Exh1).
  12. At the close of the Prosecution's case, this Court found that the Prosecution had established a prima facie case against the Accused persons who were consequently placed on their defence. They each elected to tender sworn testimonies and did not call any witnesses.

### **The Defence Case**

13. DW1, Susan Kwamboka, the 1<sup>st</sup> Accused, testified that she was at her home on 18<sup>th</sup> May 2022. She denied the allegation that she had an affair with the deceased and stated that she PW1 implicated her



in the murder case because she had refused to be his lover. She claimed that PW1 threatened her with dire consequences for refusing to be his lover. She stated that she knew her co-accused as they all lived in the same village but that the deceased hailed from a nearby village.

14. She denied the allegation that she invited anyone to her house to assault the deceased and stated that the charges against her were false.
15. The 2<sup>nd</sup> Accused, Thomas Nyakango Marita (DW2), testified that he knew the deceased as he used to see him in their area but that he had never worked with him. He stated that he knew the other accused persons as they all lived in the same village. He could not recall the events of 18<sup>th</sup> May 2022 but could only remember his arrest on the night of 1<sup>st</sup> June 2022. DW2 denied the allegation that he went to the house of the 1<sup>st</sup> Accused and stated that he did not know how the deceased died.
16. The 3<sup>rd</sup> Accused Wycliffe Mogaka Marita (DW3), testified that he knew the other accused persons as they all came from the same village. He stated that he could not recall the events of 18<sup>th</sup> May 2022 but could only remember that he was arrested on the night of 1<sup>st</sup> June 2022. He denied the allegation that he was called by the 1<sup>st</sup> Accused to go to her house and assault the deceased.
17. The 4<sup>th</sup> Accused, Josephat Osiemo (DW4) also denied any involvement in the deceased's murder and further denied the alleged interaction with the 1<sup>st</sup> Accused.
18. At the close of the trial, the parties filed and exchanged written submissions which I have considered.

### **Analysis and Determination**

19. Having considered the evidence presented both sides and their respective submissions, I find that the main issue for my determination is whether the charge of murder was proved against each of the accused persons to the required standard.
20. Section 203 of the Penal Code stipulates as follows:-

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
21. Halsbury's Laws of England, ‘Criminal Law’, (Volume 25 (2020) at paras 1–552 and Volume 26 (2020), paras 553–1014), at paragraph 129, states as follows: -

“To establish a case of murder, the prosecution must prove:

  - a. That the unlawful death of the victim was caused by an act or omission of the defendant.
  - b. That the defendant did that act or omitted to act with malice aforethought, express or implied.”
22. In *Johnson Njue Peter vs. Republic* (2015) eKLR, the Court of Appeal listed the three elements of the crime of murder as follows:-
  - i. The death of the deceased and the cause of that death.
  - ii. That the accused committed the unlawful act which caused the death of the deceased.
  - iii. That the accused had the malice aforethought.



23. In the case of Joseph Githua Njuguna vs. Republic [2016] eKLR the Court of Appeal outlined the ingredients of the offence of murder as follows:-

“...13 Under section 203 of the Penal Code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See Milton Kabulit & 4 others v Republic [2015] eKLR.” (Emphasis added).

#### **Death of the Deceased and the Cause**

24. In this case it was not contested that the deceased herein, James Mitema Moturi, died on 24<sup>th</sup> May 2022. It is also not disputed that the death was by a human hand or that the deceased was killed. All the witnesses stated that the deceased succumbed to his injuries while undergoing treatment at a hospital in Eldoret. PW6, Dr. Morebu, who conducted the Post-Mortem examination on the body of the deceased established that the cause of death was severe head injury due to blunt force trauma to the head. The Post-Mortem Report was produced as (P.Exh1). I find that the fact that the death of the deceased was by a human hand and that it was by an unlawful act was proved beyond reasonable doubt.
25. Killing a person is unlawful except in circumstances authorized by law. This is the position that was stated in the case of Gusambizi Wesonga vs. Republic [1948] 15 EACA 65 cited with approval in the case of Republic vs. Boniface Isawa Makiod [2016] eKLR it was held that:-

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self-defence of property.”

#### **Whether the accused was the perpetrator of the unlawful act that culminated in the death of the deceased**

26. Counsel for the accused submitted that none of the prosecution witnesses witnessed the alleged assault that led to the death of the deceased and that there is therefore no direct evidence linking the Accused persons to the crime. It is however trite that where there is no direct evidence, a court can rely on circumstantial evidence linking the accused to the offence. In the case of Ahamad Abolfathi Mohammed and Another vs. Republic [2018] e KLR, the court stated:-

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”



27. The above position was reiterated in the case of Republic vs. Jumaa Kaviha Kalama Ndolo [2020] eKLR where the court stated:-

“Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion. It works by cumulatively, in geometrical progression, against other possibilities and has been likened to a rope composed of several cords:

One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. There may be a combination of circumstances no one of which would raise a reasonable suspicion but the three taken together may create a strong conclusion of guilty with as much certainty as human affairs can require or admits of.”

28. In the instant case, the exculpatory facts presented by the prosecution are that before he died, the deceased, on separate occasions, made a dying declaration to PW1, and PW2 when he told them that the 1<sup>st</sup> Accused called Accused 2, 3 and 4 to her house where they assaulted him. The prosecution also alleged that shoes belonging to the deceased were found in the 1<sup>st</sup> Accused’s house which was also allegedly had signs of a struggle.

29. The test to be applied when considering circumstantial evidence is now settled. There are several court decisions on the issue of circumstantial evidence. In the case of Sawe vs. Republic [2003] eKLR the Court of Appeal stated:-

“In order to justify a conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

30. In the case of Abanga alias Onyango vs. Rep Cr. A No.32 Of 1990(Ur) the court observed:-

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

31. Applying the above test to this case my findings are as follows: On whether the deceased was at the 1<sup>st</sup> Accused’s house on the date that he was allegedly, I find that none of the witnesses stated that they knew the exact date or time that the deceased was assaulted or that they saw the deceased at the 1<sup>st</sup> Accused’s house on any date or at all. PW4, the Investigating Officer, alleged that he recovered a pair of shoes belonging to the deceased from the 1<sup>st</sup> Accused’s house and that there were signs of struggle in the said house.

32. It is however noteworthy that the deceased’s alleged shoes were neither positively identified as belonging to the deceased nor produced as exhibits at the trial. It is instructive to note that the investigating officer



did not present any photographs taken at the 1<sup>st</sup> Accused's house in order to prove his claim that there were signs of a struggle at the said house. I also note that even though it was alleged that the 1<sup>st</sup> Accused called her 3 co-accused persons to her house to beat up the deceased, none of the witnesses testified that they heard or saw the 1<sup>st</sup> Accused calling the co-accused. Furthermore the Accused's call logs were not presented before this court so as to confirm the alleged communication between the 1<sup>st</sup> Accused and her co-accused. The alleged murder weapon, to wit, the hammer, was also not produced as an exhibit to confirm the claim that the accused persons assaulted the deceased with a hammer.

33. My finding is that in the circumstances of this case, and owing to the glaring gaps in the prosecution's case, it cannot be said that there is any chain that can lead to a conclusive finding that the accused persons herein were involved in the murder of the deceased.

34. Turning to the dying declaration, it was alleged that the deceased informed PW1 and PW2 that he was assaulted by the 2nd, 3rd and 4th Accused at the behest of the 1st Accused over an alleged love affair that went sour. Section 33 (a) of the Evidence Act (Cap 80) states as follows on dying declarations: -

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

“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;.....”

35. The principles governing dying declarations were considered by the Court of Appeal in the case of Philip Nzaka Watu vs. Republic [2016] eKLR. The court held that:-

“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.”

36. The court reiterated the above stated principles in the case of Charles Njonjo Gituro vs. Republic [2019] eKLR; and in the case of Moses Wanjala Ngaira vs. Republic [2019] eKLR where it held inter alia:-

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

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (Republic v Muyovya bin Msuma (1939) 6 EACA 128. See also Republic v Premanda (1925) 52 Cal 987.)

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

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

It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (R v Eligu s/o Odel and another (1943) 10 EACA 9; Re Guruswani [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the



second accused in R v Eligu s/o Odel and Epongu s/o Ewunyu (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (R v Said Abdulla (1945) 12 EACA 67; R v Mgundulwa s/o Jalo (1946) 13 EACA 169, 171).”

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

20. The law in this area is clearly articulated in the case of Nelson Julius Karanja Irungu vs. Republic [2010] eKLR which was cited to us by learned counsel for the appellant. It is clear however that this case does not support counsel’s contention that the deceased’s statement does not qualify as a death declaration because she was not under contemplation of imminent death. We do not therefore need to discuss the details as to whether the deceased was in imminent danger of death when she made the statement in question. The statement is clearly admissible in evidence.”
37. In the present case, it was alleged that the deceased was on 19<sup>th</sup> May 2022 found injured, lying in a pool of blood and barely able to stand or talk. The deceased died 5 days later on 24<sup>th</sup> May 2022 while undergoing treatment at a hospital in Eldoret where he had been transferred from Nyamira Hospital. This court is of the view that the deceased must have interacted with various people other than his immediate family members during the entire time that he was in hospital before he succumbed to his injuries. I say so because a hospital environment has doctors, nurses and other hospital who the deceased could have informed of the cause of his injuries not to mention the police who must have had information of the alleged assault. It is for this reason that I find it quite curious that the deceased only informed his relatives (brother and sister) of the identity of his attackers yet he interacted with many people other independent witnesses who could have corroborated the claim that he made a dying declaration.
38. It is worth noting that PW5, who was the first person to find the deceased injured in his house testified that the deceased was not able to talk at the time he found him lying in a pool of blood. This court is therefore at a loss as to how the deceased was able to selectively talk to only his siblings and inform them of his attackers. I am therefore not persuaded that the dying declaration is reliable evidence.
39. My above findings on the issue of the dying declarations coupled with the glaring gaps that I have already noted in the prosecution’s case lead me to the conclusion that the prosecution did not prove the charge of murder against all the accused persons beyond reasonable doubt.

## **Conclusion**

40. Having made the above findings, I have no choice but to conclude that the four accused persons are not guilty of the murder of James Mitema Moturi and to acquit each one of them accordingly under section 322(1) of the Criminal Procedure Code. I direct that the accused persons be set at liberty forthwith unless they are otherwise lawfully held.
41. It is so ordered

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**W. A. OKWANY**



**JUDGE**

