REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 72 OF 2014

(Formerly Kisii High Court Criminal Case No. 72 of 2013)

REPUBLIC..PROSECUTOR

VERSUS

SUNDAY NYAMOHANGA MANGA GETAMA......ACCUSED

JUDGMENT

1. When **JOSEPH MWITA CLEOPHAS** (hereinafter referred to as **'the deceased'**) went to a party to celebrate the New Year 2011 with his friends in the afternoon of 01/01/2011 little did he know that he was about to lose his life a couple of hours ahead.

2. As the deceased was heading home that night he met three people on the way who accosted him. He ran away as they pursued him. One of them caught up with the deceased and stabbed him in the stomach. The deceased raised alarm and ran into the home of one **MUNIKO MWITA SINDA (PW3)** who assisted him by calling a taxi driver one **CHARLES GITUMBE (PW1)** who came to his home and picked the deceased to hospital. PW3 as well raised alarm when he saw the intestines of the deceased protruding outside the stomach and many neighbours gathered at his home.

3. As PW3 was awaiting for the arrival of PW1 he interrogated the deceased who had fallen in a trench just outside his house with intestines protruding from his stomach as a result of the injury. PW3 did not know the deceased. It was the deceased who clearly told him what had happened on the way who even went ahead to give the names of the three people who had confronted him on his way back home. The three people were **NYAMOHANGA MANGA GETAMA, MUKONO MAGAIWA** and **GESASE RABUNA**. PW3 also knew all the three persons so well as they were from his neighbourhood. The deceased went ahead to tell PW3 that it was **NYAMOHANGA MANGA GETAMA** who had caught up with him and stabbed him with a knife. The deceased further informed PW3 that when he met the three people on the road he recognized them and even talked with them. He even referred to them as '*saiga*' meaning '*age-mates or people who were circumcised together*'.

4. When PW1 arrived at PW3's home to collect the deceased to hospital he recognized him as a brother to one **ELIAS BABERE MWITA (PW2)** whom he had been drinking beer with in a bar at Ntimaru town by the time PW3 called him. On picking the deceased, PW3 rushed to the said bar at Ntimaru and collected PW2 who accompanied him and the deceased to hospital. PW1 and PW2 also managed to talk to the deceased as they were on their way to hospital. The deceased again narrated what had happened to him and gave the same names of the attackers as those he had given to PW3. PW2 was holding the deceased at the back of the car as PW1 drove to the hospital. The deceased was treated at Pastor Machage Memorial Hospital but succumbed to the injuries later that night at around 03:00am.

5. When PW3 returned to his house after the deceased had been taken to hospital and all the other people having dispersed back to their homes, he was called by the said **NYAMOHANGA MANGA GETAMA** who was in the company of the two other people who had been mentioned by the deceased as the attackers. The three people stood at the fence to PW3's homestead. PW3 heard and clearly recognized their voices since he knew them too well. However, PW3 refused to go to the fence and asked the three people to enter into his homestead but they declined. Sensing danger, PW3 raised alarm that the attackers had returned. They then fled and the accused person left the village. He was arrested around two years later.

6. A post mortem examination was conducted on the deceased's body by **DR. VITALIS OWUOR K'OGUTU (PW4)** on 03/01/2011 who was of the opinion that the death of the deceased had been resulted by the stab wounds in the stomach which had pierced the intestines around three times. **PW5** was the investigating officer who had taken over the conduct of the matter from the initial investigation officer who had been transferred. PW5 produced the statement of the initial investigating officer as an exhibit.

7. At the close of the prosecution's case the accused person was placed on his defence. He opted to give an unsworn statement. He denied any knowledge of the alleged events that led to the death of the deceased and stated that he had been arrested on account of a goat which was allegedly lost and found in his possession. He wondered why he had been framed in this case.

8. The foregone are the facts upon which this judgment is premised on. I have carefully considered the evidence on record as well as the exhibits. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients: -

> ***(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 therefore consider each of the issues independently.

9. As to the proof of the fact and cause of death of the deceased, it is not in dispute that the deceased in this matter died. That position was confirmed by PW1, PW2 and PW4. The first limb is hence answered in the affirmative.

10. As to the cause of the death of the deceased, PW4 produced a Post Mortem Report which he prepared upon conducting the examination himself. The said report gave the possible cause of death of the deceased to have been resulted by the stab wounds in the stomach which had pierced the intestines. Since there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

11. I will now turn to the second ingredient as to ascertain whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person, I am well aware that the evidence touching on the accused person's involvement in the death of the deceased was only what PW1, PW2 and PW3 were allegedly told by the deceased before he died. There was no eye-witness account in this case.

12. It is now for this Court to ascertain if the said statements were indeed dying declarations and if so, whether they can be relied upon in the circumstances of this case. **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."

13. 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."

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

15. In dealing with this issue therefore, this Court remains cautious of the danger of receiving the dying declaration without the necessary corroboration as so laid down in the foregone binding judicial precedent.

16. The statements by the deceased related to the events that took place leading to his death. He claimed that he was accosted by three people who included the accused person and two others who were well known to him and that it was the accused person who stabbed him. The statements are therefore dying declarations in law. As to their corroboration, I find there was indeed ample corroboration. The statements were not only made to one witness but to three witnesses being PW1, PW2 and PW3. PW1 and PW2 received the statements as they were taking the deceased to hospital. PW1 received the statements immediately the deceased was stabbed. The deceased identified the assailants by their names and stated that he knew them well and had been circumcised together. There was consistency on what the deceased said to PW1 and PW2 on one hand and what he said to PW3 on the other hand.

17. Based on the foregone evidence, this Court finds that the dying declarations are reliable and hence form the basis of the finding that it was the accused person who, while in the company of his two other colleagues, attacked and stabbed the deceased and that it was the stab which resulted to the death of the deceased.

18. On the third ingredient of whether there was malice aforethought, this Court has carefully revisited the events as they unfolded. The deceased and the three assailants met on the road in the night of the new year. They stopped the deceased on realizing that the deceased had known them when he called them by their names as well as *'saiga'*; that they had been circumcised together, the accused person drew a knife. On seeing the knife, the deceased started running away and the assailants began a chase as the accused person was armed with a knife. The accused person then stabbed the deceased once and that was the fatal

stab. There is no evidence of any exchange between the assailants and the deceased. The accused person was peacefully walking home and his only 'mistake' was to identify the assailants.

19. There is no doubt that the assailants were armed during the night and did not want to be recognized. But that alone cannot constitute *mens rea* for murder. There is equally no evidence that the assailants set out for the deceased that night. They only bumped into each other on the road. There was also only one stab to the deceased. To me the assailants may have wanted to frighten the deceased who had known them but unfortunately had to pass on.

20. I will now have a look at the law on malice aforethought. **Section 206** of the Penal Code defines *'malice aforethought'* as follows:

> **"206. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.**

21. The Court of Appeal has also dealt with this aspect on several occasions. In the case of <u>**Joseph Kimani Njau vs R (2014)**</u> <u>**eKLR,**</u> the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of <u>**Nzuki vs R (1993) KLR 171,**</u> held as follows: -

> **"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-**
>
> > **i. The intention to cause death;**
> >
> > **ii. The intention to cause grievous bodily harm;**
> >
> > **iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.**
>
> **It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed** <u>**The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975)AC 55**</u>**".** (emphasis added).

22. In the case of <u>**Nzuki vs. Republic (1993)KLR 171**</u>, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that

case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed: -

> ***"There was a complete absence of motive and there was absolutely nothing*** **on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him gracious harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."**

23. The foregone analysis perfectly fits the case before this Court. I therefore find that the ingredient of malice aforethought was not proved in the circumstances of this case.

24. The foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased. However, it is clear that the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

25. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed hereinbefore, this Court however finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is accordingly convicted accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 21st day of March 2017.**

A. C. MRIMA

JUDGE