



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NUMBER 7 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

COLLINS SIKUKU KOLONGOLO.....ACCUSED

J U D G M E N T

The accused **Collins Sikuku Kolongolo** is charged with offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. That on 20th day of January, 2019 at Khalala Village, Sitikho Location of Webuye West Sub-County within Bungoma Country murdered Nashon Makhanu Juma.

The evidence by the prosecution is that on 20th January, 2019, **PW 2 Abraham Simiyu Makhanu** who was staying with the deceased who was his grandson, was informed by deceased that he had been assaulted by Collins. He knew Collins who is the accused. Deceased informed him that he had quarreled with one Fundi over allegations of witchcraft. The deceased informed him that accused then assaulted him and he sustained injuries on the chest back and head. The next day he went to school but was unable to sit and was taken to Khalara Dispensary where he was treated and discharged. His health continued to deteriorate and on 25th January, 2019 he was taken to hospital where he died the next day.

PW 2 Fredrick Barasa a village elder was on his way to church when he heard screams from the home of Accused. He asked Dickson to go and check. The next day Dickson told him that the deceased had quarreled with one fundi over witchcraft. On 24th January, 2019 he went to the home of **Abraham (PW 2)** where he found the deceased who complained of pain on chest and back.

PW 5 No. 236144 IP Patrick Wafula took over the investigation file from Titus Malamas. He found that a post mortem had been performed whose report was disputed by the family of the deceased. He arranged for a 2nd post mortem which was performed on 28th January, 2019.

The accused was put on his defence. He gave sworn evidence where he stated that on 20th January, 2019 at 10. A.m. he was carrying posts to build a house.. He was with his brother Walter Sikuku. They were collecting posts form the forest to the site which was about 400 metres away. Walker then quarreled with the deceased. Walter informed them deceased had assaulted him and escaped to a sugar cane farm. He did not see deceased. On 26th January, 2019 people came to his home and destroyed their property. He went to Webuye Police Station where he was arrested and later charged with present offence. On cross-examination he confirmed that Walter was his brother aged 13 years old and the deceased was his cousin.

The accused is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code which provides: -

203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person convicted of murder shall be sentenced to death.

The ingredients of the offence which the prosecution must prove are: -

1. The fact and cause of death of the deceased.

2. That the accused caused the death of the deceased through an unlawful act or omission.

3. That the accused had malice aforethought which is the intention to kill or cause grievous harm.

Mr. Ikapel for the accused filed written submissions. He submitted that the cause of death has not been established as there had been two post-mortem reports which were at variance as to the cause of death. He submitted that none of the witnesses saw the accused assaulting the deceased. He submitted that the prosecution sought to have a circumstantial evidence but did not set out the inculpatory facts necessary for inference that it is accused who committed the offence.

What was the cause of death of the deceased? **PW 4 No. 54360 Sgt Julius Kiuvua** testified that on 5th January, 2019 he went with a family member to Webuye Hospital where a post-mortem was done on body of deceased. He testified that an earlier post-mortem done by Dr. Omuyewe on 28th January, 2019 had been disputed by the family. **PW 1 Daniel Juma** the father of the deceased testified that the earlier post-mortem had shown that deceased died from ulcers. He disputed this conclusion and asked for another post-mortem to be done. **P W 6 Dickson Muchana** a consultant Pathologist performed a second post-mortem examination. On 5th February, 2019 he found both fore-arm, front leg and back of neck. Upon opening the body he found injury to back of chest, extensive inflammation of lung, injury to upper part of diaphragm foam in airway, swelling of brain and kidneys appeared dark. He formed opinion that cause of death was due to failure to breathe due to injury to the lung. This witness alluded to having seen the earlier post-mortem report by Dr. Muniyewo which he dismissed as not free it stated that the lungs were normal when he had not opened.

Despite these variations in the alleged first and the 2nd post mortem, the only report that was produced is the one by **PW 6 Dickson Muchana**. The reports confirms the fact of death. It also shows the cause of death to be due to failure of oxygen due to injury to the lung.

The second ingredient the prosecution has to prove, is that it is the accused who inflicted the injuries for which the deceased died. Positive identification of the accused as the person who inflicted the injuries or whose unlawful act caused the death of the accused is an important ingredient of the offence of murder.

PW 1 David Juma the grandfather of the deceased was informed that the deceased had died, by Collins win Simiyu. **PW 2 Abraham Simiyu Makhana** the grandfather of the deceased was only informed by the deceased that he had been assaulted by the accused. As a result of the assault, he complained of injuries on the chest back of head and back. **PW3 Fredrick Masinde** village elder only received a report from Dickson that deceased had quarreled with one Fundi. **PW 4 Sgt Julius Kivukua** only attended a post mortem and **PW 5 IP Patrick Wafula** the investigating officer only compiled file and arranged for the 2nd post-mortem to be done.

The accused in his defence testified that on the material day he was working with **Walter Sikuku** his brother, who informed him that they had quarreled with deceased who then bet him (Walter) who escaped to the sugar cane farm. The accused denied ever meeting the deceased that day.

The prosecution in effort to prove the offence relied on what the deceased told his grandfather **PW 2 Abraham Simiyu** to show that it is accused who assaulted the deceased and inflicted the injuries from which he died. The prosecution therefore, was relying on what they considered to be a dying declaration in which he named the deceased as the person who had assaulted him. Under Section 33(a) of the Evidence Act a statement made by a deceased person relating to the cause of his death is admissible in evidence. Section 33(a) provides: -

“33(a) 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”

The principle upon which dying declarations are admissible in evidence is the realization in normal human interaction that a person who is about to die will only want to say solemn things as he would not want to meet his maker with a lie in his mouth. The dying declaration is also made in a spontaneous manner that they may be no intention of contortions or distribution of the events and not under the influence of another person. In **Choge Vs Republic (1985) KLR**, the court on doing declaration stated: -

“The general principle on which a dying declaration is admitted in evidence is that in a declaration made in extremity cases when the person is at point of death relying in English Case of R Vs Perry (1909) 2KB 687 at 701 and when every hope of this world is gone when every (9) motive of falsehood is science and the mind did induced by the most powerful considerations to say the truth a situation so solemn and so awful is considered by law as creating an obligation equal as that imposed by positive oath administered in a court of justice.”

In Kenya, however the admissibility of a dying declaration need not depend to the time of making it in a hopeless expectation of imminent death. There is need 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.

In Kenya while dying declaration is admissible to evidence, the weight to be attached to the evidence is less than that attached to it in English decisions. There is always need for caution in the reception of such statements. In **R versus Choge** (supra) the Court of Appeal stated: -

“The caution with which this kind testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting and the particulars of violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed.”

The probative value of the dying declaration and the weight to be attached to it will, therefore, depend on circumstances of the attack and the conditions favourable for positive identification of the attacker.

In **Republic Vs Enigo S/O Odel 1943 10 EACA** the Court of Appeal said:-

“Here we repeat what this court said in R Versus Muyovya bin Msuma 6 EACA 128 at 129. We are no prepared to rule that no circumstances can a conviction proceed upon evidence consisting of a dying declaration but on the other hand we are prepared to say that a careful direction should be given by the Judge as to the nature of such evidence and the caution with which it should be received. He also directed himself and the assessors as to whether there was any corroboration of the deceased’s statement. Corroboration is desirable of course though we do not say that it is always necessary to support a conviction. To say so would be to place such evidence on the same pace as accomplice evidence and that would be incorrect.”

In this case, **PW 2 Abraham Simiyu Machona** is the only one who gave evidence connecting the accused to the commission of the offence. He testified that the deceased told him he had been beaten by the accused an allegation that he had quarreled with accused’s brother who had told deceased that he (deceased) was a wizard, who would bewitch the accused’s accused that was being built. He complained of injuries on the chest, back of head and at the back. However, in the statement, **PW 2** recorded at the police station he stated that accused did not tell him what the problem was.

The only evidence, therefore, to connect the accused to the offence is the statement of dying declaration, the deceased made to the grandfather **PW 2**. There is no other evidence to connect him to the offence. The evidence of a dying declaration while it is admissible should be taken with caution before the court would find a conviction on it.

In this case, evaluating the whole evidence, I find it unsafe to base a conviction on the solely on the dying declaration of the deceased as made to **Abraham Simiyu (PW 2)**.

I, therefore, find the accused not guilty of the offence of Murder under Section 203 as read with Section 204 of the Penal Code and acquit him. I order that the accused **Collins Sikuku Kolongolo** be set at liberty unless otherwise lawfully detained.

Dated, signed and delivered at Bungoma this 7th day of May, 2020.

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S N RIECHI

JUDGE