



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[CORAM: MRIMA, J.]

CRIMINAL CASE NO. 23 OF 2016

REPUBLIC..... PROSECUTOR

VERSUS

JOSEPH MARWA GASIARI.....ACCUSED

JUDGMENT

1. **Peter Mataiga Gasiara**, the deceased herein, was shot in the night of 14/10/2016. He was inside his hotel at Kegonga town in Kuria East Sub-County within Migori County. He bled profusely and was rushed to hospital. He however succumbed to the injuries as he underwent treatment at the Migori County Referral Hospital.
2. The matter was reported to the police. Investigations were commenced which culminated with the arraignment of the accused person before Court facing the information of the murder of the deceased. The accused person was jointly charged with others not before Court. The accused person and the deceased were siblings. The accused person was the first born while the deceased was the third born.
3. The accused person denied the information and the case was set for hearing. Five witnesses testified in support of the information. The wife of the deceased testified as **PW1**. She was one **Truphena Atsulu Anyonzi**. Another brother to the deceased testified as **PW2**. He was **Samwel Rioba Gasiari**. **PW3** was **Soso Robert Chacha** who was the Assistant Chief of Kegonga Sub-Location, Nyabasi Location in Kuria East Sub-County. **No. 232903 C.I. Capis Otieno** the DCIO Kuria East testified as **PW4**. He was the investigating officer. **Dr. K'Ogutu Vitalis Owuor** who conducted the post mortem examination on the body of the deceased testified as **PW5**. For purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.
4. The prosecution's case was centred on a dying declaration by the deceased. It was **PW3** who led that evidence. **PW3** testified that on 14/10/2016 at around 08:00pm he was walking back to his home. He suddenly heard gunshots from the direction of Kegonga town. He then saw people running away. He walked back to the town. He saw a group of people gathered and approached them. He learnt that the attackers had fled. He saw the deceased having been injured in the stomach. He immediately called some Administration Police Officers from the nearby station who responded. They took over the scene. There was another person who was also injured. **PW3** rushed the two injured persons using a vehicle to Kehancha Police Station and then to Kehancha District Hospital.
5. There were five people in the vehicle. **PW3** further testified that the deceased told him that he had been shot by his brother. The deceased stated that the brother who had shot him had also killed his other brother's cows sometimes back and the matter was reported at Ntimaru Police Station. After taking the two injured persons to hospital **PW3** returned to the scene before proceeding home. He later recorded his statement with the police.
6. **PW4** was called and informed of the incident by the Deputy OCS Kehancha Police Station. That was around 10:50pm. **PW4** rushed to the scene. He found the Deputy OCS but the victims had already been rushed to hospital. He went to Kehancha District Hospital where he found two people who were allegedly injured in the incident. The deceased had long been rushed to Migori County Referral Hospital due to his condition. He proceeded to the said hospital and found the deceased already dead. He saw a gunshot wound on the abdomen.
7. **PW4** commenced investigations. He recorded statements from potential witnesses and re-visited the scene. He gathered that it was the accused person who fitted the description of the brother which **PW3** talked of. The deceased had been charged in *Kehancha Senior Principal Magistrate's Court Criminal Case No. 782 of 2016*. The accused person was the complainant in that case. The deceased was charged in connection with the shooting of the accused person's four cows.
8. **PW4** also witnessed the post mortem examination of the body of the deceased on 21/10/2016 at Migori County Referral Hospital Mortuary. It was conducted by **PW5**. **PW2** identified the body of the deceased prior to the exercise. A Post Mortem Report was prepared and produced as an exhibit. **PW5** observed a single bullet shot wound on the left upper abdomen at the mid clavicular line but just below the peritonium. The bullet had exited at the back just left to the T11 vertebra. Internally, the aorta had been shattered and the stomach perforated.

PW5 opined that the cause of death was hypovolumic shock due to internal haemorrhage caused by a bullet shot.

9. PW3 asked the accused person to report at the Police Station on 16/10/2016. The accused person obliged. PW4 arrested him in connection with the death of the deceased. PW4 escorted him to the Migori County Referral Hospital where the accused person was mentally examined and certified fit to stand trial. The accused person was subsequently charged.

10. At the close of the prosecution's case, the accused person was placed on his defence. He opted to give unsworn testimony and also called four witnesses. They were the wife of the accused person one **Mary Gati Marwa (DW1)**, the mother of the accused person one **Nyairabu Gasiani (DW2)**, a neighbour and a work mate to the accused person one **Thomas Wambura Nyamohanga (DW3)** and a son to the accused person one **Chacha Stephen Marwa (DW4)**.

11. The accused person denied committing the offence. He also denied being at the scene of crime. He contended that he was at his home in Kibarote village whereas the incident occurred at Kegonga town. He posited that the two places are quite distant from one another. He further contended that he never disappeared from his home and co-operated with both the local administration and the police. The accused person denied any grudge between the deceased and himself. He explained that out of family discussions and with a view to foster peace in their family he even terminated the criminal case against the deceased long before the incident. The accused person could not understand why he was implicated in the murder of his brother.

12. The defence witnesses buttressed the accused person's position. They wondered why the accused person had been charged over the murder of the deceased.

13. At the close of the defence case the Defence Counsel **Miss Okota** filed elaborate and well researched submissions. The prosecution relied on the evidence on record.

14. From the foregoing, this Court is now called to find if the ingredients of the offence of murder have been proved. 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: -

15. There is no doubt that the deceased died. That was attested to by all the prosecution and defence witnesses. The first limb is hence answered in the affirmative.

16. As to the cause of the death of the deceased, PW5 produced a Post Mortem Report he personally filled after conducting the autopsy. The report opined that the possible cause of the death of the deceased was hypovolumic shock due to internal haemorrhage caused by a bullet shot. 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: -

17. The accused person denied killing the deceased. The evidence pointing to the accused person was mainly by PW3 who relied on a dying declaration by the deceased. As such, the starting point is the law. **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.

18. 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.

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

20. There are four ingredients of a dying declaration. They are: -

(i) The statement must have been made by the deceased.

(ii) The statement must refer to the accused person.

(iii) The statement must amount to a dying declaration. That is to say a Court must carefully weigh the statement against Section 33(a) of the Evidence Act.

(iv) The statement must be corroborated.

21. I will now look at the evidence alongside the foregone. According to PW3 the deceased told him that he had been shot by his brother which brother had also killed his other brother's cows sometimes back and the matter reported at Ntitaru Police Station. That is the statement. From the evidence it is possible that the deceased made the statement to PW3. But did the statement refer to the accused person? First, the name of the brother was not given. Second, it was alleged that the brother who had shot the deceased had also killed two cows belonging to his other brother and the matter reported at Ntitaru Police Station.

22. PW4 testified that the accused person had reported the unlawful shooting of his cows. That, upon investigations the deceased was found culpable and was charged in *Kehancha Senior Principal Magistrate's Court Criminal Case No. 782 of 2016*. Given that the accused person was the complainant in the criminal case then he could not be the same person who had killed the alleged cows. There is therefore a possibility that the deceased referred to another of his brothers.

23. I hence find that although the deceased made a statement on who had shot him, there lingers a considerable amount of doubt as to whether the statement referred to the accused person. That aside, even if the statement referred to the accused person herein and also amounted to a dying declaration the issue of corroboration is lacking. PW3 stated that there were five people in the vehicle as he took the injured persons to hospital. Indeed, the deceased spoke in the presence of those people. There is no evidence to suggest that the rest of the people in the vehicle did not hear what the deceased said. Apart from the deceased the other people who were in the vehicle did not die. However, none of them testified. There were no explanations to that state of affairs. Needless to say, those people were crucial witnesses. In that case the presumption in **Bukenya & Others versus Uganda (1972) E.A. 594, Kingi versus Republic (1972) E.A. 280** and **Nguku versus Republic (1985) KLR 412** arises.

24. As the statement of the deceased did not explicitly refer to the accused person, the nexus between the shooting of the deceased and the accused person as the perpetrator is missing. The upshot is that the second ingredient is not proved.

25. Having so found, the information of murder against the accused person is not proved. The accused person is found **NOT GUILTY** of the murder of his brother **Peter Mataiga Gasiara**. He is hereby acquitted. He shall forthwith be set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of October 2019

A. C. MRIMA

JUDGE

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

Miss. Okota 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