



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 2 OF 2012

REPUBLICPROSECUTOR

VERSUS

PHILLIP NZAKA WATU.....ACCUSED

JUDGMENT

PHILLIP NZAKA WATU hereinafter referred to as the Accused is charged with murder contrary to Section 203 as read with Section 204 of the penal code.

The particulars being that:-

“On the night of 21st December 2011 at Kasidi village Ruruma-Rabai Kilifi County he murdered Mwambui Chiruru Mwambui”.

This matter was part-heard before Lady Justice Nzioka. She heard nine witnesses presented by the prosecution which then closed its case. After compliance with Section 200 of the Criminal Penal Code the defence opted to have the case proceed from where it had reached. Thereafter the matter was heard by this court up to conclusion.

The Deceased Mwambui was dumb and was commonly known to the villagers as **“BUBU”**. On the 21st December, 2011 he had gone to Kasidi Shopping Centre in the evening. David Chipelu (PW3) saw the Accused known as Nzaka hold the hand of the deceased and did as if they wanted to engage in a discussion. This witness told the Court that he was at a distance of about 15-20 feet from where the two were (Deceased and the Accused). Suddenly, when he checked again he saw the Deceased lying on the ground and upon a closer scrutiny saw his intestines protruding from his stomach. The accused attempted to flee but he got hold of him and demanded to know why he had stabbed the old man and why he was running away. The witness shouted that **“he has killed Bubus”** twice and members of public rushed to the scene and wanted to lynch the accused before he was rescued by the village elder.

BETTY CHINZI (PW2) is the wife of the Deceased. The same day the Deceased was killed she was in the same Shopping Centre where she had gone to buy paraffin. She told the court that Mabeyu (PW1) informed her that somebody had stabbed her husband near a vegetable kiosk at the Trading Centre. She went to check and found him lying on the ground facing upwards. He informed her that he was dying because he had been stabbed by Nzaka. His intestines were protruding from his stomach. She took her lesso and tried to return the intestines back. Afterwards police officers arrived and took away the body to the morgue as he had passed on.

JAMES CHIVIVA NGAO (PW4) a village elder was handed over the Accused by members of public who were threatening to lynch him and he in turn handed him over to police who proceeded to carry on investigations.

DR. LUCY WAHOME (PW8) carried a postmortem examination on the body of the Deceased and formed the opinion that the cause of death was haemorrhagic shock due to gut injury due to penetrating abdominal injury caused by a sharp object.

In his submissions, Counsel for the defence maintains that nobody actually saw the Accused stab the Deceased and the evidence of the prosecution witnesses is largely hearsay.

The evidence of PW2 who is the wife of the deceased is faulted on account of having not been corroborated.

Counsel relies on the Ugandan case of *Tarikabi -Vs- Uganda 1975 EA pg 60* where it was held

- i. ***A dying declaration need deal only with the cause of death or with circumstances leading to death.***
- ii. ***There must be satisfactory corroboration of a dying declaration (Akumu V. Republic)***
- iii. ***On the facts the courts finding on the corroboration would be upheld”.***

In the Case of *Katu -Vs- Uganda (2002) /EA* it was held that,

“Evidence regarding a dying declaration always had to be received with caution because the test of cross-examination was wanting and the particulars of the violence could have occurred in circumstances of confusion and surprise”.

In the present case the incident took place at about 6.30 p.m which was still daylight. The accused had found (PW3) seated outside a shop and greeted him. The witness saw him join hand as if they were engaged in a conversation. They were the only three people at the time. That is the Accused, the Deceased and the Witness. Suddenly upon checking he saw the the older man lying on the ground having been stabbed and with intestines protruding from is stomach. Thats when he went and got hold of the Accused who wanted to flee and shouted for help. The evidence of PW3 therefore cannot be said to be hearsay. He was present at the scene at the time the Deceased was stabbed with a knife.

There was nobody else at the scene to stab the deceased unless it was argued that the Deceased stabbed himself. When the wife of the Deceased (PW2) rushed to the scene she found him still alive and by use of sign language he communicated to her that it was the accused by the name Nzaka who had stabbed him. This witness was a wife of the Deceased for forty (40) years. In that span of forty (40) years she must have learned to communicate with him.

I am satisfied that the dying declaration by the Deceased was corroborated by the evidence of PW3 who was present at the time of the murder and who arrested the Accused at the scene there and then.

The Accused had armed himself with a knife with which he viciously thrust into the Deceased stomach spilling out his intestines.

The accused intention was to cause the death of the Deceased. He clearly had malice aforethought section 206 of the Penal Code;

“(a) defines malice aforethought as 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 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 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.”

As argued supra the Accused had the intention to kill and actually killed his victim . I have analysed the evidence adduced by the accused in his defence. His was an unsworn statement to the effect that he was merely going home after a hard days work. When he was confronted by three youths who were asking him for Kshs. 200/= to go and buy palm wine. When he refused he was beaten and when the village elder appeared he was taken to the chief's offices and later was handed over to police whereby he was charged with the offence of murder.

During cross-examination of the prosecution witnesses, at no time were questions posed on the issue of three men who were demanding Kshs. 200/= to buy palm wine beating him. This is clearly an afterthought. He was arrested by PW3 who was alone at the time. I am satisfied that the prosecution has proved its case beyond reasonable doubt for the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code and I convict the Accused accordingly.

Judgment delivered, signed and dated this **12th** day of **March 2014**.

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M. MUYA

JUDGE

12TH MARCH, 2014

In the presence of:-

Learned Counsel for the State Miss Mwaura

Learned defence Counsel Miss Odhiang holding brief Tindi

Court clerk Musundi