REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 16 OF 2011

REPUBLIC

VERSUS

JAMES GITHINJI WAMANI…….....ACCUSED

JUDGMENT

On the night of 31 May 2011, Isaack Wanjohi Ndegwa was stabbed outside the gate to his home. Soon before that, he had been drinking with his brother James Ndei at a shopping centre close to their home. Ndegwa died a few moments after the attack but not before he had told his brother Ndei that it was the accused who stabbed him. Ndei himself claimed to not only have seen the accused at the scene but he also stabbed him while he was attending to his injured brother. It is against this background that the accused was charged with the murder of Isaack Wanjohi Ndegwa, an offence that is defined in section 203 of the Penal Code cap. 63.

According to the charge and information, on 31 May 2011 at Mung'aria village in Nyeri County within Central Province, the accused murdered Isaack Wanjohi Ndegwa, who I will henceforth refer to as "the deceased". After he was examined by Dr. Owino whose report was produced by Dr. Richu Mwenda (PW9) and found fit to stand trial he denied the charge and so a plea of not guilty was entered accordingly.

James Ndei (PW1) testified that he, together with the deceased, one Mwaniki and one Kibuchi had been drinking at a bar at Mung'aria shopping centre till 9.30 PM when they left to go home. He left with his brother and after about 30 metres walk, he returned to the shopping centre to buy cigarettes. It was while he was on his way back from the shopping centre that he heard some noise near the deceased's gate. As he approached the gate, he noticed it was the deceased who was making noise. The latter told him that he had been stabbed by Gidii which is the name they used to call the accused.

As he held the deceased, he was also stabbed by Gidii; he could tell it was Gidii because there was enough security light at the gate and therefore, so he testified, he was able to see him. He ran away leaving his brother at the scene. Anthony Kibuchi (PW2), his other brother came to the scene and took him to Gichira Health Centre where he was given first aid before he was referred to Nyeri Provincial General Hospital for treatment. It was his evidence that the accused is a person he had known for many years because they all hailed from the same village. He gave his nickname, Gidii, to the police when he recorded his statement on 1 June 2015.

Anthony Kibuchi Ndegwa (PW2) testified that he too was the deceased's brother and together with Ndei (PW1) they had been working for him on the material day. He was on his way to the deceased's house where he was going to sleep on the material night when he heard him shouting. As he rushed to where he was, he met Ndei (PW1) on the way. He was bleeding from the shoulder. Ndei told him that he had been stabbed by Gidii. He found the deceased clutching on his chest; he was bleeding. He heard him say in Kikuyu language "*Gidii you have killed me"*. He then rushed home to inform his mother. He also called for a vehicle in which they travelled to a health centre where they were apparently told that the deceased had died; Ndei (PW1) was, however, given first aid and referred to the provincial general hospital.

The deceased's body was taken to the mortuary where a postmortem was conducted in Ndegwa's presence. He described the accused as a neighbour whom he knew and that he was popularly referred to in the village as Gidii.

Ann Nyokabi (PW3) testified that the deceased, his bother and cousin had been in a bar in which she worked as bartender on the night of 31 May 2011. They all left together but after some time Ndei (PW1) came back to buy cigarettes.

According to police constable Johnson Muruthi Mwaniki (PW5), he encountered the deceased's mother crying at Mung'aria shopping centre on 31 May 2015. She was in a vehicle carrying the deceased at the time. It was his evidence that the deceased was bleeding. She told him that her other son (PW2) had been left at the scene. He asked the driver to go to the scene so that they could get Ndei to hospital. The scene was at the deceased's gate.

The officer in charge of Mung'aria Administration police post directed him and other officers to go and arrest the accused. They found him

at his house and arrested him. He knew the accused person before. The deceased's brother mentioned the accused's name and it was on the basis of that information that they arrested him.

The case against the accused was investigated by Inspector James Ouna (PW6) and constable Keton. They commenced their investigations after the accused had been arrested. After taking the statement of Ndei (PW1) who had been by then discharged from the hospital, they proceeded to the scene of crime; they were led to the scene by Ndei (PW1) who also led them to the accused's house. When he interrogated the accused, the latter told him that he had been accosted by two people on his way home on the material night. He fought back believing them to be robbers. The officer established that the accused's house was set ablaze by members of the deceased's family and members of the public after the incident. He also established that the accused's home was approximately 50 metres from the accused's home. Ndei told him that he knew the accused as Gidii.

Senior sergeant Mongera (PW7) testified that that on 31 May 2011, at about 11.50 PM, he got a call from constable Mureithi who informed him that he was at Gichira health centre and that he needed assistance because he had two casualty cases. He went to the health centre and found Ndei (PW1) being attended to by nurses; the other person was the deceased but was already dead. He then proceeded to the accused's house together with constable Mureithi and other police officers. They found the accused who informed them that he had been attacked by a group of men while he was coming from Mung'aria shopping centre. He even led them to the scene of crime where they found a lot of blood spilt on the ground. It is then he was arrested and subsequently charged.

Dr Obiero Okoth (PW8) conducted the postmortem on the deceased's body. The body was identified to him by Anthony Kebuchi (PW2) and Jackson Kamunge Ngatia (PW4) whose evidence was restricted to this identification and witnessing of the post-mortem exercise. The pathologist observed that the body was of an African male whose stated age was thirty-five years old. The body was in jumper and green trouser both of which were blood-stained. Other observations he made were a tear around the chest; a stab wound on the head, at the parietal region and on the right-hand side of the chest. One of his ribs was fractured and a cut wound on the upper right lung. There was massive haemothorax in cardiovascular system. The weapon used to inflict these injuries was described as sharp. He opined the cause of death to have been 'haemothorax and lung injury secondary to penetrating chest injury as a result of a stab wound'. He certified the deceased's death and signed a certificate to that effect.

The last prosecution witness was Dr. Evelyn Chege (PW10); she filled the P3 form in respect of Ndei (PW3) who had presented himself for examination on 21 September 2011. His clothes, according to treatment notes, were blood-stained and he claimed to have stabbed by a person known to him. On general examination he was intoxicated and bleeding profusely; he was however, conscious. The left shoulder had a stab wound measuring 8 centimeters caused what was probably a sharp object. He was stitched and given analgesics. The degree of injury was rated as 'harm'.

In his defence, the accused swore that on 31 May 2011 he only went to church but returned home after the church service. He slept between 8.30 PM and 9.00 PM only to be awaken at about 2.00 AM the following morning by police officers. They conducted a search in his house but couldn't find what they were apparently looking for. He was arrested and asked to accompany the officers. After about 30 metres walk he was shown blood at some spot. He was then asked to board a police vehicle which was at the scene and taken to the police station from where he was subsequently charged. He denied having murdered the deceased. He stated further that his property was burnt down when he was in remand. He agreed that the deceased was his neighbour. He, however, denied that he is called Gidii.

Section 203 under which the accused was charged defines the offence of murder as follows:

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

The evidence of the "death of another person" has not be disputed; "the other person" referred to in this law would, in the present case, be Isaack Wanjohi Ndegwa whose death was certified by Dr Obiero Okoth (PW8). His evidence capped the evidence of Ndei (1) and Ndegwa (PW3) that their brother was stabbed to death. Again, the body on which Dr Obiero conducted a post-mortem was positively identified as that of Isaack Wanjohi Ndegwa. Evidence in this respect was given by his brother Ndegwa (PW3) and his uncle Ngatia (PW4) both of whom identified the body and witnessed the post-mortem exercise. Thus the facts of death and of a person which are essential components in the offence of murder were proved without any controversy.

It was also proved that the fatal injuries to which the deceased succumbed were not of his own making; they were inflicted by another person; thus, the other element of this offence was also proved; that the deceased died as a result of an act of another person.

The other component is whether the act of stabbing the deceased was unlawful; it certainly was because there is no evidence that it was justified.

With those elements in place, the only other questions are whether the accused is the person who authored the unlawful act that caused the death of the deceased and whether he had the necessary malice aforethought.

The prosecution answer to the first limb of this question is primarily the evidence of a dying statement or declaration of the deceased. Moments before his death, he told his brother Ndei (PW1) that the accused had stabbed him. His other brother Ndegwa (PW2) also heard him say that Gidii had murdered him. He had been walking home with his brother all along, but the latter had to go back to buy cigarettes. Nyokabi (PW3) confirmed in her testimony that moments after the deceased and Ndei (PW1) left her bar, the latter returned to buy cigarettes. Nyokabi's testimony lends credence, at least to the evidence of Ndei, that he not only went back to the bar but that his brother was alone at the time he was assaulted.

The evidence of a dying declaration or statement is admissible under section 33 (a) of the Evidence Act cap. 80; it reads as follows:

33. Statement by deceased person, etc.,

When Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) 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.

This provision of the law is in *pari materia* with section 32(1) of the Indian Evidence Act, which applied in this country prior to the enactment of our own Evidence Act. It has been applied in several cases where the evidence of a dying declaration has been brought to the fore; one such case was **Jasunga s/o Okumu versus Republic (1954) 21 E.A.C.A** 331. In that case, the deceased had been found lying on the road with a stab wound in his chest. He told the police officer who had found him that he had been stabbed by the appellant. The officer took him to hospital from where the deceased's statement was also recorded. In that statement, the deceased stated that he was on his way home when the appellant and another person confronted him. The appellant demanded money from him and assaulted him; he also threatened that he would kill him if he did not give him money. The appellant then drew a knife stabbed the deceased in his chest. He fell down and the appellant and the other man ran away. He died of internal haemorrhage and shock the following morning.

The learned trial judge convicted the appellant based on the assessors' unanimous verdict that the appellant was guilty.

In discussing the admissibility of the deceased's statements, the court held as follows:

In Kenya the admissibility of a dying declaration does not depend, as it is 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 the dying decelerations 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.

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 circumstances of confusion and surprise calculated to prevent their being accurately observed…The deceased may have stated his inferences from facts concerning which he may have committed important particulars, from not having his attention called to them.

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. Ramazani bin Mirandu (1934) 1 E.A.C.A 107; R v. Muyovya bin Msuma (1939) 6E.A.C. A. 128. The fact that the deceased told different persons that the appellant was the assailant is evidence of consistency of his belief that such was the case: it is no guarantee of accuracy.

And whether corroboration is necessary in order to sustain a safe conviction solely based on a dying declaration, the court had this to say:

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 &Another 1943) 10 E.A.C.A 90; re Guruswami (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… But it is, generally speaking, very unsafe to base a conviction solely on a 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 E.A.C.A 67; R v Mgundwa s/o jalo and others, (1946) 13 E.A.C.A 169, 171.).

In addition to the cases cited above, we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration, unless, as in Epongu's case (Epongu s/o Ewunyu, (1943) 10 E.A.C.A 90) there was evidence of circumstances going to show that the deceased could not have been mistaken in his identification of the accused.

As to the question of the sufficiency, admissibility and the weight to be attached to a dying statement; the court ruled as follows:

The statement was, apparently taken when the accused was suffering from extreme exhaustion: it was un acknowledged and there is no means of knowing whether the deceased would have acknowledged its correctness or would have wished to alter or add to it, had he been able to do so. If the statement had, on the face of it, been incomplete because the accused had sunk into a coma before he finished it, it would have been inadmissible (Waugh v The King, (1950) A.C 203) … It is not necessary, in order

to render a dying statement admissible, that it should be a complete account of the attack, provided that it is, or may rationally be assumed to be, all that the deceased wished to say about it. (Sarkar on Evidence, 9th Edition, p 510). But the weight to be accorded to a dying statement must depend, to a great extent, upon the circumstances in which it is given, and the effects of a wound may dim the memory or weaken or confuse the intellectual powers. (Sarkar on Evidence, 9th Edition pp.303,309).

I have applied the Jasunga decision in at least two previous cases where this question has arisen; this is in **High Court Criminal Case No. 27 of 2010(Nyeri), Republic Versus Albanas Kioi Maweu (2019) eKLR** and in **High Court Criminal Case No. 38 of 2011(Nyeri), Republic Versus George Mwangi Onyango**.

As the Jasunga decision illustrates, the admissibility and perhaps the weight attached to a dying declaration in England is tied to "*the declarant having at the time, a settled, hopeless expectation of imminent death*; in which event, "*the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.*" Such conditions do not apply in Kenya and, for avoidance of doubt, section 33 (a) expressly states that dying statements "*are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death*". But even if it was necessary that the deceased must have been in imminent danger of death, circumstances under which the declaration was made in the present case would fit the bill. The deceased here faced the prospects of imminent death and, as it turned out, he died soon after he was stabbed.

One theme that keeps recurring whenever evidence of dying declaration is considered is that of corroboration of the declaration. It is apparent from the excerpts of the Jasunga case which have been reproduced here that as much as the Court of Appeal for East Africa appeared to downplay the need for corroboration of the evidence of a dying statement, it still acknowledged that "… *we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration.*" Thus, the absence of corroboration may not necessarily be fatal to the prosecution case but it is still relevant all the same; I suppose the degree of its relevance depends on the circumstances in which the declaration was made which in turn vary from one case to another.

In the case against the accused there is some degree of corroboration which, in my humble view, is enough to sustain the quest for admissibility of the deceased's declaration on the cause of his death.

To begin with, Ndei (PW1) arrived at the scene where the deceased was stabbed soon after he had been stabbed. It was Ndei's evidence that he had walked with the deceased for about 30 metres from the bar where they had been drinking before he realised that he wanted cigarettes and therefore he had to go back for them from the same bar. It wouldn't have taken him long to walk to the bar and return to join his brother who was now ahead of him. It is therefore logical to conclude that unless the assailant ran away from the scene of crime after attacking the deceased, he was still in the vicinity when Ndei arrived back.

And indeed, he was in the vicinity because as Ndei was attending to his brother, the assailant struck again and this time round he stabbed Ndei. Just like deceased was able to recognise the assailant, Ndei also saw him when he struck the second time. He was able to tell that it was Gidii who assaulted him because there was sufficient security light. There is nothing to suggest that Ndei may have been struck by a different assailant from that who struck the deceased. The assault on the deceased was almost contemporaneous with the attack on Ndei. Thus, the evidence of Ndei largely corroborated the deceased's dying declaration that it was the accused who stabbed him.

Besides Ndei's evidence, there is the testimony of inspector James Ouna (PW6) who interrogated the accused in the course of investigations. According to him, the accused claimed that he had been accosted by two people whom he fought back believing them to be robbers. Similarly, Sergeant Mongera (PW7) who was among the officers who arrested the accused testified that the accused told them he was attacked by a group of men while he was coming from Mung'aria shopping centre.

The evidence of these two officers would suggest that the accused was involved in some confrontation on the material night and from the evidence available this confrontation was none other than the one in which the deceased and his brother Ndei were stabbed.

It is worth noting that the accused neither denied the evidence of these two officers nor was their testimony in this regard challenged by way of cross-examination.

The furthest the accused went, was to raise an alibi; that he was not at the scene of crime at the material time. There would be nothing wrong in the accused relying on this kind of defence but it is trite that an accused person who wishes to rely on such a defence must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. It has been held that a belated disclosure of this defence goes to the credibility of the defence. (See **Athuman Salim Athuman v Republic [2016] eKLR).** But this does not mean that the trial court should ignore should ignore it altogether; it still has the duty to weigh the defence against the prosecution evidence. If I take this course, I am inclined to conclude that the prosecution evidence placing the accused at the scene was neither controverted nor shaken and, on my part, I find no basis to doubt it. The accused's attempt to put forth an alibi was, at best, an afterthought.

Another critical question raised was that of identification.

Considering the deceased was attacked at night, the question of how the accused was identified was always inevitable and due to its centrality not only to the prosecution case but also to the accused's defence, it certainly deserves an appropriate answer.

There is evidence that the deceased was attacked outside his gate and from the evidence available, there was security light. According to Ndei, "there was enough security light" at the deceased's gate, which happens to have been the scene of crime. This evidence was not discounted. In these circumstances, and in the absence of any evidence contrary to that given by Ndei, I am prepared to find that the conditions were favourable enough for both the deceased and his brother to recognise the accused.

They recognised rather than identified him because they lived in the same neighbourhood and had known each other all along. As a matter of

fact, it was the accused's own evidence that he knew the deceased as his neighbour. It follows that either of them would have been ideally placed to recognise the other in circumstances where a question regarding their positive identification or recognition would arise.

The other aspect of identification of the accused was his name. Both the deceased and Ndei referred to the accused as "Gidii" or "Kidii". This is the name that the deceased uttered to his brothers and it is also the name that that Ndei mentioned to his brother Ndgewa(PW2) when he met him as he fled from the accused who had just stabbed him. It is also the same name that he gave to the police when he made his report.

The accused denied that either of names were his name. He was empathic that his official name was James Githinji Wamani.

It is true, and the prosecution did not contest the accused's official name; as a matter of fact, that is the name that was adopted in the charge and information. The prosecution case, as I understand it, is that the deceased and his brother knew him by a name that was incidentally different from his official name but they were not mistaken as to whom that name referred. They knew it referred to the accused. In other words, looking at things from their perspective, the name "Gidii" or "Kidii" referred to the same person as James Githinji Wamani. I also note that in the course of their testimony, the deceased's two brothers, Ndei and Ndegwa consistently referred to the accused as Gidii or Kidii. They appeared not to know him by any other name. So, the accused is right that neither of these names are his names but they are the names the deceased and his brothers knew him by. In short, there is no question of mistaken identity.

In disposing of this question of identification, I am minded that the Ndei is, in many ways, a single identification witness. Whenever the court has to rely on evidence of this nature it is always incumbent upon the trial court to warn itself of the danger of relying on the evidence of a single identification witness before relying on it to convict an accused. See **Wamunga versus Republic (1989) KLR 424. T**he Court of Appeal spoke of the evidence of identification generally in the following terms:

It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

The evidence against the accused, however, is not solely that of identification; the primary evidence against him is that of a dying declaration. If anything, the evidence of identification is as relevant as it is corroborative of the deceased's dying declaration. To put it differently, it would still be plausible for this court to convict on the evidence of a dying statement or declaration because corroboration is not always necessary to sustain a conviction based on such evidence.

In the ultimate, I find and hold that the accused is the person who fatally wounded the deceased.

So far so good for the prosecution case.

The question whether the accused had malice aforethought is what, in my humble view was not proved to the required standard.

Malice aforethought is the mental element necessary for one to be convicted of the offence of murder; it is either express, implied or constructive. It is express when it is proved that there was an intention to kill unlawfully **(see Beckford v R [1988] AC 130)**, but it is implied whenever it is proved that there was an intention to unlawfully cause grievous bodily harm **(see DPP v Smith [1961] AC 290).**

It has been held to be constructive if it is proved that the accused person killed in furtherance of a felony (for example, rape or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm **(see Raphael Mbuvi Kimasi versus Republic (2014) eKLR; Isaak Kimanthi Kanuachobi versus R (Nyeri Criminal Appeal No. 96 of 2007 (unreported).**

This element has a statutory underpinning in section **206** of the **Penal Code;** this section prescribes circumstances under which malice aforethought may be deemed to have been established; it provides as follows:

> ***206. Malice aforethought***
>
> ***Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***
>
> ***(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
>
> ***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
>
> ***(c) an intent to commit a felony;***
>
> ***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

No evidence was led as to the existence of any of these circumstances; according to inspector Ouna (PW6) and sergeant Mongera (PW7) the accused told them he fought back men who confronted him while he was on his way home and whom he thought were robbers. Inspector Ouna was not sure whether in those circumstances the accused was culpable for the offence of murder. This is what he said in his evidence:

I interrogated the accused who claimed that he had been accosted by two men on his way home. He fought them believing them to be robbers. During the investigation, it was not possible to establish whether he was accosted or not and that is why we charged him with the offence (of murder).

It is intriguing that the investigation officer would have charged the accused with the offence of murder when he was not sure that he had committed this offence. Suffice it to say, and for present purposes, it is difficult to attribute malice aforethought to the accused in the face of such evidence. And without this important component of the offence of murder, it would be unsafe to convict him as charged.

However, having held that the accused inflicted the fatal injury to which the deceased succumbed, I find him guilty of a lesser offence of manslaughter contrary to section 202 of the Penal Code; this provision of the law is to the effect that any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. From the evidence available, the accused's conduct would squarely be covered as an offence under section 202 rather than 203 of the Penal Code. He is convicted accordingly.

Dated, signed and delivered in open court this 4th day of May, 2020

Ngaah Jairus

JUDGE