



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 36 OF 2013**

**REPUBLIC..... PROSECUTOR**

**Versus**

**STEPHEN MUTWIRI NGAE..... 1<sup>ST</sup> ACCUSED**

**WILLIAM GITONGA M'MARIO ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Dying declaration**

1. **STEPHEN MUTWIRI NGAE and WILLIAM GITONGA M'MARIO** ("the accused) have 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 26<sup>th</sup> day of March, 2013 at Athiru Runjine Location in Igembe South District within Meru County jointly murdered ISAACK NKUNJA MWIRERIA.

**Evidence**

2. The prosecution called six witnesses to establish its case. **PW1 George M'Ikiao M'Mugambi** cousin of the deceased confirmed that he and Japheth Ntarangwi identified the body of the deceased at Maua Methodist mortuary.

3. **PW2 Jacob Mwithalie M'Laibuni** testified that on 26<sup>th</sup> March 2013 as he was heading to check miraa in his shamba he met the accused on the road running in the opposite direction. He flashed a torch at him and said they were going to do their work. As he continued down the road he saw the deceased lying down. He had been beaten and injured with a stone on the left side of the ribs, his knee, hands and elbow. The deceased told him that it was the accused persons who had beaten him as they demanded a phone from him- which they took. He escorted the deceased to his home where he met his children and thereafter left and went home. Later he was informed that the deceased had died.

4. **PW3 Julius Gitonga Mweriria** brother to the deceased, told the court that on 25<sup>th</sup> March 2013 the 1<sup>st</sup> accused came to his home and told him that he had given the deceased his phone and he gave him Kshs. 500/-. The 1<sup>st</sup> accused gave him the Kshs. 500/- to give to the deceased so that he could return his phone. The next day the deceased came to his home and he gave him the Kshs. 500/- as he told him that he had given the phone to Mutwiri. But later at about 1.00PM Mutwiri came and asked for the phone. Mutwiri told him that the deceased had belittled him.

5. On the same day at 1.30PM the deceased's wife called him and told him that Isaac had been brought home by Yakubu after being beaten on the road by two people. He went to deceased's home the next day where he found him injured on the chest, ribs, left leg and left hand. Him, their elder brother Daniel Murungi and Ntarangwi took him to the police station and reported the matter and then took him to the hospital. At around 9.00PM they received a call that he had died. The deceased said that the accused were the ones that beat him. Elizabeth was not there when he told him.

6. **PW4 Elizabeth Kanario Isaac** wife of the deceased told the court that when **PW2** brought the deceased home at around 10.30PM she did not see him because she had gone to the toilet but her children saw him. He found the deceased vomiting and he had been beaten on the chest, ribs and kicked on the stomach. He informed her that it was the accused who did it because the 1<sup>st</sup> accused gave him a phone of which he had given back. At around 11.30PM he called **PW4** who came the next day and took the deceased to hospital. He, John Gitonga, Japheth Ntarangwi and Daniel Murungi came and took him to Maua Hospital. Later that night he died.

7. **PW5 NO. 54000 P.C Joseph Masango** the investigating officer told the court that on 29<sup>th</sup> March 2013 he was asked to investigate the assault of the deceased. When he went to the scene he found that the fence and long grass had been disturbed, foot marks and a stone. He recorded statements from witnesses but none of them saw the accused beat up the deceased. The deceased's brother reported the matter at the police station after the deceased's wife told him what the deceased had said. But he did not see the deceased when he was brought to the

station. The 1<sup>st</sup> accused was arrested by the members of the public on 28<sup>th</sup> March 2013 and the 2<sup>nd</sup> accused in 2014.

8. **PW6 Dr. Kariuki Michael** stated that the cause of death was cardio respiratory arrest due to asphyxia due to foreign body (stomach contents) blocking the larynx due to regurgitation arising from trauma (repeated) in the abdomen. The injuries on the deceased's chest and abdomen wall, upper and lower caused the repeated trauma. If there was no trauma the deceased would be alive.

### **Defence**

9. When put on their defence the accused gave sworn testimonies and called one witness. **DW1 Stephen Mutwiri Ngae** told the court that at the time of his arrest he was 16 years. His co-accused is his neighbor and not family member. On the material day he was at school and went back home at 5.00PM. He cut grass for the cattle, took milk to Molo and thereafter went back home and continued to read up to 9.00PM and then went to sleep. The next day before he left home Gitonga, Julius and Daniel Murungi came and asked him to take them to Maua and check on the deceased. But when they arrived at Maua they took him to the police station on the allegation that he hit Isaac with a stone. That the two told him to say that it was his co-accused who beat up the deceased and he would be free but refused to do so.

10. He said that he gave the deceased his phone on 12<sup>th</sup> March 2013. Isaac came home drunk and when he asked him for it he said that the battery went down and it was with Julius Gitonga. They went to Gitonga's place where they found the phone with no battery so he opted to leave the phone until Isaac brought the battery. Isaac changed the story and demanded Kshs. 500/- so that he could release the phone to him which he paid him. He was also drunk. From that day he did not see him again until he saw him at the hospital. But he met Isaac being taken to the hospital on a motorbike.

11. **DW2 William Gitonga** told the court that on the material day he was home during the day but not at night. At about 10.00PM he was already at Maua town selling miraa up to 5.00 AM where he was working with Martin Kimathi, Stanley Itei and Patrick Mugambi. He did not go back home but proceeded to Kihutine to buy miraa. He only went back home on 27<sup>th</sup> March 2013 at 1.00PM. He continued with his business much later after his co-accused had been arrested. He was arrested one year later. He denied that he went into hiding and stated that he continued to do his business in Maua.

12. According to him, the witnesses lied because Julius Gitonga was doing miraa business and he was giving him competition. He knew the deceased as they came from the same village and the co-accused is his friend who told him of his quarrels with the deceased but he did not help kill him.

13. **DW3 Stanley Mutia M'Mauta** corroborated the testimony of DW2 as they were together with him the whole time working after the incident occurred. DW4 Grace Kendi, wife of DW2, also corroborated his testimony. She told the court that on the material day the 2<sup>nd</sup> accused came home at 10.00AM and left at 1.00PM. She saw him the following day at 10.00AM. That he continued working until the day he was arrested.

### **ANALYSIS AND DETERMINATION**

14. I have carefully considered the evidence on record. The accused is facing a charge of murder. **Section 203 of the Penal Code** decrees that:-

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

15. The four ingredients of the offence that arise from the definition and which the prosecution must prove beyond reasonable doubt are:

***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**

16. On the fact and cause of death of the deceased, **PW1** stated that he identified the body of the deceased and **PW5** was present during the post-mortem examination. **PW6** conducted the post-mortem examination and according to his report the deceased had bruises on his chest, abdominal wall, upper and lower limb. The cause of death was cardio respiratory arrest due to repeated trauma. According to the **PW6** if there was no trauma the deceased would be alive. The death of the deceased was as a result of the injuries he which were inflicted on him. These pieces of evidence proved beyond any reasonable doubt that the deceased died and of cardio respiratory arrest due to repeated trauma. The question now becomes:

### **Was the death of the deceased as a result of an unlawful act of the accused?**

17. The third issue is whether the death of the deceased was a direct consequence of an unlawful act of the accused. According to **PW2** he saw the accused running in the opposite direction before seeing the deceased lying down on the road a few meters ahead. That the deceased

told him that it was the accused who had beaten him. **PW3** and **PW4** stated that the deceased told them the same thing. However none of them saw the accused beating the deceased.

### **Dying declaration**

18. This case relies heavily on dying declaration. According to Section 33(a) of the Evidence Act, dying declaration refers to:

***“Statements, written or oral, 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) 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;***

***...”***

19. The Court of Appeal in the case of **CHOGE vs. REPUBLIC [1985] ECLR** 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.”***

20. The same court buttressed the above position in **PHILIP NZAKA WATU vs. REPUBLIC [2016] ECLR** 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.”***

21. 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.

22. The standard of proof in criminal cases is beyond reasonable doubt. From the evidence adduced **PW2** stated that he took the deceased home. **PW4** testified that she did not see **PW2** when he brought the deceased home as she was in the toilet at the time. She testified that the deceased told him who beat him and so did **PW3**. **PW3** said that **PW4** was not present when the deceased told him that the accused beat him. According to the investigation officer, it was **PW4** who told **PW3** what the deceased had said to him about being beaten by the accused persons. The question becomes: Was **PW3** really told by the deceased of what had happened to him? Or did he merely rely on what **PW4** told him? **PW4** further stated that when the deceased said Mutwiri she understood him to mean and to refer to Steven Mutwiri. This is problematic in relation to dying declarations and more pointed evidence is needed, for there are many people called Mutwiri.

23. Secondly, the court was told that when the deceased was taken to the hospital they passed by the police station first to report the incident. **PW5** testified that the 1<sup>st</sup> report made at the police station was booked by PC Kelimo. He did not see the deceased when he came to report. Again, according to the OB 74 of 27<sup>th</sup> March 2013, Julius Gitonga Mwireria reported that Isaac Nkunja had been assaulted by Mutwiri, William Gitonga and Maurice Ntarangwi. This puts to doubt the evidence by the prosecution witnesses that they went to the police station with the deceased and reported the incident.

24. Thirdly, **DW1** stated that on the material day he was asleep while **DW2** was at work which was confirmed by **DW3** and **DW4**. The evidence by **DW2** that he continued with his miraa business and that he did not go into hiding is believable as no cogent evidence was led to show otherwise. **DW2** was however arrested a year later. As nothing shows that he went into hiding, why was he not arrested immediately but one year later? No explanation was given on this matter. It has been mentioned that the deceased was attacked by Mutwiri, William Gitonga and Maurice Ntarangwi. I have perused the charge sheet and it does not refer to others not before court. See information dated 15<sup>th</sup> July 2014. Nothing was said of Maurice Ntarangwi by the investigation officer.

25. It is not disputed that the deceased was beat up but the evidence before court leaves a lot to be desired as to whether the accused beat him up. The dying declaration is not supported by sufficient evidence that the deceased made statements that the accused persons beat him up. There is doubt whether he made the declaration claimed and to whom. The doubt in law must be resolved in favour of the accused. In upshot, the prosecution has failed to prove, beyond any reasonable doubt, that the death of the deceased was as a result of the unlawful act of the

accused persons.

**Malice aforethought**

26. After such conclusion that the death of the deceased was not as a result of the unlawful act or omission of the accused persons, seldom will you find malice aforethought thereto.

27. Accordingly, the prosecution has not proved its case beyond any reasonable doubt. I find the accused not guilty of the offence of the murder of **Isaack Nkunja Mwireria**. Consequently, Stephen Mutwiri Ngae and William Gitonga M'Mariu are hereby acquitted of murder. The two shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered. .

**Dated, signed and delivered in open court at Meru this 15<sup>th</sup> day of November 2018**

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**F. GIKONYO**

**JUDGE**

**In presence of**

M/s Nelima for 1<sup>st</sup> accused

Mrs. Kaume for 2<sup>nd</sup> accused

2<sup>nd</sup> accused absent

1<sup>st</sup> accused present

M/s Mwaninki for state.

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**F. GIKONYO**

**JUDGE**