**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 166 OF 2003**

**REPUBLIC............................................PROSECUTOR**

**VERSUS**

**JOSHUA MWORIA MWITI......................ACCUSED**

**J U D G M E N T**

[1] **JOSHUA MWORIA MWITI** ("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 13th day of October, 2003 at Kirwire Village, Ukuu sub location of Uruku Location, Meru Central District, within Eastern Province murdered Grace Karimi.

[2] The trial of the accused commenced in 2007 before Lenaola J. (as he then was) and has been heard by a series of Judges from that time. On 7th July, 2014, Makau J ordered that the matter be heard afresh. Thereafter it was heard by Wendoh J. and I took over the defence hearing and concluded the hearing.

**ANALYSIS AND DETERMINATION**

[3] Only the defence made final submissions which I shall consider in my judgment.

**Elements of offence of murder**

[4] I have carefully considered the evidence on record. The accused is facing a charge of murder. ***Section 203 of the Penal Code*** defines that offence as follows:-

> ***"203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."***

**[5]** Arising from the above definition, the prosecution must prove beyond any reasonable doubt the following elements of crime:

> ***1. The fact of the death of the deceased***
>
> ***2. The cause of such death***
>
> ***3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person and***
>
> ***4. Proof that the said unlawful act or omission was committed with malice aforethought.***

**Of fact and cause of death**

[6] Of the fact and cause of death, evidence adduced show that the deceased died and the cause of death was established by **PW2 Frankline Gikunda Mburugu** (but labeled PW1)in his postmortem report **(P Ex No. 1**) as cardiopulmonary arrest due to hemorrhage due to a wound caused by a sharp object. I am satisfied that the prosecution has established the fact and cause of death.

**Was death as a result of unlawful act or omission by accused?**

[7] The next issue is whether the death of the deceased was a direct consequence of an unlawful act of the accused. It was **PW2's** testimony

that the deceased told him that the accused had stabbed her and she thought she could not survive the injury. This is an element of dying declaration, I will restate the principle thereto as provided for in law and postulated in case law. ***Section 33 of the Evidence Act*** *deals with admissibility of statements made by persons who are not in a position to adduce evidence in court. It states that:*

> ***"Statements, written or oral or 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) <u>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.</u> 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;***
>
> **(b) ……….**

[8] The Court of Appeal in the case of **CHOGE vs. REPUBLIC [1985] EKLR** stated the general rule on dying declaration as follows:

> ***"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."***

[9] The same court buttressed the above position in **PHILIP NZAKA WATU vs. REPUBLIC [2016] EKLR** that:

> ***"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."***

[10] See also the case of ***<u>Swami vs. King Emperor (1939) 1ALL ER 396</u>*** where a dying declaration was admissible on the basis that it provided evidence of the circumstances of the transaction.

[11] Although a dying declaration requires no corroboration to support a conviction, caution on the part of the court is necessary especially where the conviction is solely on the basis of a dying declaration. I may add that caution includes ensuring that the fact that a dying declaration was made is sufficiently supported by cogent evidence. In addition, presence of other independent evidence will augment the assurance intimated by the Court of Appeal in the above cited case. I will apply this test.

[12] The defence submitted on this aspect and argued that no witness referred to the accused person by his name. The defence argued that the witnesses referred to Nkunja which is not the name of the accused or his assumed name. The accused insisted that he did not know the said Nkunja. He was therefore sure that the alleged dying declaration was not made in respect of him. What does evidence portend?

**Nkunja refers to Mworia, the accused**

[13] **PW1, Jennifer M. Kirigia** testified that on 13$^{th}$ October 2003, at 8.00pm her child by the name Grace Karimi was killed. Mowria the accused was her daughter's boyfriend. The accused came to her home on the material day and she prepared tea for both of them. After taking the tea, the accused left with the deceased. She then heard screams from her daughter and she went to check what it was. She saw the accused hit the deceased in the head. She claimed that she saw the accused with a knife and stabbing her daughter. She identified the accused in the dock to be Mworia who was with her daughter, now deceased. PW1 saw the accused at her home with the accused. This is a person she knew as the boyfriend of her deceased daughter. She placed the accused squarely at the scene. Her evidence on identification of the accused is not vitiated.

[14] **PW3, Joseph Gikunda** (but labeled PW2) told the Court that on the material day, he passed by Jennifer's house and found Grace Karimi with Mworia taking tea. He greeted the two and went to his house. Jeniffer was his mother and Grace was his sister. Grace is the deceased herein. Mworoa is the accused herein. He said that the accused was also known as Nkunja. Later Mwenda came to his house, switched off the radio and informed him that he found Grace on the ground groaning. When Mwenda inquired about where the deceased had gone, Jennifer told them that she left with Mworia. They left for the scene and found the deceased on the ground at the road. He flashed his torch and noticed she was bleeding. He went for a wheel barrow so that they could take her to a place where they could find a vehicle. He asked Mwenda to call Francis to help them with his vehicle. When he lifted her in order to place her on the wheel barrow, she told him to leave her alone because she will not survive for she had been badly stabbed by Nkunja. They found a vehicle and she was heaved on board. They went to the police station at Nkubu and were given a letter to take her to hospital. They took her to hospital and she died thereafter. They went back to the police station and reported that she had died. They also went to the home of Nkunja with the police but did not find him. Nkunja was later arrested by Kariene police station and was taken to Nkubu police station.

[18] From this evidence and in cross examination, it emerges that PW2 knew the accused before the incident. He stated that the accused used to visit their sister, the deceased in the evening, two to three times a week. This person he knew was called Nkunja or Mworia. Accordingly, the evidence of PW2 shows that the witness knew the accused as Nkunja. He also knew his home and even took the police there to arrest him on the fateful day but did not find him. The deceased in her dying declaration stated that Nkunja is the person who stabbed her. .Contrary to the submission by the defence, this evidence is clear that Nkunja refers to the accused. PW2 also stated that Mworia is also called Nkunja. I am aware that a conviction on dying declaration alone must be entered after extreme caution. I do not find anything to suggest that the deceased was under extreme limitation as to make her confused. She seems to be a brave young lady in the circumstances. I do not even find anything which would suggest that she would make such a declaration just to frame the accused. Evidence adduced show that the deceased and the accused were friends or intimately involved. I also do not find anything to suggest that PW2 had any grudge with or bad blood existed between him and the accused or that he could be lying. I do not see the reason that PW2 may lie on a serious matter as this one. His evidence was strong even during cross-examination. Accordingly, I find that there is sufficient evidence to support the dying declaration herein that the accused stabbed the deceased.

[19] It bears repeating that conviction on dying declaration alone requires the court to take extreme caution. There is also other independent evidence. PW1 confirmed that the accused was with the deceased at her house on the material day. They left together. She then heard screams and there was the deceased badly injured. This evidence is consistent with the fact that the accused stabbed the deceased. In addition, PW4, Nicasious Njeru (but labeled PW3) is the police officer who received and recorded the report on 13th October 2013 on assault on the deceased by a person known to her. From the evidence, PW3 and Mwenda were amongst the people who reported the assault to the police. PW3 told the court that the police from Kariene accompanied by Mwenda brought in the suspect in the murder herein. The suspect is the accused. The evidence of PW4 corroborates that of PW4 in material respects. Mwenda was central in the evidence by PW3 and PW4. From the evidence by PW2 Mwenda is the one who told him that he found the deceased groaning on the ground. Evidence suggests that PW3 and Mwenda knew the accused, reported the assault and also took the police to the home of Nkunja. PW4 also confirmed that the person alleged to have stabbed the deceased was arrested by Karien Police and brought to Nkubu police station. PW4 further confirmed that Mwenda accompanied the police from Kariene when they took the accused to Nkubu police station after his arrest. PW3 confirmed that the person charged herein is Joshua Mworia Mwiti alias Nkunja. I am aware that the defence submitted that crucial witnesses such as the arresting officers from Kariene were not called as witnesses. They cited the case of **SAID AWADHI MUBARAK vs. R [2014] eKLR.** The failure thereto does not weaken the case of the prosecution because PW4 who received the accused at Nkubu police station and interrogated the accused testified and his evidence was sufficient. It is only where the evidence is barely adequate that adverse inference should be drawn on the failure to call crucial witnesses. The evidence by PW4 augments the evidence by PW1, PW2 and PW3. It also buttresses the fact that the accused stabbed the deceased as a result of which she died. I so find.

[19] There is no doubt the deceased was found at the spot described by PW1 and PW3. P and the other witnesses supported that fact. It is not also in dispute that PW2 was one of the persons who reported the incident and also took the deceased to hospital. PW3 spoke to the deceased and the dying declaration is sufficiently supported by evidence. The medical evidence show that the deceased sustained severe injuries, internal chest injuries, hemorrhage, stab wounds by a sharp object which culminated into cardiac arrest and eventually death. From this evidence, the deceased was severely injured which is consistent with the evidence by PW1, PW2 and PW3 that she was in anticipation of death when she made the declaration that the accused stabbed her. There is nothing to show that she was mistaken of the person who attacked her. I hold that the dying declaration referred to the accused as the person who attacked the deceased.

[19] The evidence of PW1 and PW2 was direct and quite vivid; it also placed the accused at the home of Jennifer and scene of crime. PW2 also found the accused with the deceased taking tea at the home of Jennifer. He greeted the two. His mother Jennifer also informed them that the deceased had left with the accused. His evidence also puts the deceased and the accused together at the material day. Even if I apply the law on circumstantial evidence to the facts of this case, inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. See the test in **TEPER vs. R [1952] 2 All ER. 447** which was restated by the Court of Appeal at Kampala in **SIMON MUSOKE vs. R [1958] EA 715**, that:-

> ***…in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis that that of guilt.***

See also the Court of Appeal in **Dorcas Jebet Ketter (supra)** referring to their predecessor court in the case ***Kipkering Arap Koske vs. Republic (1949) 16 EACA, 135*** *that:-*

***"that in order for a court to convict an accused person based solely on circumstantial evidence;***

> ***(a) The inculpatory facts must be incompatible with the innocence of the accused,***
>
> ***(b) The facts must be capable of no other conclusion or explanation except the guilt of the accused."***

[20] The accused in his defence dismissed the charges and witness testimonies herein as lies. He denied knowing or having any relationship with the deceased. He told the court that he was at Narumoru, Nyeri County on the material day. He also stated that he went to Meru in August 2003. What baffles the court is that contrary to this claim, he was arrested at Kariene which is in Meru on 17th February 2003. In addition, I find it curious when he stated that these are trumped up charges yet nothing tangible is found tending to explain why the family of the deceased would implicate a complete stranger for the murder of their kin. The defence was mere denial. He also raises a defence of alibi. In ***R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145***, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

> ***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".***

[23] In light of the evidence by PW1, PW2 and PW3 and the time when the defence was raised, I find the alibi to be an afterthought. In any event, I am satisfied that the evidence available places him at the scene and his alibi does not hold sway. I do not believe it and I dismiss the defence.

[21] In the upshot, I find and hold that the death of the deceased was as a result of unlawful act of the accused.

**Of malice aforethought**

[22] On the final issue, on whether there was any 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) ……..***

[23] The medical evidence show that the deceased sustained severe injuries, internal chest injuries, hemorrhage, stab wounds by a sharp object which culminated into cardiac arrest and eventually death. The injuries on the deceased were as a result of stab wounds on the chest, head, back and neck. The weapon used, the intensity of the injuries sustained show that the accused intended to cause grievous bodily harm or death of the deceased. He had the necessary malice aforethought in killing the deceased. Accordingly, I am satisfied that the prosecution has been able to prove its case beyond any reasonable doubt. I find the accused guilty of the offence of the murder of **Grace Karimi** 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. Right of appeal explained.**

**Dated, signed and delivered in open court at Meru this 21st day of November 2018**

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**F. GIKONYO**

**JUDGE**

**In presence of**

Kiarie for state

Carlpeters for accused.

Accused - present

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**F. GIKONYO**

**JUDGE**