



**Republic of Kenya**

**Court of Appeal, at Nairobi**

**Criminal Appeal No 111 of 1987**

**Musili v Republic**

**Gachuhi, Masime & Cockar JJ A**

**May 31, 1991**

*Evidence – dying declaration – evidential weight of a dying declaration - whether corroboration is necessary to support a conviction.*

The appellant was convicted of murder and sentenced to death as authorized by law.

The evidence against the appellant was that on the material date he was seen walking in the direction where the deceased had gone to graze his cattle. Not long afterwards, screams were heard coming from the deceased's home prompting people from around to run towards the source of the screams.

On arrival at the scene, the deceased was found lying on the ground having been shot with an arrow in his abdomen. Each of the four prosecution witnesses testified that they heard the deceased say he had been shot by the appellant. Other witnesses testified that they met the appellant running across at right angle to the direction they were following and that he was carrying a bow and arrows.

In his defence, the appellant raised an alibi. He stated that at the material time he had been cutting trees for one Charles and that he was resting at his home when he was arrested.

**Held:**

1. The law in Kenya relating to acceptance of a dying declaration as evidence is clear that whilst corroboration of a statement as to the cause of death made by the deceased before his death is desirable, it is not always necessary in order to support a conviction.
2. Although there is no rule of law that to support a conviction there must be corroboration of a dying declaration, it is generally unsafe to base a conviction solely on an uncorroborated dying declaration.
3. The learned judge in his summing up had given correct directions with regard to the cautious manner in which the dying declaration was to be approached.
4. There was strong corroboration in the suspicious circumstances in which the appellant, armed with a bow and arrows was seen during the two material occasions. This court concurred with the High Court's finding that the appellant was guilty of murder.

Appeal dismissed.

## Cases

1. *Rex v Eligu s/o Odel & another* (1943) 10 EACA 90
2. *Rex v Ramzani Mirandu* (1934) 1 EACA 107
3. *Rex v Mgundulwa s/o Jalu & 2 others* (1946) 13 EACA 169
4. *Pius Jasunga s/o Akumu v Reginam* (1954) 21 EACA 331

## Statutes

Penal Code (cap 63) section 203, 204

May 31, 1991, the following Judgment of the Court was delivered.

The appellant has been convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and sentenced to death. Briefly the facts are that on 17th February, 1986, the deceased Kimanzi Sanga, aged 51 years, left his home in Mutuangombe, Endui location in Kitui district at about 8.00 am in the morning to graze his cattle in the direction of the home of Maluki Kakuli. Soon after the appellant armed with a bow and arrows was seen by two witnesses PW6, Rose Mukusi Musyoki, and PW 11, Rhoda Wayua Mwinyithya, separately from different places following the direction the deceased had gone towards the home of Maluki Kakuli. Not long after screams were heard coming from Maluki Kakuli's home which brought people from around the vicinity running to the source of the screams. Four of them PW7, PW6, PW9 and PW10, testified that on arrival at the scene they found the deceased lying on the ground having been shot with an arrow on the left side of his abdomen. Each one of these four witnesses heard the deceased say that he had been shot by Mwangangi Musili who is the appellant. Two of these witnesses testified that later while still at the scene the deceased, when he realized that he was about to die, directed these two to tell his, the deceased's son Kamwithi when he came back from Mombasa that he had been killed by Mwangangi Musili. These two witnesses were PW7, a nephew of the deceased and PW10, the deceased's sister-in-law.

PW 10 had further testified that on hearing the screams she and Kimala, PW9, another sister-in-law of the deceased, ran towards where the screams were coming from. They met the appellant running across at right angle to the direction they were following. The appellant was carrying a bow and arrows.

The deceased died as a result of cardio respiratory failure caused by poison contained in the arrow and by internal bleeding.

The same morning at about 11.00 am the appellant was arrested in front of his house, which was in the neighborhood, by David Maluki Kakuli (PW12) and other members of the public. No bow or any arrow was recovered from the appellant's house.

The defence of the appellant was alibi which was more or less the same he raised before the committing magistrate which was that on that morning he had been cutting trees for one Charles Kilavi Kilo. After keeping the 10 trees and 4 poles that he had cut on one side of the road he came back home at about 11.00 am. He was resting when Maluki with three others came. He was asked what he was carrying back home. He replied that he had come with a panga. He was taken to where the deceased lay. In answer to Maluki he had replied that he knew the deceased but denied having seen him that morning.

The learned trial judge had ably analysed the evidence to the assessors and in our view had given the correct directions as to the law with regard to the onus and the dying declaration. All the three assessors found the appellant guilty of murder and so did the learned judge following his careful and well-reasoned judgment.

Apart from the dying declaration the other major issue before the trial judge was the identification of the

person who, armed with a bow and arrows, was earlier seen following the direction the deceased had taken to graze his cattle and was later seen, still armed with a bow and arrows, running away from the screams when all the neighbourhood was running towards the screams. Four prosecution witnesses had seen and recognized that armed person as the appellant on these two occasions. Each one of them had known the appellant personally. The appellant lived in the neighbourhood. Rose Mukisi Musyoki (PW6), the daughter-in-law of the deceased, had known the appellant even before her marriage. A very short time after the deceased had left home to graze his cattle, while she was standing outside her house she saw the appellant about 50 yards away, armed with a bow and arrows, going in the same direction which the deceased had gone towards the home of Kakuli.

Rhoda Wayua Mwinyithua (PW11), recently married to the deceased's nephew, came to know the appellant as a neighbour. On the fateful morning at about 7.30 am she had gone to a certain home to have her child's teeth examined. On her way back with her husband when near the home of Mwangangi Kaluku she saw the appellant about 50 yards away, armed with a bow and arrows, going towards the home of Maluki Kakuli. The learned judge had noted that Mwinyithua (PW8) the husband of the witness had not mentioned in his evidence having seen the appellant earlier in the morning in the circumstances related by his wife. The omission had not caused the learned judge to change his view that Rhoda (PW11) was a witness of truth and that she had in fact seen the appellant in those circumstances. We do not see any reason to disagree.

Kimala w/o Musembi (PW9), a sister-in-law of the deceased, was running from her shamba towards the direction the screams were coming from when she saw the appellant holding a bow and arrows running across at right angle to the direction she was running. He was about 50 yards away. Although she did not see his face she recognized him and was emphatic about her recognition of the appellant stating that when one knows somebody and he is at a distance of about 50 yards (indicated) or could not mistake that person. She had even spoken to the appellant and had asked him why the screams were coming from that side. The appellant had not replied and had continued running. Kathina Musembi (PW10) another sister-in-law of the deceased, who had known the appellant as a neighbour, also ran along with PW9 from the shamba when she heard the screams. While running in the direction the screams were coming from the appellant ran across at right angle to her direction. The appellant was carrying a bow and arrows and passed her at a distance of only about 5 paces away. She said during cross-examination that she saw the appellant's face.

Each one of these four witnesses had known the appellant before and had recognized him from a short distance in broad daylight. The learned trial judge accepted the evidence of these witnesses as being the truth. On our own evaluation of the evidence we are satisfied that their evidence was reliable and truthful. We concur with the findings of the trial judge that the appellant armed with a bow and arrows had followed the direction taken a short time earlier by the deceased and had, immediately after the screams had started, made a quick get away from the vicinity while still armed with the bow and arrows. Like the trial judge we have no doubt in our minds that those screams were made by the deceased after he had been shot with the poisoned arrow.

The above evidence of the highly suspicious circumstances under which the appellant was found in the vicinity armed with a bow and arrows at the time when the deceased was shot with an arrow is circumstantial evidence. The evidence that it was the appellant who shot the deceased with the arrow comes from the latter's dying declaration.

The arrow had pierced the deceased's abdomen on the left side. If it was fired from the left side of the deceased then there was every likelihood of the deceased having seen the appellant. That he had in fact seen the appellant is borne out by the evidence of PW7, who, after the deceased's screams were heard in the vicinity, was the first to arrive at the scene. The deceased was at that time lying on the path holding the arrow head which had pierced the left side of the abdomen and was trying to pull it out. The deceased told PW7 that in case he died the witness should know that it was Mwangangi Musili who had shot him. Within 10 minutes of PW7's arrival at the scene. To each one of them the deceased had said that it was Mwangangi Musili who had shot him.

Later when the wheel-burrow arrived the deceased had declined to be put on it. It is clear that realization of imminent death had by then come to him because this is what PW7 said the deceased told him.

“Come, may I tell you my last words. When Kamwithi comes tell him that I have died and that I had been killed by Mwangangi.”

According to PW7 the deceased died about half an hour later. Kamwithi was the deceased's son who at the time was in Mombasa. Mwangangi Musili is the appellant.

In our view this was a strong evidence of a dying declaration made immediately after the fatal assault and given by witnesses who were found by the learned trial judge to be witnesses of truth and credibility. The law in Kenya relating to acceptance of dying declarations as evidence is clear that whilst corroboration of a statement as to the cause of death made before his death by the deceased is desirable it is not always necessary in order to support a conviction. To say so would be to place such evidence on the same plane as accomplice evidence and would be incorrect – (U) *R v Elighu s/o Odel and another* (1943) 10 EACA 90.

However, it has always been stressed by the Court of Appeal that although there is no rule of law that to support a conviction there must be corroboration of a dying declaration, but it is generally unsafe to base a conviction solely on an uncorroborated dying declaration, and that too great weight should not be attached to dying statements which should be received in evidence with caution (T) *R v Ramzani bin Mirandu* (1934) 1 EACA 107, (T), *R v Mgundulwa s/o Jalu and others* (1946) 13 EACA 169, (K) *Pius Jasunga s/o Akumu v R* (1954) 21 EACA 331.

We observe that the learned trial judge in his summing up had given correct directions with regard to the cautious manner in which the dying declaration was to be approached and that it was unsafe to act only on the dying declaration. There was strong corroboration in the suspicious circumstances in which the appellant, armed with a bow and arrows, was seen during the two material occasions, that is when following the direction in which the deceased had gone little earlier, and soon after making a quick get-away from the vicinity when the deceased's screams were heard after he had been shot with an arrow. The learned trial judge had agreed with the unanimous decision of all the three assessors and had found the appellant guilty of murder. We concur with his finding. The appeal against conviction is dismissed.