



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER CASE NO. 7 OF 2013

REPUBLIC.....PROSECUTOR

V E R S U S

DENNIS MUCHIRA MUCHIRI.....ACCUSED

JUDGMENT

1. The accused person Denis Muchira Muchiri (to be referred to herein as ***“the accused”***) is charged with murder contrary to ***Section 203 as read with Section 204 of the Penal Code***. It is alleged that the 1/7/2011 at Karikoine Village Njuku sub-Location, Kirima Location in Kirinyaga East District within Kirinyaga County jointly with others not before court murdered Evanson Munyi Muchiri.

The accused person denied the charge.

2. The facts of the case are that the accused and deceased are step-brothers. On 1/7/2011 the deceased raised an alarm at night and went to the home of his neighbour Anthony Kariuki Ngare (PW 3). On opening the door PW-3- saw the deceased on the ground and he had serious injuries on the head, face and other parts of his body. PW-3- called his mother who on seeing the deceased she started screaming and attracted neighbours to the scene. The deceased in the presence of neighbours stated, ***“Muchira why did you cut me like this, when I recover I will cut you like a goat.”*** Neighbours raised funds and had him escorted to Kerugoya Hospital where he was admitted. While at the hospital, the deceased was visited by his two brothers Jackson Kaburi Muchiri (PW-1-) and Stephen Kabiru Muchiri. The deceased informed his two brothers that he was attacked by Muchira his Stepbrother who was with three other people. The deceased was taken to theatre but he did not recover, he succumbed to the injuries. A Postmortem was done Doctor Andrew Kanyoni Gatangi (PW-8). He formed the opinion that the cause of death was severe head injury caused by a sharp object leading to depressed skull and brain damages. The doctor found that the deceased had several cuts on the head and other parts of the body. He produced the postmortem form as exhibit -1.

3. The accused who was a step-brother of the deceased was identified as the one the deceased mentioned in his dying declarations.

4. In the meantime the accused who had disappeared was spotted in Mombasa by Fredrick Muchiri and Kenneth Kabore Kababii. They reported to the police at Changamwe. PW-6- No. 78120 P.C. Kandia made arrangements and managed to arrest the accused. He later escorted him to Kianyaga Police Station. The accused was examined by Doctor Thuo, a Psychiatrist at Embu Level -5- Hospital who found that he was fit to stand trial. Based on the dying declarations made by the deceased implicating the accused, the accused was charged with this offence.

5. In his sworn defence the accused stated that he was in Mombasa on the date the deceased was injured.

The prosecution called ten witnesses.

Summary of the evidence by the Prosecution witnesses.

6. PW 1 Jackson Kaburi Muchiri the brother of the deceased and step-brother of the accused, was called at 1 a.m and was informed that the deceased had been injured. He instructed the caller to take him to hospital and he followed thereafter. He met the deceased who narrated that he was attacked by 4 people among them the accused. That the accused had earlier called him and asked him to open the door and when he refused they forced their way and attacked him using pangas. He also informed him that the previous Sunday the accused and their father had warned the deceased to leave the shamba lest they kill him. They went to report to the police and on coming back found deceased being taken to theatre where he later died.

7. PW 3 the Anthony Kariuki Ngare neighbour of the deceased and the accused. The deceased had knocked on his door and upon opening saw that he was lying down with cuts on his head, face and others parts of his body. He stated; ***“Muchira, why did you cut me like this, when I recover I cut you like a goat”***. Together with other neighbours, they took the deceased to hospital. Later the following day he but was informed he passed on. Upon being cross-examined by the court he stated that there was no other person called Muchira in their village.

8. PW 4, Charles Gachoki Kiraria was called by PW 3 and saw the deceased with several cuts. The deceased stated that Muchira had cut him together with 3 others and he stated, if he recovers, he will cut Muchira like a goat for having cut him and causing him much pain. He did not know any other Muchira in the locality except for the accused but during cross-examination he confirmed that he knew other people called Muchira in Gichugu as the name is common. They ferried the deceased to hospital and later reported to the police.

9. PW 5 James Muchiri Gachebe testified that on that night, he heard scream in kikuyu ***“why are you killing me”***. He went near the deceased’s house and found it was broken into and at the house of Lucy, saw the deceased sitting down with several cuts. Upon being queried, the deceased said it was Muchira and if he recovered he would cut him like a goat. He did not know which Muchira he was referring to but he knew there was dispute between the deceased and his father.

10. PW 7 Stephen Kibiru Muchiri the brother of the deceased and step-brother of the accused, was informed that the deceased had been injured. The following day, he went to hospital and met deceased who stated he saw and recognized the voice of Muchira their step-brother as one of the attackers. They went to report to the police station and later the deceased passed on. The deceased and their father had a dispute over coffee and on the previous Sunday their father had threatened the deceased.

11. PW 8 Doctor Andrew Kanyoni Gatangi testified that the cause of death was severe head injury which resulted in brain damage.

12. PW 9 Doctor Joseph Thuo, a Psychiatrist, examined the accused and found that he was fit to stand trial. He produced the report a **exhibit -2-**.

13. PW 10 Inspector Andrew Machemo, received the report while at Kimunye Police Post. He visited the scene and found that there was a hole at the bedroom of the house of the deceased. Some timber had been removed to suggest that the attacker could have gained entry through the hole. He entered the house and found the beddings were soaked in blood. The deceased had by then been taken to hospital. He noticed drops of blood from the house of the deceased to the home of his neighbor Anthony Ngure Kariuki. He then proceeded to Kerugoya Hospital to check on the condition of the deceased but found that he had already been taken to the theatre. Later in the evening he was informed that the deceased had passed away.

14. I have considered all the evidence adduced and the submissions. There are two issues for determination which are:-

a) Whether it is the accused who jointly with others caused the death of the deceased. Actus reus.

b) Mensrea.

15. The evidence tendered by the prosecution witnesses is that the deceased made dying declarations that it is the accused who inflicted the injuries. Indeed PW-1- and PW-7- who visited the deceased in hospital testified that the deceased informed them that it is the accused who inflicted the injuries on him. PW-1- and PW-7- had no doubt that the deceased referred to the accused when he mentioned that Muchira who is his step-brother inflicted the injuries on him. From the evidence, it is clear that PW1 & PW-7- had not met other witnesses by the time they met the deceased in hospital. I find that it is the deceased who made the dying declaration and implicated the accused.

16. The testimony of PW1 & 2 was well corroborated by the witnesses who met the deceased on that material night soon after he had sustained the injury. These witnesses are, PW-3-, PW-4- and PW-5-. None of these witnesses expressed doubts that ***“Muchira”*** who the deceased referred to was the accused in this case. The propensity of their evidence is that the deceased mentioned the accused as the person who caused him the injuries and deceased said he would cut him like a goat when he recovers.

17. The evidence of PW-1- & PW-7 shows that the deceased gave details that he was called by the accused who told him to open the door. The deceased said he was attacked by four people and the accused was one of them. The deceased could not have failed to recognize the voice of the accused who was his brother. I also note that the attackers left the deceased for dead and would not have expected him to live to identify his assailants. That being the case the attacker could not have concealed himself or his voice. I agree with the submissions by the State that the deceased did recognize the accused by his voice and was therefore placed at the scene of the murder.

18. Though the defence submits that PW -1-, 2 and -7- were brothers of the deceased. There is independent evidence by PW-3-, PW-4- and PW-5- who corroborated the testimony of PW-1-, 2 & 7 that the deceased had implicated the accused.

19. The contention by the defence that the context in which the name Muchira was mentioned was different does not change the strong evidence by all the witnesses that the person mentioned was Muchira and PW-1- & 7 crowned it all that the Muchira mentioned was the accused, a step-brother to the deceased. I find that there were no glaring inconsistencies on the evidence by the witnesses as submitted by the defence.

20. The defence submits that evidence by PW-1- & -PW -7- is contradictory. This is based on the fact that PW-1- admitted that he had added the name Denis to his statement and deceased had not mentioned Denis. Again that PW-1- had said that accused had threatened deceased a week before his death. PW-5- stated there was an incident that particular day but Denis was not involved. This bit of submission is not in the evidence of PW-5- and I disregard it.

21. On the issue that PW-1- added Denis, this does not weaken evidence of PW-1- because we have unshaken evidence by PW-7- that deceased mentioned Muchira who is his step-brother. In any case PW-1- testified that the Doctor told them to go and report to the police to come and hear what the deceased was saying. PW-1- said they went to Kerugoya, Kianyaga Police stations and Kimunye. PW 10 corroborates the testimony of PW-1- & -2- that he accompanied them to the hospital, and he found he had been taken to the theatre. There are no contradictions in the testimony of PW-1-. It is not expected that witnesses give testimony which is the same word for word. As such minor contradictions which do not change the probative value evidence must be ignored.

22. The defence submits that PW-10- did not conduct investigations. What PW -10- did were investigations. There is no gap as PW-6- testified as to the report made at Changamwe and he arrested the accused and brought him to Kianyaga Police Station. On the issue of identification and the **R –v- Patrick Mwirigi (2014) eKLR** cited. The PW-1- said deceased recognized the voice not appearance. The authority is distinguishable. The deceased told PW-1- that accused told him to open and he refused. They then broke inside and attacked him. Deceased could not fail to recognize the voice. The declarations were corroborated as PW-10- found the house was broken into and the bed was soaked with blood.

23. I find that the deceased made dying declarations that it is the accused who injured him. A dying declaration is admissible to prove a charge of murder if it is proved that it was made by the deceased at a time he thought or expected that death was imminent.

24. The defence relies on **Choge –v- R (1985) 2 KAR** in the case the court stated that the law in Kenya does not require a condition of admissibility that the deceased had ***“a settled hopeless expectation of death. There need not be corroboration in order for a dying declaration to support a conviction but exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction on the declaration of a deceased person. -----. The declaration though admissible could not be solely relied on to obtain a conviction and could only be added to other evidence which incriminated Choge”.***

25. These are the principles for admission of dying declarations. In this case the evidence is overwhelming and well corroborated that the deceased recognized the accused as the person who fatally wounded him.

Section 33(a) of the Evidence Act Cap 80, Laws of Kenya provides at relevant part as follows:-

Statements, written or oral, of admissible facts made by a person who is deadare themselves admissible in the following cases:-

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 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.

In David Ngugi Gichuru v Republic [2011] eKLR

The Court of Appeal stated;

It is not in dispute, and Mr. Monda readily conceded that no witness saw the appellant kill the deceased as indeed none of the witnesses was at the house of the deceased at the relevant time..... The main evidence against the appellant was that of the dying declaration of the deceased given to Boniface, Peter and Isaac long before the deceased died but given immediately the deceased was found on the ground along the road.....

He administered first aid to the deceased and conversed with the deceased. That is when the deceased told him in Kikuyu what would be translated into English as *“Even if I die it is a man called Ngugi who has killed me. He was talking about the shamba last night.”* That dying declaration was made almost immediately after the attack. Boniface had no time to concoct it. Equally, when Peter found the deceased on the ground, he asked Boniface to call Isaac. When Isaac was taking him to Kiambu District Hospital, the deceased again told Isaac that it was the appellant who had cut him. These were utterances made when events were still fresh, in the mind of the deceased and the deceased had just suffered the attack upon him. In our view, he made the declaration.....

On the manner of receiving and considering evidence of dying declaration, the Court proceeded to state;

In the case of Pius Jasanga s/o Akumu v. R (1954) 21 EACA 331, the predecessor to this Court stated inter alia:-

“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 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 and another (1943) 10 EACA 9, Re Guruswani (1940) Mad 158, 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 of cross examination, unless there is satisfactory corroboration.”

In **Philip Nzaka Watu v Republic [2016] eKLR** referred to by the prosecution, the Court of Appeal stated;

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. This Court expressed itself as follows in CHOGE V. REPUBLIC (supra):

“The general principle 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 considerations to tell the truth. In Kenya, however the

admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. 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.”

..... In her words, before the deceased died, he told her:

“Bye, I am going. I am dying because I have been stabbed. I have been stabbed by Nzaka.”

The declaration was specific enough to identify the appellant and the manner in which he had attacked the deceased, i.e. by stabbing him.

26. In this case immediately after the attack before the deceased was taken to hospital he stated that it was Muchira who had cut him. He had recognized the accused since he had called him **asking him to open the door and when he refused they forced their way and attacked him using pangas. The deceased gave the name Muchira and repeated it before he was taken to the theatre. The declaration was specific and there is no doubt who Muchira was. The dying declaration is admissible.**

27. The deceased said the accused Muchira is the one who attacked him. He said –

“Muchira why did you cut me like this, when I recover I will cut you like a goat.”

28. It was the defence case that the deceased only mentioned ‘**Muchira**’. The court of Appeal in **Philip Nzaka Watu –v- R Cr. Appeal No. 29/15** where the deceased in a dying declaration stated that “**Nzaka**” stabbed him, the Court upheld the conviction and stated that, a dying declaration must be specific enough to identify the appellant and the manner in which he was attacked. The deceased in this case said it was Muchira like the case of Philip Nzaka. So the fact that the deceased gave the word “**Muchira**”, is not a ground to reject the dying declarations.

29. There is strong circumstantial to show that accused is the one who attacked the deceased. The accused gave defence stating that he was in Mombasa when the offence was committed. However when he confronted with evidence that he had recorded a statement, he admitted that he recorded it stating that on 1/7/11 he was preparing to go back to Mombasa and his father did not want him to go. During Re-examination of accused by his Advocate the accused stated, **“that he was normal when he recorded the statement. The statement I read it when I was given the statement. The way it is written that I was to go back it is what is true.”** I returned that day in the evening at 6.00 Pm. This shows that the accused was in Kirinyaga on the material day. To add to this evidence of PW-6- who arrested the accused after he was informed that he had committed murder and fled to Mombasa. The action by accused to flee to Mombasa is relevant as is indicative of guilty mind and maybe relied upon as evidence that corroborates the prosecution case. This was stated in **Bukenya Patrick & Another –v- Uganda Cr. Appeal No. 151/01 S. C. Uganda** which was followed with approval in the case of **Philip Nzaka Watu –v- R(supra)**.

30. The accused was not truthful when he said he was in Mombasa. His defence of alibi was dislodged. The accused stated that he did not attend the deceased’s burial and yet he said they had not disagreed. The accused having admitted that he was in Kirinyaga, on the material day and nobody knows when he left, the reasonable conclusion is that he left after fatally attacking the deceased.

31. I find that the prosecution has adduced sufficient evidence to prove that the accused is the one who fatally attacked and injured the deceased.

The second issue is mens rea.

Section 203 of the Penal Code

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

Section 204 of the Penal Code

Any person convicted of murder shall be sentenced to death.

Section 206 of the Penal Code:-

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.

32. The incidence of malice aforethought has been considered by the Court of Appeal in binding decisions. Malice aforethought connotes criminal liability which requires that there be mens rea and actus reus in order for the offence charged to be proved.

33. The injuries inflicted on the deceased shows that the injuries were grievous harm. The accused knew or ought to have known that the injuries would result in the death of deceased. The injuries as testified by PW-7- Dr. Karomo were –

- **Multiple cuts on the head.**
- **Cut on the nose**
- **Multiple cuts on the fingers.**
- **Laceration on both hands.**

34. The Doctor stated that the injuries were severe and resulted in the death of the deceased.

35. There was evidence that the accused and his father had threatened the deceased. PW-1- stated that there was a land dispute. He further testified that deceased told him and his brother that he had received threats to his life from the accused and their father. He said the dispute emanated from a shamba the deceased was residing in. PW-7- testified that the accused and their father had threatened the deceased with death because he had allegedly stolen coffee. This threat was on Sunday before the incident. PW-7- was given the information by the deceased. Malice aforethought implies pre-meditation or an intention to cause death or grievous harm to any person. Under **Section 206 Penal Code** which defines malice aforethought, the key ingredients are, intention to cause death or to do grievous harm, knowledge that the act or omission causing death will probably cause death to the person whether that person is the person actually killed or not, an intent to commit a felony and an intention by the act or omission to facilitate flight of the person who committed a felony or attempted to commit a felony. The prosecution has proved that the accused had threatened to kill the deceased. The accused in his defence said his father had told him not to leave for Mombasa.

36. The threat to kill deceased was executed. The injuries caused were severe and resulted in death. I find that the prosecution has discharged the burden to prove that there was mens rea.

37. I have considered the defence of the accused. I have stated that the prosecution proved that the accused was not truthful as he had recorded a statement saying he was in Kirinyaga and when confronted he said he left at 6.00 Pm. The defence is not truthful. I find that the defence of alibi was dislodged by the prosecution and more so by the dying declaration in which the deceased first called him by his name and he recognized his voice.

38. I find that the accused lied in his defence. I find that there is sufficient evidence which disapproves the defence of the accused.

39. In conclusion, I find that the prosecution has adduced sufficient evidence which has proved the case against the accused beyond any reasonable doubts. I reject the defence of the accused. I find the accused person guilty of the offence of murder contrary to **Section 203 of the Penal Code** and I convict him accordingly.

Dated at Kerugoya this 13th day of June 2019.

L. W. GITARI

JUDGE