



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 23 OF 2018

REPUBLIC.....PROSECUTOR

-versus-

STEPHEN MARWA NYAMBURI.....ACCUSED

JUDGMENT

1. This case presents a scenario where the deceased herein one **Mwita Gura Gura** allegedly lost his life out of a controversy with the accused person herein, **Stephen Marwa Nyamburi**. It was alleged that the two differed on 20/08/2018 and that the deceased died on 22/08/2018 while undergoing treatment. The incident occurred at Makonge village in Siabai Location within Kuria East Sub-County of Migori County. When the matter was reported to the police, investigations were commenced which culminated with the arraignment of the accused person before Court faced with the information of the murder of the deceased.

2. The accused person denied the charge and the case was set for hearing. Seven witnesses testified in support of the information facing the accused person. One of the sons of the deceased testified as **PW1**. He was **JMM** who was aged 13 years old. The wife of the deceased was one **Lucia Kemu** who testified as **PW2** whereas **Mary Gati**, who referred to **PW2** as her Aunt, testified as **PW3**. A neighbour to the deceased one **Mwinga Christopher Chacha**, testified as **PW4**. **No. 117535 PC Mary Njuguna** attached at Ntitaru Police Station testified as **PW5**. The investigating officer **No. 76880 Corp. Weldon Kiplangat Yegon** testified as **PW6** whereas **Dr. K'Ogutu Vitalis Owuor** testified as **PW7**. For purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case was that on 20/08/2018 the accused person went to see **PW4** at his home over wedding preparations. The accused person did not find **PW4** and as he was on his way back home, the accused person met **PW4** who was in the company of the deceased. That was around 07:00pm. The deceased had gone to see **PW4** over calves he intended to use in ploughing. The three exchanged greetings and even shook hands. The deceased then left the accused person and **PW4** to have their discussion as he diverted into his home which was just near where the three had met. The deceased stood outside of his house.

4. **PW4** and the accused person discussed as they took the route that passed through the homestead of the deceased towards the homestead of **PW4**. As they neared the compound of the deceased, the deceased confronted the accused person and asked him why he was using that route and yet he had restrained him from doing so and to instead use an alternative route anytime he wanted to go to the homestead of **PW4**. The accused person did not agree with the deceased and they bitterly exchanged words. The accused person contended that he was only using a public road and the deceased had no right to stop him and that he was at liberty to do what it pleased him. **PW4** intervened and escorted the accused person back to the main road where they parted ways each going to his home.

5. The exchanges were heard by the members of the family of the deceased who were inside the house who all readily recognized the voices of the deceased and the accused person. It was contended that the accused person instead returned to the home of the deceased and continued exchanging words with the deceased. It was **PW1** who was the first one to come out of the house with a solar powered D-Light lamp although there was ample and bright moonlight. **PW3** followed **PW1**. They both saw the accused person and the deceased still exchanging words as the accused person was holding a stick and had a big knife tucked around his waist. As the exchanges intensified **PW3** returned inside the house but **PW1** remained outside. **PW1** saw the accused person hit the deceased with the stick he had. The accused person then left behind the stick as he ran towards the main road. The accused person sat at the door leading into his house. **PW2** came to where the deceased was and asked him what it was all about. The deceased told **PW2** that it was the accused person who had hit him with a stick and fled but he was otherwise alright. The deceased took the stick and threw it inside the house. **PW2** returned into the house and joined **PW3**.

6. **PW1** and the deceased remained outside the house. After a short while they saw the accused person return into their homestead. The accused person demanded his stick from the deceased in Kiswahili saying '*Nipatie fimbo yangu*'. As the stick was not forthcoming **PW1** saw the accused person cut the deceased on the head using the big knife he carried. The deceased rushed inside the house and sat at the veranda as the accused person fled. **PW1**, **PW2** and **PW3** then requested the deceased to go to the hospital but he declined. They spent the night at home and in the morning **PW2** went to see one **Mwita Komora** (not a witness) and requested him to plead with the deceased to go to hospital. The

said Mwita Komora did so and he accompanied the deceased together with PW1 to Ntitaru Sub-District Hospital. The deceased was treated and discharged.

7. The deceased while in the company of PW1 then proceeded to and reported the incident at Ntitaru Police Station. They were attended to by PW5 who booked the report and referred them to the Crime Branch Office for further investigations. The deceased later returned home and his condition deteriorated. On 22/08/2018 PW2 returned the deceased to the hospital and as he underwent treatment he passed on. PW2 informed the police of the death of the deceased.

8. On instructions of the OCS Ntitaru Police Station, PW6 accompanied the OCS and two other police officers to the Ntitaru Sub-District Hospital where they viewed the body of the deceased and noted an injury on the forehead. PW6 interviewed PW2 and collected the treatment notes. The police took the body to Migori County Referral Hospital Mortuary for preservation and further police action. PW6 recorded statements from potential witnesses, recovered the stick from the witnesses and obtained a copy of OB extract from Ntitaru Police Station. He also visited the scene and prepared a Rough Sketch Map. PW6 asked a colleague PC Adenya to witness the post mortem examination of the body of the deceased where PW7 opined that the cause of death was the cut on the forehead which fractured the skull causing internal bleeding into the brain. On completion of the investigations, PW6 formed the opinion that the accused person be charged with the murder of the deceased. However, since the accused person was at large and PW6 was on transfer to DCI Uriri, he handed over the matter to PC Adenya and PC Maiyo.

9. The accused person was arrested on 28/08/2018 by members of public at Isebania town and was taken to Isebania Police Station. The accused person was transmitted to Ntitaru Police Station where he was escorted to Court on 30/08/2018. He was later escorted to Migori County Referral Hospital for mental assessment on 12/09/2018 and formally took plea on 01/10/2018. PW6 produced the stick, the Sketch Map, the treatment notes, the OB Extract/Investigation Diary and the mental assessment report as exhibits. PW6 further informed Court that in the course of the investigations he found out that the controversy between the deceased and the accused person was based on suspicion that the accused person had a sexual affair with the wife of the deceased (PW2) and that is why the deceased did not want the accused person near his home. PW6 however did not go into the root of the allegation since the deceased was already dead.

10. At the close of the prosecution's case, the accused person was placed on his defence and he opted to give unsworn testimony without calling any witness. The accused person denied committing the offence. He narrated how he met and even greeted the deceased as he went to see PW4 over some wedding preparations. That, as he was escorted back to his home by PW4 through the pathway that passed through the homestead of the deceased, they stood at a distance from the homestead of the deceased while talking. That, the deceased emerged and began abusing the accused person that he had an affair with his wife and he did not want to see him near his home. PW4 intervened but was also abused. The accused person then left and walked away heading to his home. Suddenly, he heard a voice from his back telling him to stop and he was hit with a stick on the back. As he also had a stick he retaliated and hit the attacker with his stick on the head and he fled. He only learnt later that the deceased had died. At the close of the defense case the matter was left for judgment.

11. From the above evidence, this Court is now called to find if the ingredients of the offence of murder have been proved in this case. The offence of murder carries three ingredients which are: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will consider each ingredient separately.

(a) Proof of the fact and the cause of death of the deceased: -

12. There is no doubt that the deceased died. That was attested to PW1, PW2, PW4, PW6 and PW7. The first limb is hence answered in the affirmative.

13. As to the cause of the death of the deceased, PW7 produced a Post Mortem Report which he personally filled after conducting the autopsy. The report opined that the possible cause of the death of the deceased was the cut on the forehead which fractured the skull causing internal bleeding into the brain. Since there is no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:
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14. The accused person denied killing the deceased. The evidence pointing to the accused person was mainly by PW1, PW2, PW3 and PW5. Some of the rest of the witnesses also, albeit sparingly, testified about the accused person. PW1 was aged 13 years and after a *voir dire* examination he gave an unsworn testimony. He narrated the twin events where the accused person assaulted the deceased with a stick and a knife respectively. He testified that although the incidents occurred when there was ample moonlight and one could clearly see with ease he further carried a D-Light lamp which was quite bright. He then saw the attacker without any difficulty. PW1 knew the accused person. Although the accused person did not hail from the village, he was a frequent passerby who passed through their home as he visited PW4. PW1 therefore knew him physically and even by his voice. That is why when PW1 heard the deceased exchanging words outside the house he definitely knew that the other person was the accused person. When PW1 went out of their house, he truly met the accused person and his father (the deceased). He also saw the accused person armed with a knife tucked on the waist and stick. He saw the accused person hit the

deceased with the stick before he left the stick behind and fled towards the main road.

15. After a while PW1 again saw the accused person return to their home. PW1 still had his lamp on. This time round the accused person spoke in Kiswahili as he demanded his stick from the deceased. It was then when PW1 saw the accused person cut the deceased with a knife on the forehead and fled.

16. PW2 also knew the accused person physically and would recognize his voice as well. Infact the deceased suspected an affair between the accused person and PW2. Likewise, PW2 readily recognized the voice of the accused person when she heard him engaged in an exchange with the deceased outside the house. PW2 had also seen the accused person pass by their homestead on his way to PW4 while singing or talking and was familiar with his voice. The deceased also told PW2 that he had been hit by the accused person.

17. Like PW1 and PW2, PW3 as well knew the accused person as he regularly saw him passing by their homestead. She would also recognize his voice. PW3 saw the accused person when he first exchanged with the deceased as she followed PW1 out of the house. She saw the accused person holding a stick with a knife tucked on the waist. When the deceased was cut on the head PW3 asked him what had happened and the deceased told her that it was the accused person who had cut him.

18. PW5 received the deceased who was accompanied by PW1 as he went to the police station to report the incident. PW5 stated that the deceased told her that he had been attacked and injured by the accused person herein. The Investigation Diary produced as Exhibit 3 is clear on the issue. The deceased gave the name of his assailant as the accused person herein. The need for a witness who recognizes an assailant to readily give the name was so stressed by the Court of Appeal in **Simiyu & Another vs. Republic (2005) 1 KLR 192**.

19. PW1 was hence the sole eye-witness in this case. In such an instance and given that the identification of the assailant is contested this Court is under a legal duty to weigh the evidence of PW1 with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence on recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under: -

It is trite law that where the only evidence against a defendant is evidence of 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 conviction.

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

20. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

21. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows: -

On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...

22. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night: -

We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.

23. By juxtaposing the evidence of PW1, the defence and the law, this Court finds and so hold that the prevailing conditions and circumstances favoured a positive recognition of the accused person as the one who attacked the deceased. The accused person stated in his defence that he indeed met the deceased as he was with PW4 shortly before he was attacked and that the deceased abused him and PW4. However, PW4 did not state that the deceased abused the accused person or him when they met. There is no doubt that the accused person, PW4 and the deceased met at the scene. It is also clear that the accused person hit someone with a stick. The totality of the defence is that it is not holding and is for rejection as the accused person was rightly placed at the scene by PW1.

24. There is also the evidence of PW2 and PW3. Although PW2 and PW3 did not see the accused person physically they contended that they recognized his voice as he exchanged words with the deceased. The conditions to be satisfied for the credibility of voice recognition evidence were discussed by the Court of Appeal in **Malindi Criminal Appeal No. 27 of 2016 Safari Yaa Baya vs. Republic (2017) eKLR** as follows, that: -

(a) It was the accused person's voice;

(b) The witness was familiar with it and recognized it;

(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

25. The Court of Appeal had also previously held in **Karani vs. R (1985) KLR 290** and **Choge vs. R (1985) KLR 1** that just few words like 'break her legs' sufficed.

26. PW2 and PW3 testified that they regularly saw the accused person pass through their home. He used to talk as well as sing and that his voice was well known to them and were familiar with the voice and able to recognize it with ease. Both stated that they were not mistaken at all on the voice of the accused person. After all there was suspicion that PW2 and the accused person had an affair. Conversely, the accused person did not state in his defence that he talked at the scene. By weighing the evidence of PW2 and PW3 against that of the accused person and in line with the law, I am satisfied that PW2 and PW3 positively recognized the voice of the accused person and also placed him at the scene.

27. There was another aspect of identification touching on dying declarations. PW2 and PW3 testified that they separately talked to the deceased who told them that it was the accused person who had hit him with a stick and cut him with a knife on the head respectively. **Section 33(a) of the Evidence Act, Chapter 80** of the Laws of Kenya provides as follows: -

33. Statements, written or oral or of electronically recorded 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 and 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.

28. Further, Courts have had several occasions and interrogated the above provisions. In **Pius Jasunga s/o Akumu vs= R (1954) 21 EACA 333** the predecessor of the present Court of Appeal had the following to say:-

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.....It is 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 EACA 9) and 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 the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.

29. The Court of Appeal in a later case of **Stephen Muturia Kinganga v. Republic (2013) eKLR** reiterated the foregone.

30. It is therefore settled that a dying declaration must be corroborated. I will now intently look at the evidence of PW2 and PW3 with a view to first ascertain whether the deceased made the alleged statements and if so whether the statements amounted to dying declarations and further if there was corroboration. Having gone through the evidence hereinabove there is no doubt that the deceased made the statements to PW2 and PW3 respectively. He first told PW2 that it was the accused person who had hit him with a stick and later told PW3 that it was still the accused person who had cut him with a knife. As to whether the statements were dying declarations, I also find no difficulty in finding that the statements by the deceased amounted to dying declarations. The statements squarely related to the events that eventually led to the death of the deceased. On corroboration, the evidence of PW1 perfectly corroborated the dying declarations.

31. This Court therefore finds and hold that the deceased made holding dying declarations to PW2 and PW3 which were duly corroborated. The evidence of PW2 and PW3 further placed the accused person at the scene of crime and further as the assailant.

32. The evidence of PW7 further corroborated that of PW1 who stated that the deceased was cut once on the forehead using a knife. PW7 found a single deep cut wound on the forehead caused by a sharp object which was approximately 12 cm which had fractured the skull and caused internal bleeding into the brain. That was the cause of the death of the deceased. The evidence of PW4 also placed the accused person at the scene.

33. This Court believes to have exhaustively dealt with the aspect of identification by recognition. The eye-witness account by PW1, the positive recognition of the voice of the accused person by PW2 and PW3, the acceptable dying declarations made by the deceased to PW2 and PW3, the evidence of PW4, the giving of the name of the accused person to the police as the assailant and the medical evidence on the cause of death taken in totality far much outweighs the defence. This Court therefore finds and hold that the recognition of the accused person as the assailant who attacked the deceased was not in any way in error.

34. The second ingredient is also proved in the affirmative.

(c) Proof that the said unlawful act was committed with malice aforethought:

35. **Section 206** of the Penal Code defines malice aforethought as follows: -

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

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(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.

36. The Court of Appeal has on several occasions dealt with this aspect. In the case of **Joseph Kimani Njau vs R (2014) eKLR** in concurring with an earlier finding of the Court, but differently constituted in the case of **Nzuki vs R (1993) KLR 171** held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

*It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions (1975) AC 55*). (emphasis added).*

37. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed: -

There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

38. By weighing the circumstances under which the incident occurred and the foregone legal discourse I do not find any evidence of malice

aforethought. There is no doubt that there was scuffle between the accused person and the deceased. Had the accused person intended to kill the deceased then he would readily have done so in the first instance, but he instead used a stick on the deceased. Even when the accused person returned to the homestead of the deceased he did not outrightly attack the deceased. He first asked for his stick and it was until when it as not forthcoming that he confronted the deceased. That is not a conduct commensurate with intent to kill someone. Since malice is not proved, the last ingredient is answered in the negative.

39. As the last ingredient is not proved, the offence of murder is not proved as against the accused person. The accused person is hence not guilty of the murder of the deceased. However, the deceased lost his life because of the actions of the accused person, but of course without any malice aforethought.

40. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed hereinbefore, this Court finds the accused person, **Stephen Marwa Nyamburi** guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and is hereby convicted accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 2nd day of May 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Mwita Counsel for the accused person.

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

Evelyne Nyauke – Court Assistant