



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: D.S. MAJANJA J.)

CRIMINAL CASE NO. 14 OF 2013

BETWEEN

REPUBLIC.....PROSECUTOR

AND

DAVID KIPYEGON RONO.....ACCUSED

JUDGMENT

1. **DAVID KIPYEGON RONO** (“the accused”) is charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It is alleged that he murdered **EVANS NGUI MUNYAO** (“the deceased”) on 9th February, 2013 at Njipship Trading Centre, Ololmasan location of Pirrar Division within Transmara East District of Narok County.

2. The prosecution marshalled 6 witnesses to prove that the accused stabbed the deceased, who was a General Service Unit (“GSU”) officer, at Bon Soldier Bar (“the Bar”) within Njipship Trading Centre. The accused gave an unsworn statement in his defence.

3. Felix Orotaram (PW 3) testified that on 9th February 2013, he was working at the Bar when the deceased and another officer, PC David Elimlim Emeri (PW 4) came in at about 8.00pm to have their drinks. Later on, an administration police officer joined the two. At about 9.00pm, the accused, whom PW 3 knew worked at a butchery, came in, ordered for alcohol but did not pay for it. PW 3 asked an administration police officer to assist him get the money from the accused and the accused promised to pay the following day. PW 3 saw the accused leave the bar and return 20 minutes later.

4. PW 3 recalled that by 11.00pm, all revellers had left the Bar apart from the deceased and PW 4. According to PW 3, the accused had left the bar 2 minutes before the deceased also decided to leave. The deceased returned shortly. He was clutching his stomach and saying that he had been stabbed with a knife. He described the person who stabbed him as the man who worked at the butchery and who had refused to pay the bill. When cross examined, PW 3 stated that it was dark on that night and the bar had no security lights but there was electricity at Njipship and the shops nearby had lights.

5. PW 4 testified that on the material night he was at the Bar with the deceased. As they were watching a football match, the accused came in. He recognised the accused as he worked at a butchery where they used to buy meat. After a while the deceased informed him that he was leaving to go back to the camp. About 5 minutes later, he returned holding his stomach. PW 4 noted that the deceased was bleeding from the stomach. The deceased told him that he had been stabbed and when PW 4 inquired further, the deceased told him that it was the butcher who had been at the Bar earlier. The deceased gave PW 4 his mobile phone and asked him to call his immediate boss. The inspector in charge arrived in the company of other officers and took the deceased to Kilgoris Hospital. PW 4 further testified that while they were in the vehicle, the deceased kept saying that it was the butcher who had stabbed him.

6. On the material night, Evans Sawe (PW 1), was near the Bar when he saw people running out. When he went in, he found the deceased, who had injuries on the stomach, lying on the floor. He recalled that PW 1 spoke in his mother tongue which he could not understand. PW 1 recalled that he knew the deceased as a GSU officer who was often at Njipship. He told the court that accused used to work in a butchery within Njipship. He however denied that he had seen him on that night.

7. Chief Inspector Stanley Mbuki (PW 2) testified that he rushed to the Bar after receiving information that the deceased had been stabbed. He found, amongst others, PW 3 and PW 4 at the scene where the deceased was lying in a pool of blood. He observed that the deceased had stomach injuries. They attempted to do first aid on the deceased and rushed him to Transmara District Hospital. PW 2 told the court that the deceased was still talking a lot and saying in Kiswahili, “*Nakufa, Nakufa*” (“I am dying, I am dying”) but did not tell him anything about his injury. On cross examination, PW 2 stated that he knew the accused as a butcher during his stay at Njipship but did not hear the deceased mention the accused as his attacker.

8. The investigating officer, PC James Ngunjiri (PW 6), was informed of the deceased death on the material night after the deceased had been taken to Transmara District Hospital. He rushed to the hospital with his colleagues but found that the deceased had passed away and his body taken to Akemo Mortuary. He recorded the witness statements and organized for the post-mortem to be carried. He testified that that the accused was taken to Esoit Patrol Base by elders from where he proceeded to re-arrest and charge him thereafter.

9. When put on his defence, the accused stated that he was a farmer and that on 9th February 2013, he was at home working in the farm and had not been at Njipship Trading Centre that night. He denied knowing or meeting PW 1, PW 2 or PW 3. He also denied killing the deceased. He told the court that he used to sell meat in 2009 at another place.

10. The offence of murder is defined in **section 203** of the **Penal Code** as follows, “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The prosecution is therefore required to prove first, the fact of death of the deceased and the cause of that death; second, that the accused committed the unlawful act or omission that led to that death; and third, that the accused committed the unlawful act or omission with malice aforethought.

11. The fact and cause of the deceased’s death is not in dispute. PW 1, PW 2, PW 3 and PW 4 knew the deceased and recalled that on the material night he had stomach injuries. PW 2 and PW 4 confirmed that he was taken to Kilgoris Hospital where he was pronounced dead. Dr Morris Rauta (PW 5), a medical practitioner at Nyamira Hospital, produced the post mortem report prepared by Dr Mutula in accordance with **section 77** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. Dr Mutula conducted the post mortem on 11th February 2013 at Akemo Valley Hospital. He observed that the deceased’s clothing was blood stained and noted that he had a 7-centimetre-long stab wound on the left upper part of the abdomen with injury to the abdominal muscles. Internal examination revealed a massive pool of blood in the left side of the abdomen. There were 3 perforations of the small intestines with a gangrenous part of the intestine about 10 centimetres long. Dr Mutula concluded that the cause of death was massive bleeding secondary to stab wound. The findings of the post-mortem were consistent with the injuries observed by PW 1, PW 2, PW 3 and PW 4. I therefore find and hold that the medical evidence was conclusive that the stab wound inflicted on the deceased’s abdomen caused his death.

12. The next issue is whether the accused stabbed the deceased. The prosecution case was founded on circumstantial evidence since no one saw the accused stab the deceased. The prosecution relied heavily on the statements made by the deceased implicating the accused. **Section 33(a)** of the **Evidence Act** permits the admission of such statements as an exception to the general rule against admissibility of hearsay evidence. In **Philip Nzaka Watu v Republic Criminal Appeal No. 29 of 2015 [2016]eKLLR**, the Court of Appeal, while accepting that such statements are admissible, observed as follows:

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

13. The deceased’s statements implicating the accused for his murder were heard by PW 3 and PW 4. PW 3 was working at the bar while PW 4 had come to the Bar with the deceased. Both of them confirmed together with PW 1 and PW 2 that they knew the accused as he used to work at a butchery at the Njipship. I therefore have no doubt that the accused was not a stranger to the deceased and that he was a person he would recognise. That the accused was at the bar on that material night prior to the incident is confirmed by PW 3 and PW 4 who saw him when he came into the Bar and left.

14. It is against this background that the deceased’s declaration must be seen. The accused left the Bar first before the deceased left and within a few minutes, the deceased returned with injuries on the stomach. There was no reason for him to lie about the accused having stabbed him. Further, nothing of the sort was suggested to the witnesses in cross-examination. The deceased identified the accused as the man who was at the bar earlier that night and who worked at the butchery leaving no doubt that he was referring to the accused. I do not think that the fact that the incident took place at night in any way diminished the deceased’s statements implicating the accused since he had seen the accused while at the bar and he knew him. This was clearly a case of recognition. That the deceased had been stabbed in the stomach means that the accused and deceased were in close proximity thus lessening the chances of mistaken identity.

15. According to PW 3, the accused left the bar 2 minutes before the deceased also left but returned 5 minutes later having been stabbed. PW 4 had also seen the accused at the bar and his evidence also placed the accused at the *locus in quo* shortly before he went out and the deceased returned having been stabbed. Apart from describing the accused, the deceased’s statement was specific as to the manner he was attacked, that is by stabbing with a knife thus fortifying his declaration implicating the accused.

16. Taken cumulatively, the dying declaration and the circumstantial evidence presented by the prosecution unerringly point towards the accused’s guilt. The facts as presented were incapable of any other reasonable conclusion than that of the accused person’s guilt. The totality of the evidence put the accused at the scene. He stabbed the accused and ran away into the night. The fact that the weapon he used was not found does not diminish his guilt. His defence was a mere denial and I reject it in view of the overwhelming evidence against him. I therefore find and hold that the accused stabbed the deceased.

17. The last issue for determination is whether the accused killed the deceased with malice aforethought. Malice aforethought may be established by considering the nature of the weapon used, the manner in which it was used, the part of the body injured and the conduct of the accused before, during or after committing the offence (see **Republic v Tubere s/o Ochen [1945] 12 EACA 63**). The act of stabbing the deceased in the gut with a sharp object that plunged 7 centimetres into his body could only have been intended to cause the deceased grievous harm. Further, there is no evidence, either from the witnesses directly or in cross-examination, or from the accused himself that the accused was provoked or that he acted in self-defence.

18. In conclusion I find that the prosecution has proved its case against the accused beyond any reasonable doubt. I therefore find **DAVID**

KIPYEGON RONO guilty of the murder of **EVANS NGUI MUNYAO** and I convict him.

DATED and DELIVERED at KISII this 7th day of February 2019.

D.S. MAJANJA

JUDGE

Mr Okemwa, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.