

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CRIMINAL CASE NO. 8 OF 2020

REPUBLIC.....

.....PROSECUTION

VERSUS

DAVID

KIMANI

MUIGANA.....ACCUSED

JUDGMENT

1. The accused is charged with the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that, on 23rd day of March, 2020 at Mashinani area in Kinangop Sub County within Nyandarua County he murdered Patrick Muhoro Mbau.
2. The prosecution case is that, on the 23rd day of March, 2020, the deceased was in the bar in the

company of other people including Kimathi and (PW1) Edward Mwaura Ndegwa. According to PW1 Mwaura, the deceased went into the bar drunk. At that time a waiter called Shiko had been sent by a customer to bring for him a cigarette and after purchasing the cigarette and returning to the bar, the deceased hit her accidentally and Shiko slapped the deceased. That a confrontation ensued between the deceased and the other waiters intervened and took the deceased out of the bar.

3. Mwaura (PW1) stated that he left the bar for home and found the deceased lying on the grass. That he was drunk and that PW1 tried to wake the deceased up to go home as they were staying in the same place but he did not manage. PW1 further testified that the deceased told him he had been beaten by

one Kimani wherein PW1 told him to go home and they would discuss the matter the following day.

4. Apparently, the following day (PW2) Wilson Kiprotich Chirchir went to the shop to buy bread and met the deceased at the shop. PW2 testified that the deceased was holding his stomach saying that he was in pain and wanted medicine from the shop keeper but the shop keeper declined to sell to him medicine arguing that he had sold him a lot of medicine the night before. PW2 Chirchir left the deceased at the shop and told one Kioko to assist him go to hospital. He was put in the vehicle and taken to hospital.

5. However, he did not make it and died later. A report of the deceased's demise was made at the police station by the deceased's father. (PW4) No. 99895 PC Isaac Githinji who was one of the investigating

officers visited the scene of crime and gathered information from a key witness one Mukora and others that the deceased was assaulted by the accused.

6. That Mukora took the police to where deceased was assaulted and they drew a sketch plan showing the scene (produced as Pexhibit 3). That the suspect was pursue but upon learning that he was being sought he presented himself to the police station.

7. In the meantime, a post mortem was carried out on the body of the deceased by Dr. Ndegwa who formed the opinion that the cause of death was peritonitis due to perforated ileum and abdominal blunt force trauma. The accused was charged after investigation/

8. At the close of the prosecution case, the accused was placed on his defence. He testified vide a sworn

statement and stated that on 21st March 2020, he was working in a butchery near Mashinani bar. That at 8pm four people including the deceased and one Kimani went to the bar. That he closed the bar at 8pm and went home.

9. That the following day, he heard that there was a fight in the bar at Mashinani and was called at Njabini Police Station and placed in the cells for investigations. That other people including; Peter Mwangi Mucheru, Peter Mwangi Gacheru and Monicah were also placed in the cells. He denied being involved in the death of the deceased.,

10. At the close of the entire case, the parties filed their final submissions. The prosecution filed submissions dated; 14th May 2025, and relied on the case of; Antony Ndegwa Ngari versus Republic (2014) eKLR where the Court of Appeal discussed the

ingredients of the offence of murder as; the occurrence and cause of death; that the accused committed the unlawful act that led to the death; and that he had malice aforethought.

11. The prosecution submitted that the death of the deceased is proved by the evidence PW2 and PW3 who escorted the deceased to the hospital before he died. That their evidence is corroborated by the evidence of PW5 the doctor who conducted the post mortem on the body of the deceased and concluded that the cause of death was peritonitis due to abdominal to blunt force trauma.

12. On whether the accused unlawfully killed the deceased, the prosecution referred the court to Article 26 of the Constitution of Kenya, 2010, which states that life can only be deprived to the extent provided for under the constitution or in accordance with any

other written law. That every homicide is unlawful unless authorized by law or excusable and/or justifiable circumstances such as self-defence or defence to property.

13. The prosecution further submitted that, PW1 testified that the deceased informed him that the accused assaulted him. That the deceased statement having been made in relation to his cause of death was a dying declaration admissible under the law.

14. That, in addition the accused testified during the defence hearing that he saw the deceased at Mashinani bar on the day of the incident and he bought meat from him.

15. On whether the accused had malice aforethought, the prosecution argued that the accused knew or ought to have known that assaulting the deceased on the stomach would result into death or cause grievous

harm. That considering the part of the body targeted and the extent of the injuries sustained by the deceased the element of malice aforethought as set out in section 206 of the Penal Code is adequately proved.

16. Lastly the prosecution submitted that the in the information, the date of the offence was wrongly indicated as 23rd March 2020 instead of 21st March 2020. That despite this, the information was not defective as it was drafted in compliance with section 134 of the Criminal Procedure Code.

17. Further the charges and particulars thereof were read to the accused and he was able to respond to the same and participated fully in the trial. Furthermore, the evidence presented by the prosecution clearly indicated that the deceased was assaulted on 21st

March 2020 and died on 23rd March 2020, which fact was not disputed.

18. That in the circumstance, the contradiction as to the date of the offence did not prejudice the accused and there is no miscarriage of justice. Further, in any event the defect is curable under section 382 of the Criminal Procedure Code.
19. The prosecution argued that it has proved the ingredients of the offence of murder to the required standard of proof and urged the court to find that the accused caused the death of the deceased.
20. However, the defence in response submissions dated; 22nd April 2025 cited sections 203 and 204 of the Penal Code and submitted that the prosecution was required to prove the death of the deceased, that the accused caused the death and that it was actuated with malice aforethought.

21. The defence conceded that the cause of death is not in dispute as the post mortem report filled by PW4 and produced by PW5 revealed the cause of death to be peritonitis due to perforated ileum due to abdominal blunt force trauma.

22. On whether the accused committed the unlawful act that caused the death of the deceased, the defence argued that none of the prosecution witnesses saw the accused hit or fight with the deceased. That the prosecution is attempting to link him to the death through the evidence of PW1 and the witness statement of John Mwangi Mukora.

23. However, these evidence of the witnesses is not credible as they were both drunk at the material time that the offence was committed and were deceased's colleagues. Further, their testimonies were full of contradictions raising the issue on the credibility.

24. That PW1 in his evidence denied that he was involved in the fight with the deceased and stated that it was the deceased and the bar attendants and he was thrown out of the bar together with the deceased while the statement of Mukora indicates that PW1 was also involved in the fight and was thrown out of the bar together with the deceased.

25. Further, PW1 testified that he found the deceased lying 30 to 40 metres from the bar while Mukora in his statement stated that he found the deceased lying outside the butchery. That the sketch plan of the scene drawn by the police officers based on where Mukora showed them the deceased was lying indicates that the deceased was lying about four (4) metres from the butchery.

26. The defence raised the issue on the admissibility of the statement of Mukora arguing that it was not

tested through cross-examination and that the defence object to its admissibility.

27. The defence relied on the case of; *Republic vs John Nganga Njeri Criminal Case 73 of 2016) [2018] KEHC 3042 (KLR) 26 October 2018) (Ruling)* where the High Court set out the circumstances under which the statements of a deceased witness can be admitted in evidence being; the unavailability of the witness, that the statement must have sufficient indicia of reliability and that it has been subject to cross-examination or opportunity for cross examination made available to the accused, or that the statement was given under oath. That a statement that does not meet all three criteria is not admissible as evidence against the accused.

28. The defence faulted the manner the investigations were conducted and argued that the prosecution did

not call and/or investigate the bar attendants to shed light on the fight at the bar.

29. That PW5. Dr Ngulungu who testified on behalf of Dr Ndegwa in cross examination testified that blunt force trauma could have been caused by a number of objects or weapons and that it is possible that the fight resulted in the injuries on the deceased's body.

30. The defence submitted that the prosecution has failed to prove any of the ingredients and relied on section 206 of the Penal Code that set out the ingredients of malice aforethought.

31. Lastly, the defence argued that his defence was consistent and not shaken by the prosecution during cross- examination. Further the prosecution has failed to prove any grudge with the deceased. He faulted the investigations for being shoddy and termed the charges against him as a fabrication due to the

glaring evidence of the fight in the bar had been ignored. The defence urged the court to acquit the accused of the charge herein

32. At the conclusion of the case, and in considering the evidence in total, the court notes that, the offence with which the accused is charged with is provided for under section 203 of the Penal Code which states as follows:

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

33. Pursuant thereto, the ingredients of the offence are settled by various court’s decision as follows; a) proof of the death of the deceased, b) that the death was caused by an unlawful act or omission of the accused, and c) that the act was committed with intent to kill or cause grievous harm, basically malice aforethought.

34. The Court of Appeal in the case of; Roba Galma Wario v Republic (2015) eKLR reiterated the afore elements, emphasizing that proving these ingredients beyond reasonable doubt is crucial for conviction, with malice aforethought distinguishing murder from manslaughter.

35. To revert back to this matter, the court notes that, as regard the occurrence of the death of the deceased herein, the evidence of PW1 and in particular PW2 Kioko corroborated by the evidence of Dr Ndegwa who performed postmortem confirms occurrence of death. The cause of death was established by the post mortem report and as stated herein and is not in dispute.

36. The most critical issue is whether the accused committed the offence. Notably, there is no direct evidence that the accused was seen committing the

offence, consequently the case rests on circumstantial evidence.

37. The evidence relied on by the prosecution to link the accused to the defence is that of PW1 that the deceased told him it was Kimani whom the witness identified as the accused who had assaulted the deceased. According to the prosecution that is a dying declaration admissible in evidence. However, the defence call it hearsay.

38. In that regard section 33 (a) of the Evidence Act (Cap 80) deals with dying declaration and states that: -

“Statements, written or oral or electronically recorded, 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;

39. In addition, in the case of; *Philip Nzaka Watu v Republic [2016] eKLR*, the Court of Appeal stated that:

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“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

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 V. 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.

40. Further in the case of Musyoka v Republic [2025] KECA 1318 (KLR) the Court of Appeal stated that:

“50. From the foregoing, the following elements of dying declarations stand out, that is:

- i. The statement must have been made by the deceased.*
- ii. The statement must refer to the accused.*

ii. The statement must relate to the cause of one's death, or as to any of the circumstances of the transaction which resulted in one's death.

iii. Whereas there is no standing rule on the need for corroboration of a dying declaration, extreme caution must be taken in assessing the weight to be attached to a dying declaration.

51. From the analysis of the afore-cited jurisprudence, it is clear that it is not mandatory, as an exception to the rule of hearsay evidence as provided under Section 33 (a) of the Evidence Act, that a statement of declaration of death must be corroborated. It also comes out clearly that courts have been cautious in admitting such evidence in the absence of some degree of corroboration for the reasons that: first, it is evidence which will not be subjected to cross examination; and, secondly, in

the heat of the moment, a deceased person who met his death in unusual circumstances may have a questionable mindset.

41. Finally, in the case of Maina & another v Republic [2025] KECA 2296 (KLR) the Court of Appeal considered jurisprudence from other jurisdiction of South Africa and Canada and held that: -

“48. A comparative reading of these authorities reveals a shared judicial philosophy, admissibility depends fundamentally on reliability. In Kenya, Section 33(a) of the Evidence Act codifies the dying declaration rule but requires corroboration and caution. South African jurisprudence, particularly under Section 3 of the Law of Evidence Amendment Act, advances a discretionary, interest-of-justice standard that accommodates constitutional considerations. The Canadian ‘principled approach’

merges these concerns, focusing on necessity and reliability rather than formal categories. Collectively, the jurisprudence shows a movement away from rigid technicalities toward a justice-oriented assessment of reliability and fairness.

49. Across these jurisdictions, the emphasis is that dying declarations, though admissible, must be treated with great caution. The declarant's belief in impending death, mental clarity, and the voluntariness of the statement are crucial. Corroboration remains the best safeguard against miscarriage of justice. The consistent thread from Choge to Smith is that reliability is the cornerstone of admissibility, ensuring that such exceptional evidence advances, rather than undermines, the administration of justice.

42. From the aforesaid, as for the evidentially value of a dying declaration, it can be the sole basis for a conviction if the court finds truthful, voluntary and not the rest of tutoring or prompting.

43. In addition, while corroboration is not strictly required by the law, courts often look for corroboration to ensure that the statement is safe to rely upon. Further courts accept such declaration with caution because the maker cannot be cross examined.

44. Consequently, the court must ensure the deceased was in sound mind and that the statement was not a product of imagination or coercion. If a person makes a statement believing they are dying but survives, then it is not a dying declaration.

45. In the instant matter, PW1 Edward testified that, he found the deceased lying on the grass. He was drunk and that as he tried to assist the deceased, the

deceased told him that he had been beaten by Kimani. Notably two things; the drunken state in which the deceased was. He is said to have gone to the bar drunk and when PW1 met him on the road, he was still drunk. Further, the mention of only one name "Kimani". Therefore, as much as PW1 identified the accused in the dock as the "Kimani". It is not clear whether the Kimani the deceased referred to is the accused and no one else.

46. Consequently, in the absence of collaborative evidence, the evidence of PW1 must be treated with caution and cannot per se, form a basis of conviction.

47. The other evidence is of the witness Mukora who died before testifying. Under section 33 of the Evidence Act, a statement of a witness will be admissible without the witness testifying where the maker is deceased, incapable of testifying, or if attendance will

cause unreasonable delay or expense. The other circumstances under section 77 relate to where the parties have agreed on facts or verified electronic records under section 35 of the Act.

48. However, in all these circumstances the court must be satisfied that, the statement is relevant, trustworthy and that, the inability to call the witness is genuine.

49. In the instant matter, the statement of Mukora has been properly admitted as there is no dispute that he is deceased and incapable of testifying.

50. However, in a criminal trial, the accused is entitled to a fair trial under Article 50 of the Constitution of Kenya which states inter alia that, the accused will be presumed innocent until the contrary is proved and in particular under article 50(2) (k), the accused has a right “to adduce and challenge evidence”.

51. Pursuant to the aforesaid, it is the finding of this court that as much Mukora's statement has been admitted, the accused will be prejudiced if the evidence of this witness is relied on solely for a conviction. The prejudice will arise in that; the accused will not have the benefit of cross-examining the witness to establish the authenticity or veracity of his statement.

52. Further observation in this matter is that, the deceased is said to have been involved in a scuffle in the bar with one lady called Shiko. It is in evidence that, other than PW1 there were other people in the bar. The prosecution sought for an adjournment on several occasion to call additional evidence but did not.

53. Notably during pre-trial the prosecution indicated that, they had a total of 12 witnesses. Later on the court was informed on 3rd March 2021 that,

statements of five witnesses listed therein were not relevant and that the prosecution was not going to use them. The defence sought to be supplied with the same for defence case, and the prosecution agreed to supply them.

54. Subsequently, the prosecution called four witnesses and on 16th October 2023, sought for an adjournment and summons to call Mercy Wanjiku, Monicah Wambui, Peter Macharia and Philis Nyaguthi. The court ordered for issuance of the summons. On 22nd July 2024, there was only one witness in court Dr. Ngulungu. The other 2 witnesses were said not to be picking their phones. The prosecution was granted a last adjournment. That order was repeated on 23rd September 2024.

55. On 4th November 2024 the court expressed its disappointment with the manner in which the

prosecution was conducting the case. On 12th November 2024, after Dr. Ngulungu testified, the prosecution sought for an adjournment and then told the court that, the other witnesses could not be traced and closed its case. It is therefore clear that despite the court issuing summons to the witnesses, very little effort was made to trace and avail all the witnesses required in this matter. As such, the evidence of PW1 and the deceased witness remained uncorroborated.

56. In the given circumstances I find inadequate evidence to find the accused guilty as charged and I accordingly acquit him of the charge herein.

Dated, delivered and signed this 2nd day of March
2026

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Chepkonga for the Prosecution

Mr Ongeru for the Accused

Hannah: Court Assistant