



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 81 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS KAILITHIA M'MUNORU.....ACCUSED

J U D G M E N T

1. **JULIUS KAILITHIA M'MUNORU** (“the accused”) has been charged with the offence of murder contrary to *Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya*. The particulars of the offence being that, on the 18th day of June 2012, at Ikongolo Village, Kabachi location of Igembe North District within Meru County, the accused murdered **PHILIP ITAARI** (“the deceased”). He pleaded not guilty and the prosecution called four witnesses to establish its case.

2. **PW1 Njema Kathau** testified that the deceased was her son. That on 15th June, 2012 at about 9 pm, she was at her home with her children the deceased included. While in the kitchen, she heard people call the deceased to come out of his house. She peeped outside and recognized two people who had visited her son as the accused and one Jacob Kariti (now deceased). After the deceased had come out, the two left the compound with the deceased and headed towards a forest that was nearby. She went to call **PW2** who accompanied her to Nkaya forest. When they came near the forest, they heard the accused and his accomplice demand money from the deceased who denied having any.

3. Soon after, the accomplice cut the deceased on his hands and stabbed him on the nose with a knife. The accused wrestled the deceased to the ground and stabbed the deceased with a knife on the head and on the left side of the abdomen. She testified that, she and **PW2** went and fetched a blanket with which they covered the deceased. That the deceased told them that he could not move since the accused and his accomplice had injured him badly.

4. The next day, **PW1** and Salome Kaari (PW2) went to report the incidence to the Chief who collected money from well-wishers which they used to take the deceased to Meru Level 5 Hospital where he was admitted but succumbed to his injuries after three.

5. **PW2 Salome Kaari** was a neighbor to **PW1** and the deceased. On the material day, she was at home with her parents when **PW1** called her. **PW1** told her that the accused and his accomplice had called the deceased and had taken him to the forest. She accompanied **PW1** to a place near the forest and hid there. They then heard the deceased scream out of pain. They slept at **PW1**'s house until the following morning.

6. The next day, they went to the Chief and reported the incident. The Chief accompanied them to the scene where they found the deceased with injuries on the hands, a stab wound in the eye, two cuts on his left wrist and an injury on the left side of the abdomen. The deceased told her that the accused and his accomplice were the ones who injured him. The Chief raised some money from those present and took the deceased to Meru Level 5 Hospital. She later learnt from **PW1** that the deceased had passed on.

7. **PW3 Dr Paul Wambugu** produced the postmortem report carried out on 26th June, 2012 by Dr. Gitari. He stated that the deceased had a cut wound with stitches over the right cheek, the right eye, the frontal area of the scalp and the right side of the forehead. There were no abnormalities internally. The cause of death was established to be excessive hemorrhage due to multiple cut wounds.

8. **PW4 No. 67304 PC Ochieng' Omburo** stated that this matter was investigated by No. 92427 PC. Dennis Odhiambo, now deceased. From the records, the mother of the deceased was the one who reported the incident on 21st June, 2012. There was no record on how the accused was arrested nor any visit to the scene of crime.

9. When put on his defence, the accused gave sworn testimony. He testified that he knew the deceased, **PW1** and **PW2** as they all came from the same area. That he was in custody for three months in Meru Prison for theft of Miraa having pleaded guilty to that charge on 18th May, 2012 in the **Maua CM Cr. No. 2715 of 2013**. He denied knowing Jacob, his alleged accomplice. He testified that **PW1**'s son, one Robert had burnt his house leading to a serious dispute between him and the deceased before his demise.

10. I have carefully considered the evidence on record. The accused is facing a charge of murder. The definition of murder as contained in **Section 203 of the Penal Code** gives rise to four ingredients of the offence which the prosecution must prove beyond reasonable doubt. These are:-

- a) **the fact of the death of the deceased;**
- b) **the cause of such death;**
- c) **proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person; and**
- d) **proof that the said unlawful act or omission was committed with malice aforethought.**

11. The law places the obligation on the prosecution to prove each of these ingredients of the offence beyond reasonable doubt. See **Okethi Okale and Others v Republic (1965) EA 555.**

12. On the fact and cause of death, **PW1** testified that the accused and his accomplice called the deceased from his house on the material night. The deceased accompanied them out of the homestead. He was found with serious injuries the following morning from which he succumbed. The post mortem report produced by **PW3** as **PEXh.1** indicated that the body had cut wounds with stitches over the right cheek, the right eye, the frontal area of the scalp and the right side of the forehead. The cause of death was established to be excessive hemorrhage due to multiple cut wounds. Accordingly, I am satisfied that the prosecution established the fact and cause of death to the required standard.

13. As regards the 3rd issue/ingredient, **PW1** told the court that on the material day at about 9pm, she was in at her home with the deceased when the accused and his accomplice called the accused out. She recognized the two with the help of moonlight. The two took the deceased out of the homestead. She and **PW2** followed them and she saw the accomplice cut the deceased on his hands and stab him on the nose with a knife. The accused wrestled the deceased to the ground and stabbed him with a knife on the head and left side of the abdomen.

14. **PW2** testified that, upon the request of **PW1**, she accompanied **PW1** to a place near the forest where she heard the deceased scream out of pain. The next day, when they went to see what had happened they found the deceased in the outskirts of the forest with injuries and he told her that the accused and his accomplice were the ones who had injured him.

15. In his defence, the accused stated that he was in custody for three months in Meru Prison for theft of Miraa that occurred on 18th May, 2012. That he had pleaded guilty to that charge in the **Maua CM Cr. No. 2715 of 2013**. However, he could not recall the date of sentencing.

16. Counsel for the accused submitted that there was contradiction in the testimonies of **PW1 and PW2**. The record shows that **PW1** testified that she saw the accused and his accomplice assault the deceased and that she and **PW2** spent the whole night with the deceased until the following morning when they sought the help of the chief. On her part, **PW2** testified that she only heard the deceased scream with pain from the edge of the forest. Due to fear, they went back and slept in the house of **PW1** until the following morning when they sought the assistance of the area chief.

17. Although there is this contradiction, one thing that is common and which the two witnesses were firm in their testimony was that, they went near the forest and heard the deceased scream with pain. Both were in agreement that the following morning, they sought the help of the chief and when they came to the scene, they found the deceased with serious injuries. They both told the court that the deceased was talking and he told them that it is the accused and the accomplice who inflicted those injuries on him. It is instructive that the deceased only died three days later in Meru level 5 hospital.

18. **PW1** was firm in her testimony that she saw the two people who fetched her son from his house that material night. She recognized them as the accused and one Jacob Kariti, the accomplice. She was able to recognize them from the full moon that night. The two people took the deceased away from the homestead and he was later found in the morning with serious injuries. That part of evidence remained unshaken.

19. Under **section 33 of the Evidence Act, Cap 80 Laws of Kenya**, a statement made in the nature of a dying declaration is admissible. In the case of **Philip Nzaka Watu v Republic [2016] eKLR** the Court held that: -

“Decisions of this Court abound on admission and reliance on a dying declaration. Suffice to mention only two, CHOGE V. REPUBLIC [1985] KLR1, KIHARA V. REPUBLIC [1986] KLR 473 and NELSON JULIUS KARANJA IRUNGU V. REPUBLIC, CR. APP. NO. 24 of 2008. Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence. 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. 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”.

20. I caution myself that reliance on a death declaration has its limitations. It is a statement that is untested and sometimes given in circumstances that a deceased is in either extreme pain or confusion. The deceased is usually unavailable to be cross-examined on that statement. In the present case, both **PW1 and PW2** told the court that the deceased informed them that it is the accused and the accomplice who had assaulted him. He died three days later. The deceased walked with the people who took him from his home all the way to the place of the incident. He had ample time to know and recognize them. He told both **PW1 and PW2** on this aspect corroborated each other.

21. In the present case, there was the issue of the discrepancy in the names appearing at pages 1 and 2 of the postmortem report. (**PEXh1**). At page 1, the body that was submitted for postmortem was that of **Phillip Itaare**, the deceased in this case. That exhibit showed that the body was identified by among others **Njema Kathau (PW1)**. At page 2 of that report, the doctor indicated the name as **Philip Gitari**.

22. I am not persuaded that these two names were of two different persons. The name Gitari at page 2 may have been occasioned by virtue of the community the doctor came from. Mr. Kiarie submitted that the doctor being a kikuyu, may have gotten the name Itaari wrongly and written it as Gitari. That is a likelihood. Accordingly, I am satisfied that the difference in the names at pages 1 and 2 of **PEXh.1** does not affect the finding that the body that was examined was that of the deceased in this case and is corroborated by the evidence of **PW 1 and 2** on the injuries inflicted on the deceased.

23. As regards the accused’s defence, he gave an alibi. He stated that he was in prison for three months from May, 2013 after pleading guilty to a charge of theft. He identified the case in which he was sentenced to three months as being the **Maua CM Cr. No. 2715 of 2013**.

24. I am alive to the fact that it is not for the accused to prove his innocence. The burden of proof at all times rests with the prosecution to prove its case beyond reasonable doubt. Be that as it may, when an accused faces a set of facts from the that points at him as the guilty party, it behoves him to give an explanation to exonerate himself from the same. The facts that are in the exclusive knowledge of the accused, should be put to the prosecution witnesses when those witnesses are testifying to give them an opportunity to either deny or confirm them.

25. In this case, the fact of the accused having bad blood between him and the family of **PW1** was in his own personal knowledge. This put to **PW1** when she testified. When **PW4** testified, the issue of the accused having been in prison for three months from May, 2013 was never put to him. That would have given the prosecution an opportunity to investigate the authenticity or otherwise of his alibi. In any event, the accused failed to tender evidence to prove that **Maua CM Cr. No. 2715 of 2013** existed and related to him. He feigned ignorance of the date of his sentencing in order to leave the court wondering whether or not by the date of the offence he was still in prison, if at all or not. I reject his defence as being an afterthought.

26. In this regard, I am satisfied that **PW1’s** testimony that remained firm and corroborated by **PW2** and the medical evidence, proved that it is the accused’s and his accomplice’s wrongful act that caused the death of the deceased.

27. On whether there was malice aforethought, **Section 206 of the Penal Code** provides that:-

“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)

(d)

28. The testimony of **PW1** was that she heard a large stone hit a yam and fall next to her premises. When she opened the window she saw the accused move towards, the deceased who was at the material time lying down. The stone must have hit the deceased and not the yam. The post mortem report produced by **PW3** as **PEXh.1**, indicated that the body had deep cut wounds with stitches over the right cheek, the right eye, the frontal area of the scalp and the right side of the forehead. The cause of death was established to be excessive hemorrhage due to multiple cut wounds. These were serious injuries and in inflicting them on the deceased, the accused must have intended to cause grievous harm.

29. Accordingly, I am satisfied that the prosecution has proved its case beyond any reasonable doubt. I find the accused guilty of the offence of the murder of **Philip Itaari** and convict him of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya**.

DATED and **DELIVERED** at Meru this 18th day of October, 2018.

A. MABEYA

JUDGE