



**REPUBLIC OF KENYA**

**HIGH COURT AT KISII**

**CRIMINAL CASE NO 16 OF 1990**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**YIENDE.....ACCUSED**

**JUDGMENT**

The accused is charged with the murder of Francis Ohuru Yiende on 22<sup>nd</sup> November 1989 at Bosinange Location, Kisii District.

The medical evidence established that the deceased had a compound fracture on both forearms and also on the occipital area. The cause of death being the said multiple injuries leading to cerebral haemorrhage. The accused is the elder brother of the deceased. Harun (PW1) is their younger brother. He is the only witness who said something that may be considered as material in this case. According to him on the day in question when he returned from his work at around 5.30 pm he found the door of his house broken and when he went in he found the deceased lying on the floor bleeding from his head, hands and legs. When he questioned the deceased, he told him that he found the accused breaking the door and when he asked him why the accused told him that he was young and should not question him. He (the deceased) labelled the accused as a thief because he did not ask him for the keys of the house. The deceased added that thereupon the accused hit him with a metal bar and he (the deceased) held the accused by his neck when the accused pushed him, he fell down, the accused jumped on him and hit him on his head with the metal bar three times and ran away.

In his defence, the accused said that he went into the house seeing it open to find the deceased therein. He (accused) greeted him and the deceased asked him why was he greeting him. Thereupon, according to the accused, he asked the deceased why was he rude and the deceased started to break a piece of wood with a lot of force and in process the deceased fell down on some stones used for cooking and injured himself on his head. The accused further said that he then went to look for a vehicle to take the deceased to a hospital.

I have considered the evidence of Harun and the defence of the accused. Any statement made by a deceased is admissible as a dying declaration if it was established that it was made by him when he was in immediate expectation of death and had lost every hope of living. In the instant case, the evidence of Harun by itself as given by him fails to establish that the deceased made the statement he spoke about when the deceased died was under the solemn belief of impending death. The deceased some three days thereafter in a hospital. There was no evidence as to how he felt in the hospital during that period. However, taking it for a moment that this was a dying declaration, I propose to turn to the law on the point. It is not required in law, in order to support a conviction, that there must be corroboration of a dying declaration. There is a need for exercising caution though before a conviction is based solely on it. 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. In the instant case the assessors unanimously found that the dying declaration, the only evidence in the case, is insufficient to convict the accused. With utmost respect, I agree with them. It would be most dangerous and highly unsafe to rely on what deceased allegedly said to Harun. It follows that the charge must fail. I dismiss it and acquit the accused.

Dated and Delivered at Kisii this 21<sup>st</sup> Day of May, 1990

**V.V. PATEL**

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**JUDGE**