



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL CASE NO. 5 OF 2013**

**REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS**

**VERSUS**

**GODFREY ICHINGWA LUKULU.....ACCUSED**

**JUDGMENT**

1. Godfrey Ichingwa Lukulu is charged with murder contrary to section 203, as read with section 204 of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence allege that on 16<sup>th</sup> day of January 2013 at Shirumba Location in Kakamega South District within Western Province he murdered Patrick Ingoi, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 2<sup>nd</sup> February 2013.

2. The hearing of the prosecution's case commenced on 10<sup>th</sup> July 2014, three witnesses testified.

3. The first on the stand was APC Lenard Opunyu who testified as PW1. He was the first police officer to whom the report of the alleged killing of the deceased was made to on 18<sup>th</sup> January 2013 by the Chief of Shirumba Location. He was informed that someone had killed the deceased. He and others proceeded to the home of one Aggrey where the accused was found hiding in a toilet. He was arrested and was removed to the AP's Camp at Matioli.

4. David Mmayi Imbali testified as PW2. He was the younger brother of the deceased. He received information on 16<sup>th</sup> January 2013 that the deceased had been stabbed with a knife. He went to check and found neighbours ferrying the deceased on a wheelbarrow. He was still alive and talking. The deceased told him that the accused had stabbed him. He was taken to Mukumu Hospital and died there while under treatment. He witnessed the autopsy on his body being done on 18<sup>th</sup> January 2013.

5. Rose Khamali Igoi testified as PW3. She was the widow of the deceased. She stated that the deceased left for work at about 8.00 AM on 16<sup>th</sup> January 2013. They met up at a church the same day at 2.00 PM. Towards the evening a woman came to her and told her that the deceased had been stabbed by the accused person. She tied him with a piece of clothing. He was then talking and mentioned the accused. They took him to Mukumu Hospital, where he died while undergoing treatment. She stated that the deceased and the accused were workmates and friends.

6. No other witnesses testified thereafter. The matter came up for hearing next on 12<sup>th</sup> November 2014 when the defence obtained an adjournment to 23<sup>rd</sup> March 2015. Come 23<sup>rd</sup> March 2015 the matter was adjourned again at the behest of the defence to 7<sup>th</sup> July 2015. The matter was adjourned on 7<sup>th</sup> July 2015 on the application of the state. The state caused other adjournments on 10<sup>th</sup> February 2016, 11<sup>th</sup> October 2016, 1<sup>st</sup> February 2017, 15<sup>th</sup> June 2017, 26<sup>th</sup> February 2018, 26<sup>th</sup> April 2018, 18<sup>th</sup> July 2018 and 21<sup>st</sup> November 2018. The court marked the adjournments by the state on 16<sup>th</sup> April 2018 and 18<sup>th</sup> July 2018 as the last. On 6<sup>th</sup> March 2019, the state, through Mr Ng'etich, closed its case and invited me to rule on whether or not the accused ought to be put on his defence.

7. What I am required in law to do at this stage is to decide whether to put the accused person on his defence or not. In other words, I am required to determine whether a *prima facie* case has been established against the accused to warrant putting him on his defence. What amounts to a *prima facie* case was stated in *Ramanlal Trambaklal Bhatt vs. R* (1957) EA 332 as one in which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation was offered by the defence. See also *Director of Public Prosecutions vs. Geoffrey Mukonza Mwangangi* [2018] eKLR and *Frankline Muthoka Mumo vs. Republic* [2019] eKLR.

8. The elements of the offence of murder as defined in section 203 of the Penal Code are the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought. From the material before me there is *prima facie* proof that the deceased in fact he died in hospital as testified by his brother PW2 and his widow PW3. On

cause of the death, no medical evidence was presented and therefore there is no evidence on what caused his death. On the role of the accused in the possible causation of the deceased's death, I do note that no eyewitnesses testified. PW2 and PW3, however, testified that the deceased, before he died, had mentioned to them that it was the accused who had stabbed him. The only material therefore linking the accused to the deceased's death is the alleged dying declaration made to PW2 and PW3.

9. The principles governing dying declarations have been stated in a number of cases. I shall refer to only two of them, *Choge vs. Republic* [1985] KLR 1 and *Republic vs. Yiende* [1990] eKLR. In *Choge vs. Republic* (supra), the Court of Appeal said:

*“The general rule 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 consideration to tell the truth. 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.”*

10. In *Republic vs. Yiende* (supra), the High Court said of dying declarations:

*“... Any statement made by a deceased is admissible as a dying declaration if it is established that it was made by him when he was in immediate expectation of death and had lost every hope of living ... it is not required in law, that there must be corroboration of a dying declaration. There is a need for exercising caution though before a conviction is based solely on it. A dying declaration is the weakest of all evidence. It must be remembered that it is made in the absence of the accused and is not subjected to cross-examination.”*

11. The test is that the deceased at the time of making the declaration was in extremity or immediate expectation of death. It is, however, considered to be weak evidence in the sense that it is made in the absence of the person allegedly responsible for the death, who would, in any event, not have the opportunity to cross-examine the deceased on his statement.

12. From the facts that have been placed before the court by the three witnesses who testified, I cannot tell whether or not the statement made by the deceased to PW2 and PW3 amounted to a dying declaration. Firstly, none of the witnesses told the court anything about the condition of the deceased, not even about the nature of the injuries that he had sustained. His state of mind or his mental condition at the material time cannot be assessed. It is stated that he was admitted at the Mukumu Hospital on 16<sup>th</sup> January 2013 where he is said to have had succumbed during treatment. It is not stated exactly when he died, and after how long since the assault. Without evidence on his condition, state of mind and when he died precisely, it is difficult to tell whether the statement was made in extremity or in immediate expectation of death or after the deceased had lost all hope of living. I cannot therefore say that the same amounted to a dying declaration. It would be insufficient to convict on the basis of the said statement. I would be dangerous and unsafe to rely on it.

13. The standard of proof in criminal cases is put at beyond reasonable doubt. The prosecution was required to establish beyond any shadow of a doubt in this case that the death of the deceased herein arose directly from an act or omission on the part of the accused. It would only be after that is established that the accused can be called upon to give an account. As the prosecution has not established any connection between the accused and the death of the deceased, except for the statement that I have found dangerous and unsafe to rely on, I do not have before me material upon which I can convict the accused were he not to offer any explanation. I am not satisfied that a *prima facie* has been established to warrant the accused being be put on his defence.

14. That being the case, I shall accordingly find the accused not guilty and acquit him under section 306(1) of the Criminal Procedure Code, Cap 175, Laws of Kenya, of the charge of murder of Patrick Ingoi contrary to section 203, as read with section 204 of the Penal Code. He shall be set free unless he is otherwise lawfully held.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14TH DAY OF JUNE 2019**

**W MUSYOKA**

**JUDGE**