IN THE COURT OF APPEAL

AT KISUMU
(CORAM: NYAMWEYA, ACHODE & MATIVO, JJ.A)

CRIMINAL APPEAL NO. 383 OF 2019 BETWEEN

PETER CHACHA MOGAYA...................................APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Migori (Mrima J) dated 26th July 2019

in

HCCR No. 20 of 2018)

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JUDGEMENT OF THE COURT

1. This is one of those cases that testify to the enduring mystery of the blood of a slain victim refusing to go quietly in to the night. The deceased herein sustained a serious arrow injury to which he later succumbed while undergoing treatment at Kegonga District Hospital. There were no witnesses to the incident. The matter was reported to the police and the ensuing investigation culminated in the arrest and arraignment of the appellant, approximately four years later on a charge of murder contrary to **section 203** as read with **204** of the **Penal Code**.

2. The particulars of the offence were that on 19th August 2014 at Nyamagenga village in Kuria East sub-county within Migori County in the Republic of Kenya, the appellant murdered **Muruga Mwera Musungu**. The appellant denied the charge prompting the prosecution to call six witnesses to prove its

case.

3. The case for the prosecution rested primarily on the dying declaration of the deceased attested to by Angelo Mwita Moses, PW1 and Joseph Saguge Maroa PW4.

4. PW1, a neighbour to both the deceased and the appellant, testified that on 19th August 2014, he arrived at the scene shortly after the incident and found the deceased already seriously injured. He assisted in rushing him to Kegonga District Hospital on a motorbike. On the way to hospital, the deceased repeatedly told him that it was Chacha Mogaya, the appellant who had shot him with the arrow. PW1 knew the appellant well and confirmed that he was the only person bearing that name in Nyamagenga Village. The deceased later succumbed to his injuries.

5. PW4, the Chief of Nyabasi North Location, was on official duty on the material day at about 11.00 a.m., when he heard screams emanating from the deceased's farm. He went towards the scene and met the deceased emerging from the farm carrying a machete. He had an arrow lodged in his back and was crying. He informed PW4 that Chacha Mogaya had shot the arrow into his back. PW4 declined to pull it out as requested by the deceased and called a motorcyclist to take him to hospital. PW4 testified to the existence of a land dispute between the families of the appellant and the deceased and that the appellant fled from the area immediately after the incident.

6. Johanna Magonga Mwera PW2, a cousin to the appellant, testified that he became aware of the incident after the deceased had died. He later viewed the body of the

deceased at

the hospital before it was transferred to the mortuary. He too testified to the existence of a longstanding land dispute between the family of the deceased and that of the appellant. Further, that the appellant disappeared from the area immediately after the incident and remained untraceable for about four years until his eventual arrest.

7. John Magabe Mwera PW3, a brother to the deceased and uncle to the appellant, corroborated the evidence regarding the appellant's disappearance and the strained relations between the two families.

8. Dr. Awinda Victor Omollo, PW5 produced the post-mortem report on behalf of Dr. Ndege, who conducted the autopsy but was unavailable to testify. The report revealed that the deceased had sustained a penetrating wound to the right inferior scapular region, with penetration into the lung. The cause of death was determined to be right haemo-thorax secondary to posterior penetrating lung injury.

9. PC Joshua Adenya, PW6 took over the investigation after the transfer of the initial investigating officer. He stated that the appellant could not be traced immediately after the incident and was believed to have fled to Tanzania. Upon the appellant's return, PW6 arrested and charged him. He produced several exhibits including photographs, certificates, and reports, but the murder weapon could not be traced in the exhibit store.

10. In his defence, the appellant testified on oath and called no witnesses. He denied any involvement in the murder or that he fled from the area following the incident. He maintained

that

he remained within the locality and was continuously engaged in operating his motorbike business between his home and Sirare Town. He produced documents from Alliance One Tobacco Limited to demonstrate that he was a contracted tobacco farmer and asserted that he did not abandon his crops at any time. He denied the existence of any land dispute between the two families and alleged that PW4 had framed him because of a preexisting grudge between them, arising from stolen livestock which was traced to the home of PW4.

11. In a judgement dated 26th July 2019, delivered in the High Court of Kenya at Migori, ***Mrima J***. considered the evidence before him and found that the prosecution had proved its case against the appellant beyond reasonable doubt. The learned Judge convicted him and sentenced him to life imprisonment.

12. In a bid to upset that judgement, the appellant filed this appeal and raised eight grounds in the memorandum of appeal dated 20th August 2025. He alleges that: the learned trial Judge failed to properly evaluate and weigh the totality of the evidence on record; the dying declaration was unreliable and was not insufficiently corroborated; material weaknesses in the prosecution case were not addressed, including witness bias arising from a longstanding land dispute and serious investigative lapses such as the failure to produce the alleged murder weapon; the appellant's defence was not considered, including his alibi and denial that he absconded; and, that the court improperly relied on alleged flight as evidence of guilt.

13. ***Ms. Mwalo***, learned counsel filed submissions dated 20th August 2025 on behalf of the appellant and urged that while

conviction was founded solely on an alleged dying declaration and the trial court correctly cited the case of **<u>Pius Jasunga</u> <u>s/o Akumu v R</u> [1954] 21 EACA 333**, which holding is reiterated in numerous cases including **<u>Stephen Muturia</u> <u>Kinganga v Republic</u> [2013] eKLR**, the court misapplied the case. She urged that the alleged corroboration was illusory as the consistency attributed to PW1 and PW4 was mere repetition and not independent evidence in corroboration as was held in **<u>Tindall v R</u> [1942] 9 EACA 90**.

14. Counsel contended that the medical evidence only proved the cause of death but did not implicate the appellant, as there was no eyewitness, forensic evidence, or production of the alleged murder weapon. She contended that the conviction rested on an uncorroborated dying declaration, contrary to the caution found in the case of **<u>Choge v Republic</u> [1985] KLR 1** where it was stated that a conviction based solely on a dying declaration, though permissible, is a practice to be avoided and is justified only in the clearest of cases, which the present case is not.

15. Counsel urged that the trial court failed to scrutinize the prosecution evidence which was tainted by admitted hostility arising from a longstanding land dispute as acknowledged by PW2, PW3 and PW4 and the alleged dying declaration was made in a charged familial context, to witnesses who had an apparent motive to implicate the appellant. That the court paid lip service to the duty articulated in **<u>Okeno v Republic</u> [1972] EA 32** and failed to warn itself of the dangers of relying on such evidence, resulting in misdirection.

16. It was also urged that the trial court improperly relied on his alleged flight as evidence of guilt and failed to fairly evaluate the appellant's alibi, which was supported by documentary evidence and that the appellant was not required to prove the alibi beyond reasonable doubt. Counsel posited that the prosecution failed to rebut this evidence and compounded the weakness of its case by failing to produce the alleged murder weapon. She referred to the case of **Mwangi v Republic [2007]**

2 EA 261, where this Court emphasized the importance of producing a murder weapon. It is her view that the defence was glossed over, occasioning injustice.

17. ***Ms. Ikol Esaba*** learned Senior Assistant Director of Public Prosecution, (SADPP), filed the submissions dated 21st August 2025 for the respondent and urged that the identity of the appellant as the assailant was firmly established through a reliable dying declaration made by the deceased to PW1 who testified that on the way to hospital, the deceased repeatedly named the appellant as the person who had shot him with the arrow. That PW4 independently testified that the deceased told him he had been shot by the appellant. Counsel asserted that there was no ambiguity as to the identity of the assailant, PW1 having confirmed that there was only one person known by that name in the area.

18. Counsel submitted that the dying declaration was truthful and reliable and was corroborated by surrounding circumstances, including medical evidence confirming that there was a penetrating injury consistent with the weapon described. Reliance was placed on the case of **Nelson Julius**

Karanja

Irungu v Republic [2010] eKLR, where a conviction founded on a dying declaration was upheld.

19. Counsel urged that malice aforethought was proved within the meaning of **section 206** of the **Penal Code**. That the weapon used was a poisoned arrow, a lethal weapon whose use demonstrates an intention to kill or cause grievous harm. Additionally, that PW3 testified that the arrow was poisoned and that such weapons are commonly known within the Kuria community. That PW5 confirmed that the deceased sustained a deep penetrating injury to the back and into the lung and the appellant knew or ought to have known that the use of such a weapon would probably cause death. Therefore, that the nature of the weapon and the injury inflicted clearly established malice aforethought.

20. On sentence, counsel submitted that life imprisonment was lawful and proportionate given the gravity of the offence and the way it was committed. That the testimony of PW6 that the appellant had previously threatened to kill the deceased, further demonstrated intent. Further, that the appellant has not laid any basis for the Court to interference with the sentence, however, if the Court is inclined to interfere, the sentence should be at least a minimum of 40 years imprisonment.

21. The appeal came before Court for hearing on 2nd September 2025 via the virtual platform. Ms. Mwalo learned counsel appeared for the appellant, who also joined the proceedings from Kibos prison. Ms. Esaba was present for the respondent. Both counsel opted to rely wholly on their submissions.

22. This being a first appeal, this Court is under a duty to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it neither saw, nor heard the witnesses and give allowance therefore. This role is articulated in this Court's decision in **David Njuguna Wairimu vs Republic [2010] eKLR** as follows:

> ***"In Okeno v. R [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision. In Okeno v. R (Supra) the Court said: -***
>
> > ***'It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions.'"***

23. Having considered the grounds and record of appeal and the rival submissions of the parties, the following issues arise for our determination:

a) Whether the conviction was improperly founded on a dying declaration.

b) Whether there were material weaknesses in the prosecution case, including witness bias arising from a longstanding land dispute, investigative lapses, and the failure to produce the murder weapon.

c) Whether the appellant's defence, including his alibi and denial of absconding was glossed over.

d) Whether the trial court properly evaluated and analysed the totality of the evidence on record before arriving at the conviction.

24. As stated earlier, the appellant was charged with murder contrary to **section 203** as read with **204** of the **Penal Code**. The section provides as follows:

> ***"203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."***

25. To sustain a conviction under **section 203** as read with **204** of the **Penal Code,** the prosecution must prove beyond reasonable doubt, that the deceased died as a result of an unlawful act or omission on the part of the appellant; and that such an unlawful act or omission was committed with malice aforethought. This position is well articulated in **Roba Galma Wario vs Republic** **[2015] eKLR** where this Court held that:

> ***"For the conviction of murder to be sustained, it is imperative to prove that death of the***

deceased was caused by the appellant; and that he had the required malice afterthought. Without malice

> ***afterthought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional***."

26. In the appeal before us, it is common ground that the life of the deceased was cut short because of misadventure. Put differently, it was not due to natural cause. It was as a result of an unlawful act. The postmortem report produced by PW6 determined the cause of death to be right haemo-thorax, secondary to a posterior penetrating lung injury.

27. The more irksome questions are whether the appellant was the perpetrator of the unlawful act that caused the death of the deceased, and whether such act was accompanied by malice aforethought as asserted by the respondent. On these limbs, the prosecution's case rests on the dying declaration of the deceased. Consequently, we assessed the evidence to establish whether the prosecution proved that the dying declaration of the deceased was sufficient to secure a conviction.

28. A dying declaration is admissible in court by dint of **section 33 (a)** of the **Evidence Act**, which stipulates that:

> **"33.*Statements, written or oral or of 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 and 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."

29. Notwithstanding **section 33(a)** of the **Evidence Act,** courts have consistently adjured 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 confusion and surprise so as to render the deceased's 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 to ascertain that a conviction founded on a death declaration is indeed safe. (See - **Philip Nzaka Watu v Republic [2016] KECA 696 (KLR)**)

30. The Court of Appeal expressed itself as follows in **Chogev Republic *:***

"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."***

31. The appellant's principal complaint herein was that the conviction was founded on an uncorroborated dying declaration. The respondent on the other hand contended that the dying declaration was truthful and reliable and was corroborated by surrounding circumstances, including medical evidence confirming a penetrating injury consistent with the weapon described.

32. We note that the deceased made consistent and spontaneous statements to PW1 and PW4 shortly after sustaining the fatal injury, naming the appellant as his assailant. The statements were made in extremis, without evidence of prompting or fabrication. The identity of the person referred to by the deceased was not in doubt. PW1 confirmed that the appellant was the only person known by that name in the locality. The medical evidence, while not corroborative of identity, was consistent with the manner of injury described by the deceased. We therefore find that in the circumstances, this case, the dying declaration was credible evidence to found a conviction.

33. On malice aforethought, **section 204** of the **Penal Code** stipulates that:

"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."

34. The East African Court of Appeal pronounced itself on proof of malice aforethought in **Rex v Tubere s/o Ochen [1945] 1Z EACA 63**, as follows:

"In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."

49. Also, in the case of **Hyam v DPP [1974] A.C.** the Court held *inter alia,* that**:**

"Malice aforethought in the crime of murder is established by proof beyond reasonable

doubt when during the act which led to the death of another the accused knew that it was highly

probable that, that act would result in death or serious bodily harm."

35. In our considered view the nature of the weapon used, the location of the injury, and the severity of the penetrating wound, established an intention to cause death, or in the very least grievous harm within the meaning of **section 206.**

36. We note that the allegation that the prosecution witnesses were actuated by bias, arising from a longstanding land dispute was duly considered. The existence of such a dispute, without more, did not render the evidence unreliable. There was no demonstration that the alleged animosity influenced or tainted the deceased's own statement. The trial court cannot therefore be faulted for accepting the evidence after due caution.

37. The absence of the alleged murder weapon was also raised. We hold that while production of a weapon in a murder case is desirable, it is not a legal requirement where other credible evidence proves the offence. The medical evidence conclusively established the cause of death and failure to produce the murder weapon did not, in our view, occasion injustice. This Court addressed a similar scenario in **Ramadhan Kombe v Republic, Criminal Appeal No. 168 of 2002** had this to say:

> ***"In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who***

prepared the post mortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not

> ***fatal to the case of the prosecution nor did it prejudice the appellant's defence. We have no hesitation in rejecting this submission."***

38. Also, in **Chris Kasamba Karani v Republic [2010] KECA 478 (KLR)**, this Court held that:

> ***"…in our view, nothing turns on the irregularity because the production of that exhibit did not affect any ingredient of the offence. The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit."***

39. The appellant also challenged the finding that he absconded contending that his *alibi* defence was not adequately considered. We observe that the superior court evaluated the appellant's defence before dismissing it in the following words:

> *"In defence thereof the accused person stated that he was all along at home. If that was the case one wonders why the police were not able to arrest him. Further even his close family members and the local administrator could not find him at home. As to the documents he produced from the Alliance One Tobacco Ltd, I find the same to be mere copies with no authentication. On the Land Sale Agreement, I note that the same was allegedly executed by Abisai & Company Advocates and not by a specific Advocate. A firm of Advocates cannot per se witness the execution of documents, but specific Advocates*

in that firm who must append not only their signatures but also their details in confirmation that they are duly authorized in

> *law to practice law. That is the only way an Advocate can be held accountable and is in line with **Article 10** of the **Constitution**. I therefore find and hold that the documents produced by the accused person are of very little probative value, if any, and do not cast any doubt at all on the prosecution's case. The upshot is that the contention by the accused person that he did not disappear immediately after the incident is ill- founded and is for rejection."*

40. We agree with the learned Judge and add that the documentary evidence relied upon by the appellant did not debunk the prosecution's evidence that he was nowhere to be found in the area for a prolonged period after the event.

41. Having re-evaluated and analyzed the evidence, the grounds of appeal and the rival submissions, we are satisfied that the prosecution proved their case beyond reasonable doubt and the learned Judge did not misdirect himself on the law or the facts. Therefore, the conviction was safe.

42. While the appellant's counsel did not submit on the issue of the sentence, save to pray that it be set aside, the respondent urged that the sentence imposed was appropriate and proposed that in the event the Court is inclined to interfere with it, a sentence of 40 years should be considered. We have considered the circumstances of the case and guided by the holding in Supreme Court decision of **<u>Francis Karioko Muruatetu & another v Republic</u> [2017] eKLR.** We note that the trial Judge considered the aggravating circumstances of the deceased's death, and the pre-sentence report in imposing the life sentence. We however also note that the appellant in

mitigation did express remorse, which appears not to have been taken into account during the sentencing

43. Accordingly, this appeal is dismissed on conviction and only partially succeeds on sentence, to the extent that the appellant's sentence of life imprisonment is set aside and substituted thereof with a sentence of forty-five (45) years imprisonment from the date of conviction by the High Court. Time spent in custody awaiting trial shall be taken into account in accordance with **Section 333(2)** of the **Criminal Procedure Code**.

Dated and delivered at Kisumu this 13th day of March 2026

P. NYAMWEYA
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JUDGE OF APPEAL
L. ACHODE
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JUDGE OF APPEAL
J. MATIVO
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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR