



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL CASE NO. 21 OF 2012**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**NGUNGI MBUVI ALIAS CHARLES..... ACCUSED**

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

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 24/12/2009 at Iria-itune Sub-Location in Mbeere North District, he murdered Ephantus Gitonga Mbiriri. He pleaded not guilty.
2. The prosecution called nine (9) witnesses. The evidence of PW1 was that on 23/12/2009 he was herding animals of the deceased in the bush and took them to drink water in a stream. The accused then came and sent him to tell the deceased that his goats were straying into his farm and that he would kill somebody.
3. On 24/12/2009 at 2.00 p.m. PW1 left the deceased home and went to his parents home and dint return until on 25/12/2009 at 7.00 a.m. when he found one Mwaniki and Kiarago who informed him that the deceased had not returned home since he went grazing. PW1 together with Kiarago, Mwaniki, Njue and Mwaniki's wife went to where the deceased had gone grazing and found his body at a stream in a bush with cut wounds on the head, with an arrow shot in the chest and his body burnt.
4. PW2 testified that on 24/12/2009 at 6.00 p.m. she was working at her shamba when she saw the accused carrying a bow, arrows and a panga in his shamba. She later heard the deceased screaming on the lower side of the stream saying that he had been shot by the accused with an arrow. She said she was able to recognize the voice of the deceased as she has known him for 20 years. She collected her tools and went home. She said she knew both the accused and the deceased and was able to identify the bow and arrows in court.
5. PW3's testimony was that on 25/12/2009 at 5.00 a.m., her son came and informed her that as he was going to church the previous night he noticed that the deceased's cattle had not been locked up and that his gate was open. Together with her husband and a brother in law they followed the path where the deceased used to graze and stumbled on his body which was near the land of the accused.
6. PW4 told the court that on 25/12/2009 at 6 a.m. his nephew Wilcate came home from church and informed them that his grandfather's gate was open and the cattle were there. The witness and Wilcate followed the path that the deceased used to graze and found the deceased's body which had been shot and burnt near a stream.
7. PW5 stated that their son Wilcate Njiru informed them that the deceased was not at his home which

they later confirmed. He followed the path where the deceased used to graze accompanied by others and found his body near the stream.

8. PW6 testified that on 25/12/2009 he received a call from Kiarago informing him that his father was missing and was later told that the body was found at a stream near the accused's land. He later visited the scene with police officers and found that the deceased had been shot in the chest, there was a cut on the head and his body had been burnt. He added that the deceased had told him that the accused had vowed to kill him.

9. PW7 stated that on 25/12/2009 he was in charge of Ishiara police post and that at around 9.00 a.m. one Nathaniel Njeru reported that his father in law had been murdered in Ginga village. He was led to the scene in a bush on a dry river bend where he found the body of the deceased with an arrow protruding at the back. The body was burnt at the back and also had a deep cut on the back. He interrogated people in the neighbourhood. PW2 told him that she had seen the accused the previous day at 5.00 p.m. heading towards the scene. Shortly afterwards she heard the deceased screaming that he had been shot by the accused.

10. PW7 in the company of other officers were led to the house of the accused which was about 100-200 meters from where the body was. The accused was present and upon searching his house they found a bow with fresh leaves. The accused said he had used the bow six days ago which did not sound true as the area is very hot and the leaves on the bow would have dried by then. The bow had three arrows tied to it. They also recovered akala shoes and a blood-stained panga and arrested the accused.

11. PW8 stated that the medical superintendent Embu Provincial Hospital had authorized him to produce the postmortem report done by Dr. Ndegwa. He had worked with Dr. Ndegwa for five years and was familiar with his handwriting and signature. The cause of death in the postmortem report was cardiac failure due to the penetrating injury to the heart with tension pneumothorax secondary to an arrow shot to the left chest.

12. PW9 a psychiatrist stated that he examined the accused and found him mentally fit to plead.

13. Both parties filed written submissions in support of their arguments. The accused was represented by Mr. Nduku holding brief for Ken Githinji & Co. Advocates while Ms. Nandwa represented the State.

14. The defence submitted that the panga recovered at the scene of crime was not subjected to forensic investigation to determine whether the accused had handled it. The accused was subjected to psychiatric examination long after he had been charged.

15. The defence further submitted that the charges on the accused are based on suspicion since there was an alleged long standing land dispute between the accused and the deceased. That no witness saw the accused attacking the deceased or the fire that allegedly burnt the deceased's body. The accused gave an alibi of not being near the murder scene at the material time. It was also argued that what PW2 claimed to have heard cannot qualify to be a dying declaration.

16. The state counsel submitted that PW2 positively identified the voice of the deceased when he called out the accused's name as the person who had shot him with an arrow. This is because she had known the deceased since she was a young girl. The case of **SHADRACK MBAABU KINYWA VS REPUBLIC [2013] eKLR** was cited where the court held that identification by voice nearly always amounts to identification by recognition.

17. The State further submitted that care has to be taken to ensure that the voice was that of the appellant and the complainant was familiar with the voice that he recognized and that there were conditions in existence favoring safe identification. PW2 also saw the accused walking to the scene. The prosecution argued that the dying declaration was corroborated by the other evidence namely that of PW4 and PW6.

18. The ingredients of murder were explained in the case of **ANTONY NDEGWA NGARI VS**

**REPUBLIC [2014] eKLR** where the court held that the prosecution must prove the death of the deceased; that the accused committed the unlawful act and that he had malice aforethought.

19. PW2 heard the deceased saying that it was the accused who shot him with an arrow. The doctor, PW8 confirmed that the cause of death was an arrow shot to the chest. The State argued that malice aforethought was proved through PW6 who testified that the deceased had told him that there was a long standing dispute between him and the accused and that if anything happened to the deceased the accused would be the one responsible. The State concluded that this was evidence of malice aforethought.

20. The accused is charged with murder. The applicable law is Section 203 read together with Section 204 of the Penal Code.

203. Murder

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

204. Punishment of murder

*Any person convicted of murder shall be sentenced to death.*

21. In view of Section 203 the ingredients of murder are *actus reus* and malice aforethought.

Malice aforethought is defined under Section 206 of the Penal Code.

206. Malice aforethought

*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 flight or escape from custody of any person who has committed or attempted to commit a felony.*

22. In the case of **ROBA GALMA WARIO VS REPUBLIC [2015] eKLR** the court held as follows:-

*"For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."*

23. PW2 testified that she heard the deceased saying that the accused had shot him on the chest with an arrow. The prosecution claim that the words of the deceased amount to a dying declaration as defined by Section 33 of the Evidence Act.

24. Dying declarations were discussed in the case of **PHILIP NZAKA WATU VS REPUBLIC [2016] eKLR** where the court held 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. This Court expressed itself as follows in **CHOGE VS 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.”*

25. It is important for the court to determine whether identification of the deceased's voice by PW1 and PW2 were free from error. PW2 told the court that she heard the deceased screaming and saying he has been shot by Ngungi was Mbungu referring the the accused.

26. Section 33 of the Evidence Act deals with death declarations. It provides:-

*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) 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. 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) .....**

27. In the instant case, PW2 did not see the accused when he was uttering the alleged words. Neither did she explain how close she was to the deceased or for how long she had related with him during his lifetime to be able to recognize his voice without error. Was the deceased a close relative, friend or a person who interacted with her closely and frequently to enable her master his voice? This was not demonstrated beyond any reasonable doubt by the prosecution and therefore the voice identification cannot be said to be free from error.

28. In the case of **LIMBAMBULA VS REPUBLIC [2003] KLR 683** cited with approval in the case of **HEWETT VOSENA KISUSA & ANOTHER VS REPUBLIC [2014] eKLR** the Court of Appeal stated that evidence of voice identification is receivable so long as the person giving the evidence is familiar with it, recognizes it and there is no *mistake in testifying to that which was said and who said it.*

29. From the above cases, it is clear that even though dying declarations do not require corroboration, caution must be exercised when receiving them as evidence. The prosecution did not master the details necessary to prove a dying declaration. The credibility of this witness was put in question by the court due to her conduct after the incident assuming she was anywhere close to the scene.

30. I reach a conclusion that the words uttered by PW2 do not meet the test laid down in Section 33 of the Evidence Act.

31. PW6 told the court that the murder weapon, a panga was recovered at the scene by the police officers in his presence and it was blood stained. PW7 the investigating officer produced the panga in evidence but he had not taken it for analysis by the Government Chemist to establish whose blood was on the exhibit. This was a very serious omission on the part of the investigating officer. Neither was it established whose panga it was thus rendering the evidence of recovery worthless.

32. None of the prosecution witnesses witnessed the accused shooting the deceased. This case is based on circumstantial evidence which is dependent on proof of certain facts.

33. It was held in the case of **JOHN NDUNDA MWANIKI VS REPUBLIC [2014] eKLR** citing the cases of **MWITA V R [2004] 2 KLR 60**, **TEPER VS R [1952] AC 480** and **R V TAYLOR WEAVER AND DONOVAN [1928] 21 Cr. App. R. 20** that:-

*It is trite that (sic) 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 hypothesis than the guilty.*

*It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.*

*Circumstantial evidence is very often the best evidence. it is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.*

34. In cross examination of PW2, she stated that she did not tell anybody about the screams she heard at the river on the material day and even what she saw. She further said that it was normal for people in that area to carry bows and arrows for purposes of hunting. It was her allegation that the accused had told her over a year before the incident that if he met the deceased he would kill him.

35. Further her testimony that she was able to identify the bows and arrows allegedly used by the accused in court was unsatisfactory. The arrows and bows recovered from the accused and identified in court by PW2 had no special features that made them distinguishable from any other such items. The identification of the said exhibits was not positive in my considered opinion. This was not proved beyond any reasonable doubt.

36. The prosecution sought to prove two facts in this case. Firstly, that the accused had threatened to kill the the deceased about one (1) year back for allowing his cattle to graze on his land. This was through PW2 again whom the court found was a witness whose demeanor was wanting.

37. The court noted that it is strange that after she heard the screams by the deceased, she just took her tools and went home and never informed anyone about the incident. It is also strange that she was not curious to know what was happening considering that she was aware that the accused had made his intentions of killing the deceased known to her.

38. Killing someone is not just an ordinary event which a person who knows both the victim and the aggressor would ignore just like that. A reasonable man would have gone to check what was happening or even report it to the victim's family or to the relevant authorities.

39. The other fact was to be proved through PW1 and PW6. PW1 testified that on 23/12/2009 she was found by the accused at the stream grazing the animals of the deceased. The accused told him that he had heard that the animals of the deceased were straying into his land and that he would kill somebody. The deceased was found dead near the stream a few days later.

40. PW6 testified that the deceased feared for his life. He was apprehensive of the accused and his brother Mugo Mbiriri. The investigating officer did not bother to follow this lead by interrogating the two persons.

41. The evidence of PW1, PW2 and PW6 taken together is not sufficient for the court to draw an inference of the accused's guilt. Neither is it enough to show that "*there are no other co-existing circumstances which would weaken or destroy the inference*". **JOHN NDUNDA (*supra*)**. The evidence does not satisfy the legal requirements of circumstantial evidence to warrant or to justify the conviction of the accused.

42. The law requires that the prosecution proves the facts relied on accurately and convincingly leaving no room for any reasonable doubt. The prosecution have failed to prove that the accused was responsible for the act of killing the deceased or that he killed him intentionally, if at all.

43. I find the accused not guilty of murder and acquit him accordingly. He is set at liberty unless otherwise lawfully held.

It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF MAY, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**The appellant**

**Ms. Nandwa for respondent**