



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 35 OF 2014

REPUBLIC.....PROSECUTOR

-VERSUS-

GODFREY KAIGERA RWANDA.....ACCUSED

JUDGMENT

[1] **GODFREY KAIGERA RWANDA** (“the accused”) herein has been charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the offence are that on the 18th day of May 2014 at around 1.30AM at Omone village Kathithi Sub- location Imenti North District within Meru County murdered **CLIFFORD KUBANIA** (“the deceased”). The prosecution called nine (9) witnesses to establish its case.

Evidence

[2] **PW1 Eric Gikundi** stated that on 18/05/2014 at about 1.00AM he was walking home from a dart tournament when he found the deceased on the road near Muthugura’s home. He was sobbing and had been stabbed on the left hand near the biceps. He shone a torch at him which enabled him to see him. He told him that Goddy, accused, had stabbed him. He went and called the mother, and the wife of the deceased. They went back to the scene and took the deceased to the hospital but he later died while undergoing treatment.

[3] **PW2 Duncan Kirema**, brother to the accused, stated that on the material day at about 7.00PM he and his wife in the company of Muriuki and deceased took his child to the hospital as he was not feeling well. They then returned to his home at around 11.00PM. The accused then came to his home with a lot of ‘*fitina*’ which resulted in him going to the chairman to come and warn him as well as asking the deceased and Muriuki to disperse. When he came back with the chairman the accused was not home. They saw a large crowd at the scene where the deceased who had been stabbed was. He was taken to the hospital but later succumbed to his injuries.

[4] **PW3 Emmanuel Muriuki Kimathi** confirmed that on 18/05/2014 he together with the deceased accompanied **PW2** and his wife to the hospital to take their child who was ill. Thereafter they went to his home where at around 11.00PM the accused came. **PW2** advised them to go home for he knew of his brother’s anger. He and the deceased left for their respective homes while **PW2** went to report the accused to the chairman. The following day in the morning **PW2** told him that the accused had stabbed the deceased with a sword. That the deceased was taken to the hospital but died while being treated. **PW2** told him that the deceased while in hospital told him that it was the accused who stabbed him.

[5] **PW4 Poly Karimi**, wife of **PW2**, corroborated his evidence that; on the material day they took their child to the hospital in the company of the deceased and **PW3**. On returning to their home the accused came and exhibited great anger that made them sense danger from him. They asked him to leave. **PW3** and the deceased left and **PW2** went to report the matter to the chairman. As for her she went to sleep after her husband left. The following morning many people came and burnt their home. They did so for they said that the accused killed the deceased.

[6] **PW5 Peris Mukiri**, wife to the deceased, told the court that on 18/05/2014 she was woken up at midnight by **PW1** who told her that the deceased was stabbed and was lying on the road. She and her mother, Eunice Gatwiri, went to the scene and upon arrival they tried to call the deceased but he was unresponsive and bleeding from his hand. The deceased was taken to the hospital where he later died. **PW1** told them that it was the accused who stabbed the deceased. The body of the deceased lay at a place near the home of the accused which was 60 – 70 meters away.

[7] **PW6 Eunice Gatwiri**, mother to the deceased, told the court that on 18/04/2014 at around 2.00AM she was sleeping when **PW1** came and woke her and **PW5** up. He told them that the deceased had been stabbed badly and could not walk. They went to the scene and found him lying on the ground; he could not walk or respond and was bleeding profusely from his hand. **PW2** found them there and told them that the accused was the one that stabbed the deceased, so did **PW1**. They took the deceased to the hospital where he died.

[8] **PW7 Gerald Ntongai**, assistant Chief Kagiri sub – location, testified that the youth leader Kathukumi called him and informed him that

the accused had stabbed the deceased who had been taken to hospital. He stated that he has never received reports of quarrels or a fight between the two for their relationship was cordial.

[9] **PW8 No. 61184 CPL Gideon Mwanika**, investigating officer, stated that when the death of the deceased was reported he and inspector Mwatha were asked to investigate the case. He went to the scene where he found a lot of blood and found that the house of the accused had been burnt down. He then proceeded to Meru Level 5 mortuary where he saw the body which had an injury on the left arm. On 20/05/2014 the accused surrendered himself at Meru Police Station and confessed that he had stabbed the deceased. He took him to the Chief Inspector Kyoyo who recorded his statement. He read the statement and it stated that the deceased attacked him and in defence he stabbed him. That he had disagreed with deceased when drunk.

[10] **PW9 Dr. Umuro Hussein** produced the post mortem report which was conducted by Dr. Guantai. He stated that injuries sustained were cut on the left shoulder, stab wound on the left arm and armpit that severed brachiocephalic artery. The cause of death was concluded as exsanguinations secondary to severed artery and stab wound on the left arm.

[11] At the close of the prosecution's case the accused gave a sworn testimony. **DW1 Godfrey Kaigera Rwanda** testified that on 17/05/2014 he arrived at his home at 11.30 PM from working the whole day. But first he passed by his brother's house where he found him with other people that is **PW3** and the deceased. The two left and he remained at his brother's house for a while chatting. He then left at around 12.30AM for he had a lot of work in the morning. He went to bed and woke up the next morning at 6.00AM and went to work. While there, Ben called him to inform him that an incident had occurred at his home. He got there and found a crowd of people who wanted to burn down their house. He went to the police for help. He was informed that a person had been stabbed and then placed under arrest. He and the deceased had a cordial relationship as he was his best friend.

[12] This matter was canvassed by way of written submissions. The prosecution did not file their submissions and relied on the evidence adduced.

[13] The accused submitted that the death of the deceased is not disputed but the cause of death cannot be ascertained for the murder weapon was not produced. As to the allegations that he committed the act, it has not been proved for no one saw him stab the deceased. Neither was malice aforethought proved. Therefore, the prosecution has failed to prove their case beyond reasonable doubt. Hence the charges against the accused ought to be dismissed and he acquitted.

NALYSIS AND DETERMINATION

Murder

[14] According to **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.”

Thus, the four ingredients that need to be proved by the prosecution beyond reasonable doubt in order to secure a conviction for murder are:

- 1. The fact of the death of the deceased**
- 2. The cause of such death**
- 3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly**
- 4. Proof that the said unlawful act or omission was committed with malice aforethought**

[15] The first and second issues, that is, fact and cause of death of the deceased could be handled together due to their almost inextricable relation. **PW1** told the court that he found the deceased lying by the road injured as he had been stabbed. **PW5** and **PW6** who were called by **PW1** confirmed that they found the deceased injured and bleeding profusely. **PW2** also confirmed this. **PW1**, **PW5** and **PW6** stated that they took the deceased to hospital where he passed on. According to the post mortem report produced by **PW9** the body was identified by Stanley Mutuma and Robert Kathurima. The cause of death was concluded to be exsanguinations secondary to severed brachiocephalic artery following a stab wound to the left arm. This is consistent with the injuries the deceased sustained. Accordingly, the fact and cause of death of the deceased has been proved.

[16] The third issue, is whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person; that is *actus reus*. **PW1** told the court that when he found the deceased by the roadside he told him that the accused was the one who stabbed him. This piece of evidence speaks to a dying declaration purportedly made by the deceased. The Court of Appeal in the case of **Philip Nzaka Watu v Republic [2016] eKLR** held as follows on admissibility of dying declaration:

“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.”

[17] **PW1** stated that the deceased declared that it was the accused who stabbed him. He went on and testified that when he went back to the scene with **PW5** and **PW6** the deceased was able to talk and even asked for water. That he even told them that it was the accused who did it. However, according to **PW5** and **PW6** the deceased was unresponsive; he could not walk or talk. Besides, **PW1** in his statement did not state that the deceased told him that it was the accused who stabbed him. This tends to beg the question as to whether the accused did indeed make the declaration as alleged by **PW1**. The deceased may have made the dying declaration but there is some doubt thereto which should be resolved in favour of the accused. But, I leave it to the conscience of the accused and if he professes Christianity, to know that the Almighty Lord our God will avenge the death of the deceased on the day of judgment. In light of the evidence, it would be unsafe to found a conviction on the alleged dying declaration alone. But, is there other evidence which may embolden a finding of guilty?

Of confession

[18] According to **PW8** who was the investigating officer he told the court that the accused confessed to have stabbed the deceased. He told the court that on 20/05/2014 the accused surrendered himself and confessed. He took him to Chief Inspector Kyoyo who recorded his statement. He read his statement and it stated that the deceased was waiting for him at his gate. He attacked him and in his defence he stabbed him.

[19] In his defence the accused made no mention of a confession. He testified that on the material day he was at **PW2**'s house with him, **PW3** and the deceased. **PW4** was there as well but she was asleep. That **PW3** and the deceased left and he remained with his brother. They talked for a while and then he went to bed. The next day he was informed of the deceased's death as well as an arson attack on his home. When he went to report the incident he was arrested.

[20] When it comes to confessions **Section 25A (1) of the Evidence Act** stipulates that:

“25A. (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.”

Furthermore, **Section 26** of the Act states that a confession is not admissible if it is made through inducement, threat or promise. Thus, all confessions not made in court must be obtained in accordance with the **Evidence (Out of Court Confession) Rules 2009**. There is no room for admissibility of a confession without the necessary safeguards of the law as provided under **Sections 25 to 32** (inclusive) of the **Evidence Act** and under the Evidence (Out of Court Confession) Rules. [See *Caroline Wanjiku Wanjiru & another v Republic*]. In the case before me the confession alleged to have been made by the accused needed to adhere to the rules thereto. Corroborating proof of the making of the confession is needed. I will not therefore place much probative weight on the confession.

[21] More trouble for this case. Apart from the dying declaration, the accused is not the last person to be seen with the deceased; it was **PW3**. Thus, the doctrine of last seen would place a presumption of responsibility elsewhere. Besides, **PW8** stated that **PW4** saw the accused walking with the deceased armed with a knife after the commotion he was said to have caused at his brother's home. However, this seems not to be the case for **PW4** as well as **PW3** stated that the accused was not armed. Accordingly, I find the evidence adduced by the prosecution to bear discrepancies and to lack water-tight circumstantial link of the death of the deceased to the accused. These shortcomings can neither corroborate the dying declaration nor the alleged confession. Instead they both seem to raise more questions rather than provide answers to the murder incident herein. These affect the standard of proof of beyond reasonable doubt.

[22] In the upshot, I find that the prosecution has failed to prove that the deceased met his death as a result of an unlawful act or omission on the part of the accused person; that is *actus reus*.

[23] Accordingly, I find the accused not guilty of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya**. He is acquitted. He shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Milimani Nairobi this 21ST day of APRIL 2020

F. GIKONYO

JUDGE

Representation:

1. Accused represented by:

Otieno C & Co. Advocates,

P. O. Box 2035

Meru

Tel: 0725 640 420

callotti9@gmail.com

2. Republic represented by – DPP, Meru

dppmerucounty@yahoo.com