

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**HIGH COURT CRIMINAL CASE NO. 17 OF 2020**

REPUBLIC.....

....PROSECUTION

VERSUS

JOHN KARIUKI NGUGI.....

.....ACCUSED

**JUDGMENT**

1. The accused was arraigned before court on 24<sup>th</sup> August 2020, charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charges are that on 23<sup>rd</sup> July 2020 at about 0900pm at Gilgil town in Gilgil Sub-County within Nakuru County he murdered Danson Kinuthia.

2. The charge was read to the accused and he pleaded not guilty to the same. The case proceeded to full hearing. The prosecution called a total of eight (8) witnesses. The defence relied on the evidence of the accused person alone.
3. The prosecution case is that, the accused and the deceased were friends who hailed from Elburgon and worked as barbers. That in month of February 2019, the accused moved to Gilgil and started working in a barber shop owned by (PW3) Anastasia Wangari. That after sometime, the accused informed (PW3) Anastasia about the deceased and she agreed to allow the deceased to go and work for her.
4. That the deceased and the accused worked well for about three (3) months and it became evident that the deceased was more efficient in his work than the accused and ended taking up the accused's

customers leading to disagreements between them. Eventually in December 2020, the deceased informed (PW3) Anastasia that he did not want to keep fighting with the accused and quit.

5. That (PW3) Anastasia got another employee but he did not get along well with the customers and in the month of January 2021, PW3 learnt that the deceased had returned to Gilgil and she looked for him and requested him to return to work for her but on condition that he should not quarrel and/or fight with the accused. That the deceased accepted and returned to work.
6. However, three (3) days later, the accused quit his job stating that he could not work together with the deceased, and started working at a barbershop opposite that was opposite PW3.

7. That after two (2) or so months, the deceased informed (PW3) Anastasia and his wife (PW1) Susan Wanjiru that a customer had inquired from him as to why he had disagreed with the accused and had warned him that the accused was carrying a knife with the intention of stabbing the deceased. That (PW3) Anastasia advised him to report the threat to the police but the deceased opted not to stating that the accused would calm down.
8. On 23<sup>rd</sup> July 2020, at around 9:00pm (PW1) Susan the deceased's wife was in the house when she heard a scream and heard the deceased asking her to open the gate as he had stabbed and the attacker was still following him. PW1 opened door and the deceased entered. However, when she attempted to close it someone was pulling it from the outside. That the

deceased assisted her and they managed to close the door.

9. That the deceased showed her where he had been stabbed on the left side of the chest causing her to call for help. That a neighbour (PW2) Alice Muthoni Mbuthia responded and upon inquiry the deceased informed her that he had been stabbed by Kariuki. That together with other neighbours they rushed the deceased to Gilgil District Hospital where he was rushed to the theatre.
10. That after the deceased regained consciousness, they were advised to take the him to Nakuru Hospital but the deceased had lost a lot of blood due bleeding and unfortunately, he succumbed to his injuries before reaching Nakuru Hospital and the body was taken to the morgue.

11. (PW8) No. 70027 PC Daniel Wambugu the investigating officer, stated that on 24<sup>th</sup> July 2020 at 12:45am, they received a report of murder and proceeded to the scene where they recovered a knife at the gate which had broken into two (2) pieces and produced as Pexh 2(a) and (b)). That (PW3) Anastasia accompanied police to accused's house where he was arrested. That they found that the accused had washed and hang on the line the trouser (Pexh 8) he had worn on that day and which (PW8) PC Wambugu confiscated.

12. (PW4) Dr. Titus Ngulungu performed the post mortem on the decease and concluded that the cause of death was lung injury with massive haemothorax (blood loss) due to sharp blade trauma to the chest (stab injury) in keeping with homicide. That he collected a blood sample from the deceased for purposes of DNA

analysis and gave it to the Investigating officer. He produced the post mortem report as (Pexh5).

13. (PW7) Margaret Wahu Maina a Government Analyst stated that she received the deceased's blood sample marked "A", blood sample from the accused marked "B", white vest in a khaki envelope marked "C1", a grey, red and dark blue checked long sleeved shirt in a khaki envelope marked "C2", a metallic knife handle in a khaki envelope marked "D1", a metallic knife blade in a khaki envelope marked "D2", and a green pair of trousers in a khaki envelope marked "E". That she was required to determine the presence and origin of any blood stains in the items.

14. That she found that the vest (Item C1) and the shirt (Item C2) were heavily stained with blood of human origin which matched the blood of the deceased. That the knife handle (Item D1), the knife blade (Item D2)

and the pair of trouser (Item E) were not stained with human blood. She produced her report as (Pexh6). She stated that if a trouser had been washed after being stained with blood, it would be impossible to generate a DNA profile.

15. At the close of investigations, the accused was arraigned in court and charged with the present offence.

16. At the conclusion of the prosecution case, the court ruled that the accused had a case to answer and placed him on his defence. He gave sworn evidence and denied committing the offence. He stated that on the day of the offence he finished working at Blaze of Gold barber shop at 8:30pm, reached home at 9:00pm and went to sleep. That he was woken up at around midnight by a knock on the door and asked whether he was Kariuki. That his house was searched

but nothing was recovered. However, he was arrested and taken to the police station where he learnt of the death of the deceased and that he had been stabbed by Kariuki.

17. He admitted that he previously worked with the deceased at the barbershop owned by (PW3) Anastasia. That one day he found (PW3) Anastasia and the deceased in a compromising position and (PW3) Anastasia warned him not to disclose the love affair to anyone. That he did not disclose the said affair nevertheless PW3's husband was not happy with the deceased.

18. That he told the police officers about the issue and they said they would investigate but did not. The accused denied owning the knife recovered at the scene of crime and produced in court stating that they were not part of his knives at home. He further denied

washing his clothes at night claiming he only washed his doormat with the investigating officer assuming he had washed his clothes. That he was later charged with the offence.

19. In cross-examination, the accused conceded that he hailed from the same region as the deceased, that they were both barbers and were hired by (PW3) Anastasia in 2019. That he had disagreed with the deceased but (PW3) Anastasia reconciled them. He denied that he knew where the deceased lived. Further, he denied owning the trouser produced in court.

20. At the conclusion of the trial, the parties filed their submissions. The prosecution in submissions dated 16<sup>th</sup> May 2025 stated that in order to secure conviction, it has a duty to prove the ingredients of the offence of murder as laid out by the Court of

Appeal in the case of Antony Ndegwa Ngari vs Republic (2014) eKLR being that the death of the accused occurred and the cause of death, that the accused committed an unlawful act that led to the death, and that the accused committed the unlawful act with malice aforethought.

21. The prosecution submitted that, the fact the deceased died was supported by the evidence of (PW1) Susan and (PW2) Alice who escorted the deceased to hospital before he succumbed to his injuries. Further (PW5) John Bosco Kimani identified the body of the deceased during the post mortem.

22. That the cause of death was supported by the evidence of (PW4) Dr. Ngulungu who carried out the post mortem and opined the cause of death was lung injury with massive haemothorax secondary to sharp

force trauma to the chest. That this evidence was not shaken by the defence.

23. The prosecution submitted that Article 26 of the Constitution of Kenya protects the right to life and provides the circumstances in which life can be taken away. That every homicide is unlawful unless it is authorized by law or excusable under the law or in justifiable circumstances such as self-defence or the defence of property. That in the present case, the action of the accused stepping on the stomach of the deceased was unlawful.

24. The prosecution further submitted that there was no eyewitness who saw the accused commit the offence but they are relying on circumstantial evidence and a dying declaration.

25. The prosecution referred the court to the case of; *Abanga alias Onyango vs Republic Criminal Appeal*

No. 32 of 1990 (UR) where the Court of Appeal set out the three (3) test that circumstantial evidence must satisfy before a court can rely on it to find a conviction.

26. The prosecution argued that in the instant case, the deceased had been receiving indirect threats from the accused through customers at the barbershop. Further (PW6) Francis Gachagu Nderitu, the accused neighbour, saw the accused washing his clothes at night which was unusual as the accused normally washed his clothes in the morning. That the prosecution had discharged its burden of proof and showed that the inculpatory facts are incompatible with the accused's innocence and the accused should be found guilty.

27. The prosecution cited section 33(a) of the Evidence Act (Cap 80) Laws of Kenya on a dying declaration

which provides that statements by a person as to the cause of his death or circumstances of the transaction that resulted to his death are admissible whether the person who made them was under the expectation of death.

28. The prosecution submitted that, the on the night the deceased was stabbed, he informed (PW1) Susan and (PW2) Alice that the accused was the person who had stabbed him with a knife. That the statement by the deceased was made immediately after the fatal assault and is therefore not hearsay but amounts to a dying declaration and admissible. Further, dying declaration is corroborated by the indirect threats he had received prior to his death.

29. That in the case of Musili vs Republic [1991] eKLR the Court of Appeal discussing the probative value of a dying declaration stated that while it is desirable to

have corroboration for the statement although it is not always necessary to support conviction but it is generally unsafe to base conviction solely on uncorroborated dying declaration.

30. Lastly, the prosecution submitted that the accused knew or ought to have known that stabbing the deceased on the chest with a knife would result in death or cause grievous harm. That considering the type of weapon, part of body targeted and extent of the injuries the deceased sustained, the prosecution had adequately proved the elements of malice aforethought contemplated in section 206 of the Penal Code. That having proved the ingredients of the offence of murder to the required standard of proof, the court should find the accused caused the death of the deceased.

31. However, the defence in response submissions dated 15<sup>th</sup> May 2025 and supplementary submissions dated 28<sup>th</sup> May 2025 stated that the fact that the deceased died is not contested but rather whether it is the accused that caused his death.

32. That, there was no direct eyewitness who witnessed the accused commit the offence and the prosecution attempt to link the accused to the offence hinges on the name “Kariuki” which is a common second name in the Country and predominant in the location the death occurred.

33. The defence submitted that, the evidence of (PW1) Susan that the deceased informed (PW2) Alice that he was stabbed by Kariuki does not qualify as a dying declaration but is rather double hearsay as the statement was never made to (PW1) Susan and was not corroborated by (PW2) Alice.

34. That the fact that the deceased did not inform his wife (PW1) Susan and chose to inform (PW2) Alice that Kariuki had stabbed him raises questions of authenticity and reliability of the alleged statement. Furthermore, the fact that both (PW1) Susan and (PW2) Alice admitted that they did not know the accused raises doubt about its reliability and probative value.

35. Further, the alleged statement was not corroborated and that it is misleading for the prosecution to state that the deceased received indirect threats from the accused without providing any evidence of the same whatsoever. That the said Peterson, referred to by (PW1) Susan as the person who had warned the deceased that Kariuki intended stab him, was never called as a witness leaving a significant evidentiary gap.

36. That, the fact the dying declaration is uncorroborated and insufficient cannot be used to sustain a conviction. That in the case of David Agwata Achira vs R (2003) eKLR the Court of Appeal cited with approval the case of Aluta vs Republic [1985] KR 543 where it was stated that a trial judge should approach the evidence of a dying declaration with circumspection as its generally unsafe to base a conviction solely on a dying declaration of a deceased person made in the absence of an accused and not subject to cross examination unless there is satisfactory corroboration.

37. The defence argued that, (PW8) PC Wambugu the Investigating officer failed to investigate the alternative theory raised by the accused in his evidence that (PW3) Anastasia and the deceased were found in a compromising position and that (PW3) Anastasia's husband also called Kariuki was

displeased with the deceased. Further, he based his evidence on hearsay from witnesses and admitted to giving three (3) different dates for the incident.

38. The defence further argued that (PW6) John a neighbour of the deceased, testified that he neither heard nor witnessed anything unusual on the material night which contradicts the evidence of (PW2) Alice that she heard screams.

39. Furthermore, that (PW7) Margaret the Government Analyst confirmed that the accused DNA was not found on the knife allegedly used to commit the offence which corroborates the accused evidence that he did not own the said knife nor was it found in his house.

40. The defence submitted that there was no evidence to prove beyond reasonable doubt that the deceased was referring to the accused when he mentioned the

name Kariuki. That suspicion however strong cannot be a substitute for proof and that a conviction cannot be based on conjecture or speculation and urged the court to find him not guilty and acquit him

41. At the conclusion of the trial and in considering the evidence I find that the offence of murder which the accused is charged with is stipulated under section 203 of the Penal Code as follows:

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

42. 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.

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

44. In this matter, there is no dispute that the deceased's death occurred and the cause thereof.

45. However, the key question is who killed the deceased. (PW1) Susan Wanjiru testified that, at one time when the accused and the deceased were staying in the same house, the deceased told her that the accused had chased him from his house as the deceased had failed to refund the accused the money he used to purchase a mattress for the deceased. That, the deceased moved into a friend's house and the wife (PW1) gave him money to repay the accused.

46. (PW1) Susan Wanjiru further testified that, the deceased also told him that he was going to leave employment, as the accused did not want to see him at their place of work. That indeed the deceased stopped working for (PW3) Anastasia. The witness further testified that the deceased told her that, he had been warned by a customer that the accused was walking around with a knife and he could kill or stab him.

47. That on the material date, the deceased went home running and said that he had been stabbed on the left chest by the Kariuki whom she understood to be the accused and also repeated the same to the neighbour Wangechi.

48. (PW2) Alice Muthoni Mbuthia corroborated (PW1) Wanjiru and stated that Dan came out and he was

holding the chest and he said “I have been stabbed by one Kariuki”.

49. (PW3) Anastacia Wangari testified that, both accused and deceased were her employees and used to quarrel over the customer and she told them not fight and then the deceased resigned. That when PW3 Anastacia offered the deceased a job again the accused approached her and was concerned over the deceased’s return to work and actually left as he could not work with the deceased.

50. However, he simply went to work in another barber shop opposite (PW3) Anastacia’s shop. (PW3) Anastacia confirmed that the deceased told her and she heard a custom tell the deceased that the accused had said if he found the deceased he would stab him and that (PW3 )Anastacia told the deceased to report the matter to the police officers but the

deceased did not, saying that, the accused uttered those words in anger and would cool down.

51. Pursuant to the evidence of PW1, PW2 and PW3, it is clear that there was bad blood between the deceased and the accused and the accused was said to have been armed with a knife to stab the deceased and indeed, on the material day the deceased reported that he had been stabbed by the accused.

52. Consequently, the defence herein that, the accused only learnt of the deceased's death after it occurred and when he was arrested in his house is insincere.

53. Indeed, the accused admitted that he worked with the deceased in the same barber shop and both had been employed by (PW3) Anastacia. The issue of a love affair between the deceased and (PW3) Anastacia was denied by (PW3) Anastacia, even if that was the case, it is far-fetched to imagine from the evidence herein

(as the accused would rather suggest) that (PW3) Anastacia's husband was involved in the murder.

54. In addition, (PW6) Francis Gachagua Nderitu testified that, he saw the accused wash his clothes on 24<sup>th</sup> July 2020 and according to (PW8) No. 70027 PC Daniel Wambugu those are the clothes the accused wore on the material date of the offence. If the accused had a mind to wash the clothes he wore, he could as well have washed the knife, the weapon of murder, and that would inform the negative DNA results on the same.

55. The defence submitted that this case was anchored on evidence of a dying declaration which was not established. A dying declaration is provided for under section 33(a) of the Evidence Act (Cap 80) which 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;*

56. The general principles of a dying declaration can be derived from various decisions of the court such as *Philip Nzaka Watu v Republic [2016] eKLR*; where the Court of Appeal held that:-

*“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.*

57. Further, the Court of Appeal in *Musyoka v Republic [2025] KECA 1318 (KLR)* considered several decided cases and held 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.*

58. In this particular case, the deceased spoke to several witnesses herein as to how the accused had armed himself with a knife to stab him and even after he was stabbed he mentioned the name of Kariuki and the

accused is called Kariuki, therefore there is adequate evidence to corroborate the dying declaration herein as the deceased died after stating who stabbed him.

59. It is the finding of this court that, the accused was very angry with the deceased whom he believed had taken away his customers in the barber shop and which caused him loss of his job (voluntarily or otherwise) and therefore had the motive to kill the deceased.

60. The last question is whether, he had malice aforethought. Section 206 of Penal Code states as follows;

*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.*

61. In the instant matter evidence reveals that, the customers had told the deceased that, the accused

was walking around with a knife and that he would stab him. The deceased shared that information with the wife and (PW3) Anastacia, the employer. The accused is also reported to have been so angry when the employer (PW3) Anastacia returned the deceased to work and left employment as he could not work with the deceased.

62. Furthermore, on the material night it is in evidence that he way-laid the deceased and pursued him to his house even after stabbing him. But more importantly he aimed at no any other body part than the chest.

63. Notably the chest protects vital organs like the heart and lungs and major blood vessels. It serves as a respiratory pump for breathing. As such, stabbing a person in the chest is a high mortality, life threatening event that primarily targets the respiratory and cardiovascular systems. These injuries often cause

rapid death due to massive internal bleeding (exsanguination) or cardiac tamponade. That in the USA about 25% of all trauma deaths are attributed to chest injuries.

64. Consequently, the accused had no intention to leave the deceased alive. He had malice aforethought and I find adequate evidence availed to find him guilty and hereby find the accused guilty as charged of the offence of murder contrary to section 203 as read with section 204 of the Criminal Procedure Code and convict him accordingly. It is so ordered.

Dated, delivered and signed on this 17<sup>th</sup> day of March 2026

**GRACE L. NZIOKA**  
**JUDGE**

In the presence of:

Ms Chepkonga for the State.

Mr Karanja for the accused.

Accused present virtually

Ms Hannah: Court Assistant