



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO. 47 OF 2015**

**Lesit, J.**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHN OKETCH.....ACCUSED**

**JUDGMENT**

1. The accused **JOHN OKETCH** is charged with Murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are as follows:

**“On the night of 29<sup>th</sup> and 30<sup>th</sup> March, 2015 at Gachie – Jakai in Kihara Location in Kiamba Sub-County within Kiambu County murdered FRANCIS AUMA NYAMOKO.”**

2. The prosecution called seven witnesses. The accused gave sworn defence and called no witness.
3. The facts of the prosecution are that the accused and the deceased were living in a single roomed house belonging to PW3 who also lived in the same compound. On the evening of 29<sup>th</sup> March, 2015 the accused was asleep in the house when the deceased arrived home. It was 10.30 p.m. According to PW3, the accused was very drunk and was also very aggressive. The accused banged the door to enter the house. PW3 then heard banging and commotion inside the house the accused and the deceased shared.
4. That is when PW3 went to the house and in the dark held onto someone, not knowing which one it was. She then saw the accused take off running at top speed. Pw3 testified that the deceased freed himself from her and followed the accused also at top speed. None of them returned to her house ever since.
5. That same night, PW2, a cousin to the deceased was called by one Kevin and informed that the deceased was lying on the ground injured near where he lived. PW2 indeed found the deceased lying on the ground near where he lived. He had injuries on the chest and stomach. The deceased told PW2 that it was the accused that injured him. PW2 took the deceased to Kihara Sub-District hospital from where he was transferred to Kiambu District Hospital. A month later he passed away.
6. Dr. Walong, PW7 who carried out the post mortem on the body of the deceased found that the deceased had multiple traumatic injuries on the head consisting of 2 contusions, and a single stab wound on the abdomen. The cause of death was an abdominal stab wound complicated by sepsis, a severe head

injury due to blunt force trauma and surgical intervention, a left hemicolectomy complicated by burst abdomen. The Report was P.exh.2. The doctor ruled out medical negligence as the cause of death.

7. The accused was arrested on 27<sup>th</sup> April, 2015 by PW4 and PC Kuto after chasing him for 4 kms within Ruaka, which is within Kihara Police Station area.

8. The accused was placed on his defence and he gave a sworn statement. He stated that he was asleep when the deceased arrived home that day. He said he was sleeping in the house the two shared when all of a sudden he woke up to the deceased thumping him on the chest. When he asked the deceased why he was doing that, the deceased told him that he, accused, had declined to open the door for him.

9. The accused said that PW3 who was their landlady went to his rescue when she held the accused as if she was hugging him. That is when he ran away completely without looking back. He said he did not return that night. The next day he returned to the house he shared with the deceased but did not see him again. He said he was arrested a month later and informed that the deceased had died.

10. I have considered the evidence adduced by the prosecution and the defence case together with the submissions by Mr. Wakaba holding brief for Mr. Mutitu for the accused. The prosecution was led by Ms. Wafula who did not make any submissions.

11. The defence raised several issues which I will consider in this judgment.

12. Mr. Wakaba urged that the evidence adduced by the prosecution and the defence case shows that the deceased was a violent man having attacked the accused for no reason. The only other person who was at the scene when the deceased arrived home that day, apart from the accused was PW3. In her evidence PW3 testified that the accused and the deceased had a cordial relationship and had lived peacefully up to that day. PW3 stated that the two lived so harmoniously, that she thought they were brothers. PW3's evidence is confirmed by the accused in his sworn defence. The accused stated that the deceased had never behaved that way, and that the very first question he asked the deceased was why he was behaving strangely.

13. Going by the evidence of PW3 and the accused own defence it is clear that the deceased was not a violent man. His conduct of being aggressive towards the accused on the night in question took even the accused by surprise. I find that the defence counsel's submission that the deceased was a violent person has no support in both the defence and the prosecution case.

14. Mr. Wakaba submitted that the prosecution was relying on circumstantial evidence that it was the accused that stabbed the deceased. Counsel cited **Sawe vs. Rep [2003] KLR 364; Musili Tulo vs. Rep. [2014] eKLR; and Rep. vs. Michael Munyiri [2014] eKLR** for the principles which apply in determining whether the circumstantial evidence adduced by the prosecution can found a conviction.

15. The evidence against the accused is fourfold. We have the evidence of PW3, his landlady who witnessed the accused and the deceased involved in a brawl. The other evidence was of PW2 that he got information from one Kevin that the deceased was lying down in the rain with injuries. PW2 testified that he found the deceased lying down on the ground outside the compound where he lived.

16. Taking these two pieces of evidence together, it is clear that the time PW3 saw the accused run away and being pursued by the deceased was shortly before the time the deceased was found by PW2 injured. The time PW3 said that the incident took place was 10.30 p.m. This was the same time that PW2 said he was called by Kevin and informed about the deceased lying on the ground injured. It is significant that PW2 testified that he found the deceased injured and lying on the ground outside where the deceased lived. It is significant that the deceased was found lying outside where he lived, which was the same place towards where PW3 saw the accused and deceased run.

17. The third piece of evidence against the accused was the statement made by the deceased to PW3. PW3 testified that when he found the deceased injured but still alive, he asked him who injured him.

PW3 stated that the deceased answered and said he was injured by the person he lives with. When is asked the deceased to say specifically who it was, the deceased told him that it was John.

18. PW3 was landlady of the deceased and she testified that the deceased lived with the accused in the same house. PW3 on his part said that the deceased shared a house with the accused. I find from the evidence of PW2 and PW3 that they corroborate each other's evidence that the accused and deceased lived only the two of them in the same house. It is therefore proven that when the deceased said his housemate called John was the one who injured him, he meant the accused.

19. Mr. Wakaba urged that the statement PW2 alleged was made to him by the deceased implicating the accused did not amount to a dying declaration because the deceased was not at a point of extremity when he made it. He cited **Rep. vs. Nkuru Gwalia Rukaria [2014] eKLR** and urged the court to receive that evidence with caution.

20. The circumstances of the **Nkuru Rukaria** case, supra, are different from the instant one as the defence in that case was of defence of property. In the cited case, the deceased had driven sheep and goats into the accused land the ninth time and it was out of that provocation that the accused shot the deceased with a poisoned arrow. Before he died shortly after the shot, the deceased implicated the accused as the one who shot him.

21. In the same **R. Vs. Rukaria** case, supra I cited two other cases; **Choge V. Republic 1985 KLR 1**, the Court of Appeal held:

**“The general rule 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 consideration to tell the truth. 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.”**

22. The other case cited was **Republic v. Yiende High Court Criminal case no. 16 of 1990** where a court of parallel jurisdiction held:

**1. “Any statement made by a deceased is admissible as a dying declaration if it is established that it was made by him when he was in immediate expectation of death and had lost every hope of living.**

**2. It is not required in law, in order to support a conviction, that a dying declaration must be corroborated. There is need for exercising caution though before a conviction is based solely on it.**

**3. A dying declaration is the weakest of all evidence. It must be remembered that it is made in the absence of the accused and is not subjected to cross examination.**

**4. In the instant case, the evidence fails to establish that the deceased made a statement when he was under the solemn belief of impending death. Accused acquitted.”**

23. The principle applicable regarding dying declarations is that such evidence should generally be treated with caution where it was made in the absence of an accused person. The situation is made more critical where the only evidence against an accused person is the dying declaration. In this case, in addition to the dying declaration is other circumstantial evidence which I will consider later on in this judgment.

24. Regarding whether the statement made to PW3 by the accused was a dying declaration I have considered that the deceased was found by PW2 lying outside in the rain with serious injuries. The rain was very heavy according to PW2. The deceased had severe injuries. I find that in these circumstances the deceased must have been in great pain from the injuries, and in desperation due to the heavy rain

pounding on his injured body. From the findings of the pathologist, several surgical interventions were done. Despite these the deceased did not recover from his ailment. I am satisfied that in the circumstances in which PW2 found the deceased, and in view of the serious injuries testified to by PW7, the deceased made the statement at the point of extremity, and therefore the statement qualifies to be a dying declaration.

25. The accused denied stabbing the deceased. He claimed that after PW3 separated the deceased from attacking him, he left the house he shared with the deceased and did not return until the next day.

26. The accused defence is contradicted by the evidence of PW3. Her evidence was that the accused never went back to the house after the incident that night. The accused conduct of running away from the scene and of not returning to their rented house since the incident is proof the accused had a guilty mind, and that his conduct was of a man with a guilty mind.

27. We have evidence to show that the accused was arrested on the 27<sup>th</sup> April, 2015 approximately one month after the incident. PW4 was one of the arresting officers. He told the court that they chased the accused for a distance of 4 kilometres before arresting him. The only explanation why the accused started running when the police went to arrest him was because he had a guilty mind. In addition to changing his residence after this incident, the accused running to evade arrest all establish beyond a reasonable doubt that the accused had a guilty mind.

I find that it was no co-incidence that the deceased was found injured outside the compound where he lived soon after he and the accused were seen leaving the compound by PW3. I find that it is proved that the accused had both the opportunity and the time to attack and cause injury to the deceased. I find that the dying declaration by the deceased considered together with the circumstantial evidence adduced by the prosecution all go to establish beyond any reasonable doubt that it is the accused and no one else who stabbed and injured the deceased on the material night.

29. From the evidence of the pathologist who was PW7, the deceased suffered two severe injuries to the head due to blunt force trauma. He testified that the one on the back of the head could have been as a result of a fall but the one on the frontal part of the head was as a result of an assault or falling object.

30. The third severe injury was a stab wound to the abdomen which was caused by a sharp object. This stab tore into the colon leading to the doctors intervening through a surgical procedure by resection of the colon.

31. These are severe injuries. The deceased must have been in severe pain. He was also left outside in the rain with such injuries. I find that the accused must have been at a point of extremity when he made the statement. I am satisfied that it was a dying declaration.

32. Mr. Wakaba submitted that PW7 gave three causes of death and that none of them have been linked to the accused beyond any reasonable doubt. Counsel invoked **section 111(1)** of the **Evidence Act** urging that the accused should be given the benefit of doubt in the case. In addition Mr. Wakaba submitted that the evidence of the pathologist, PW7 was to the effect that the delay of half an hour to one hour in seeking medical intervention could affect medical intervention. He urged that PW2 took between 10.30 p.m. to 3.20 a.m. to obtain a note from PW5, the Police Officer to assist the deceased receive medical intervention, and that it affected the medical intervention in this case.

33. PW2 was cross-examined by Mr. Wakaba about the time he took to get the Note from the police in order to enable the doctor's attend to the deceased. He clearly stated that it took him exactly 30 minutes to get the note. He also stated that from the Police Station to the hospital where he had taken the deceased was 200 meters. The time it took PW2 to get the Note was definitely not five hours as defence counsel urged in his submissions.

34. Mr. Wakaba urged that one Kevin who reported to PW2 of deceased injuries should have been called as a witness. He urged that Kevin was a key witness not called as a witness and that his evidence was

critical. There is no evidence to help conclude that Kevin was a key witness as neither PW1 nor the accused mentioned him in their evidence. The purpose of calling witnesses is not to increase numbers but to avail evidence which will enable the court arrive at a just conclusion of the case. It is not shown what value Kevin would have added to this case had he been called to testify. Nothing turns on this point.

35. Counsel urged that the evidence of the prosecution was full of inconsistencies and contradictions and urged the court to consider **Philip Nzaka Watu vs. Rep. [2016] eKLR** where the Court of Appeal held:

**“In evaluating discrepancies contradictions, omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”**

36. I have carefully analysed and evaluated the evidence adduced by the prosecution. I find no discrepancies contradictions or omissions of material nature. The defence did not specify what contradictions, omissions or discrepancies existed in the prosecution case. Since I found none of these in the evidence I find that nothing turns on this point.

37. Counsel submitted that the prosecution did not adduce any evidence showing motive or showing malice aforethought on the accused part. The law in regard to motive is set out under **section 9 (3)** of the **Penal Code**. That provision was the subject of interpretation in the case of **Choge Vs Republic (1985) KLR1**, where the Court of Appeal held as follows:-

**“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1<sup>st</sup> appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”**

38. Motive has been defined by the court in the case of **Libambula v Republic [2003] KLR 683** which reasoned that point thus:

**“Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap. 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”**  
(Emphasis added)

39. The two cited authorities demonstrate that motive though admissible and important is not essential to prove a crime. Having considered the evidence in this case I find that the prosecution was not able to establish the motive for the attack.

40. As for malice aforethought in the case of **Nzuki V Rep 1993 KLR 171** the learned judges of Appeal set out the principles of determining whether intention to commit murder is proved as follows:

**“ 1. Malice aforethought is a term of art and is either an express intention to kill or implied where by a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as the result.**

**2. Before an act can be murder, it must be aimed at someone and must be an act committed with one of the following intentions**

**(a) To cause death;**

**(b) Cause grievous bodily harm; and**

**(c) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits these acts deliberately.**

**3. Without an intention of one of these three types, 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 the crime of murder.**

**4. The offence with which the appellant was charged and convicted was committed in an environment of beer drinking and dancing, and except for the appellants bare statement in his unsworn testimony, there was absolutely nothing on the record of the superior court from which it could be implied that the appellant had any of the intentions when he unlawfully assaulted the deceased."**

41. I am well guided. In this case I find malice aforethought wholly lacking. It is clear that the deceased attacked the accused person. Deceased person's behaviour could only be understood against the evidence that he was drunk and that alcohol may have influenced his behaviour that night. The prosecution could not therefore prove that the accused had formed the necessary malice aforethought to cause death or grievous harm when he unlawfully stabbed the deceased.

42. I find that the accused was dragged into a fight by the deceased. However his action was excessive and unreasonable. The accused inflicted more than one grave injury on the deceased. PW7 testified that whereas he could conclude that the injury on the back of the deceased head was caused by a fall, the other injury on the frontal part of the head was due to assault by blunt object or falling object and the other by sharp object. Considering the surrounding evidence, it is clear the injury on the front of the head was not the case of a falling object but an assault. The accused applied excessive force on the deceased thus inflicting serious injuries from which the deceased died.

43. Having considered the entire evidence, the submissions by counsels and all the cited authorities I find that the prosecution has proved that the accused caused the death of the deceased by the unlawful act. However, I find that for the reasons I have given in this judgment the prosecution did not prove that the accused had premeditated the deceased death neither had formed the intention to cause him grievous harm. I will therefore substitute the charge against the accused from murder contrary to **section 203** of the **Penal Code**, to **manslaughter** contrary to **section 202** of the **Penal Code**.

44. In the result, I reject the accused defence of denial I the involvement of the deceased death. I find the accused guilty of the substituted charge of **manslaughter** and convict him accordingly under **section 322** of the **Criminal Procedure Code**.

**DATED AT NAIROBI THIS 2<sup>nd</sup> DAY OF MARCH, 2017.**

**LESIIT, J.**

**JUDGE**