



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, M'INOTI & KANTAL, J.J.A.)

CRIMINAL APPEAL NO. 36 OF 2017

BETWEEN

PAUL NG'ANG'A WANJIRU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi

(Lesit, J.) dated 15th September 2016 in

H.C.C.R.C. No. 17 of 2012)

JUDGMENT OF THE COURT

This appeal was heard on 4th May 2020 remotely through Skype application in the wake of the Covid-19 pandemic. **The appellant, Paul Ng'ang'a Wanjiru**, participated in the proceedings from Kamiti Maximum Prison, whilst his learned counsel, **Mr Seth Ojienda** took part from his office in Nairobi. For his part, **Mr. Gitonga Muriuki**, learned counsel for the Director of Public Prosecutions, joined the video link from Meru. We thank the parties for supporting the use of technology to ensure that in this era of the Covid-19 pandemic, the administration of justice does not grind to a halt.

At the time material to this appeal, the appellant was a preacher in his church known as **Well of Faith Ministries** based at **Gatina**, in **Kawangware**, Nairobi. On 19th March 2012 he was charged, jointly with **James Mutunga Muia (Muia)**, a guitarist/keyboard player in the said church, with the offence of murder contrary to **sec-tion 203** as read with **section 204** of the **Penal Code**. The infor-mation dated 12th March 2012 stated that on 9th March 2012, along **Ngong Road** in Nairobi within Nairobi County, they murdered **Carol-yne Chanjirah (deceased)**.

The evidence adduced by the prosecution in support of the charge was that on 9th March 2012 at about 8.30 pm, employees of **KK Security Company**, among them **Joel Chesoni Wanjala (PW1)** and **David Kipchirchir Ruto (PW2)** were on duty from **Karen** to **Racecourse** on **Ngong Road** in Nairobi. On reaching the entrance to **Lenana School**, they were waved down by the deceased who was bleeding profusely from the head. The deceased, an orphan and mother of a child of 8 years, informed them that she had been assaulted by three people in a car that the KK team had just passed. PW1 was left with the deceased whilst PW2 and his other colleagues drove back to the car that the deceased had mentioned.

They found the car, a **Daewoo Registration No. KAD 313N** about 100 meters away. They flashed the headlights of their vehicle and the appellant and Muia came out of the car. Their clothes were drenched in blood and they explained that they had just been at-tacked by thugs. They requested the KK team to take them to the police station which the latter agreed to do. However, the appellant requested to go and lock his car first, but instead, he disappeared into the Lenana forest.

The KK team, in the company of Muia, went back to where they had left PW1 with the deceased and found the police had already arrived. The deceased identified Muia as one of the three people who had assaulted and injured her. The KK team and some of the police men escorted Muia to Karen Police Station whilst other policemen took the deceased home at Ngando from where she was taken to **Kenyatta National Hospital** and ad-mitted at the intensive care unit. She died the next day at about 10.00 am.

The evidence of the Government pathologist, **Dr. Oduor Johan-sen (PW10)**, was that on examining the body of the deceased on 15th March

2012, he found, externally, a group of four wounds, an average of 2 cm in diameter each, on her left forehead. She had a stab wound on the left face, 4 cm to the left eye. There was also a stab wound, 2 cm long, on the upper lip as well as lacerations, 2 cm long, on the right ear. Other external injuries observed by PW10 were a bruise on the left face, and swelling on the backside of the left hand. Internally the pathologist found the deceased had haematoma on the left hand below the skin where it was swollen. There was contusion around the neck and haematoma on the left side. The head had haematoma of the scalp and there was a right subdural haematoma about 30 ml on the brain. PW 10 formed the opinion that the cause of death was head injury due to blunt force trauma. In his opinion, the neck injuries were caused by a ligature in an attempt to strangle. The stab wounds were caused

by a pointed or sharp object, while the lacerations were caused by a blunt object. The defensive injuries on the back of the deceased's hand were indicative of a struggle.

Back to the appellant, after fleeing the scene, he reported at **Muthangari Police Station** the same night that he had been car-jacked near **Junction** on Ngong Road by two people armed with a pistol. Those people, he stated, were in the company of a woman with whom they were struggling. They robbed him of **Kshs 4,000** and forced him to drive his motor vehicle, Daewoo Registration No. KAD 313N to Lenana School. The report was duly entered into the occurrence book. The appellant then proceeded to **Mid Hill Hospital** for treatment.

In the meantime, the **OCS Karen**, after learning of the attack on the deceased, communicated with all Officers Commanding Stations within Nairobi, enquiring whether any person had reported a case of robbery. **Chief Inspector of Police, Alphonzo Ngundo (PW5)**, the OCS, Muthangari Police Station, confirmed from his report desk that indeed the appellant had already reported a case of robbery at that station and had thereafter proceeded to Mid Hill Hospital for treatment. PW5 dispatched two officers to the hospital where they arrested the appellant. Upon arrest the appellant was found to have an injury on the forehead and his clothes were bloodstained.

Dr. Lawrence Kinyua Muthuri (PW 9), a Government chemist produced in evidence a report prepared by his retired colleague, **Dr Paul Waweru Kang'ethe**. Dr Kang'ethe had, on 13th March 2012, received from Muthangari Police Station various samples, including the appellant's and Muia's clothes, for DNA analysis. His report showed that upon analysis, the appellant's coat and shirt and Muia's t-shirt and pair of shoes, together with swabs taken from different parts of the appellant's car, were all stained with blood matching the deceased's DNA profile. Similarly found with bloodstains matching the deceased DNA profile was a cable with iron bars on each end (ligature) that was recovered at the scene where the appellant's car finally stopped. The prosecution maintained that the ligature was used in the attempt to strangle the deceased. All these items were produced in evidence as exhibits.

At the close of the prosecution case the trial court held that the prosecution had made out a *prima facie* case against the appellant and Muia and put them on their defence. The appellant gave an un-sworn statement and did not call any witness. The substance of his defence was that on the material day, he was driving home to Kawangware from **Kibera** where he had been preaching, when Muia stopped him near **Prestige** on Ngong Road and asked for a lift. He offered Muia the lift but due to heavy traffic jam they drove very slowly with the driver's window down.

At the **Junction** they were accosted by three people, one armed with a pistol, who ordered the appellant to stop the car and raise up his hands. He complied and was slapped on the face by the gunman who entered the vehicle and sat behind him, whilst another of the intruders sat on the co-driver's seat. The third, a woman who was crying, was made to sit between appellant and the co-driver and in the process leaned on the appellant, who felt some wetness. The car-jackers ordered the appellant to drive to Ngong. Muia was crying at the back of the vehicle because he was being assaulted whilst the man on the co-driver's seat was quarrelling with the woman. On getting to the entrance to Lenana School, the car stalled and the gunman took **Kshs 4,000** from the appellant and all the three carjackers fled.

The appellant and Muia then managed to stop a KK Security vehicle for assistance and requested to be taken to Karen Police Station. Instead the three men in the vehicle became aggressive saying that the appellant and Muia had assaulted a woman, whilst in fact the woman was one of the carjackers. The KK team then started beating them and when he got the opportunity, the appellant fled. He took a *matatu* to Kawangware from where he reported his ordeal to his father in law and one John Kamau, who then took him to Muthangari Police Station to make a report. After making the report, the police referred him to Mid Hill Hospital for treatment because he was injured. However the police arrested him at the hospital, threatened and charged him with an offence that he knew nothing about. It was his evidence that he did not know the deceased and had never met her before.

The sworn defence of Muia, whom the appellant readily admitted was in the car with him at the material time, was diametrically opposed to that of the appellant. Muia stated that at the material time he was an occasional guitarist/keyboard player in the appellant's church and that on the day in question at about 7.00 pm, he spotted the appellant's car at Junction and stopped him to hike a lift home to Kawangware. When he entered the vehicle, he found the deceased in the co-driver's seat with another man behind her in the back seat.

Instead of proceeding to Kawangware through **Kingara road**, the appellant drove towards Karen and shortly started quarreling with the deceased in **Kiswahili**. The deceased asked the appellant what kind of man he was that could not care for his own child. As the quarrel escalated, Muia requested the appellant to stop the vehicle so that he could alight, but the appellant refused and accelerated the vehicle until he stopped near Lenana School. The appellant held the appellant by the throat and started beating her whilst the other man held her from behind. When Muia inquired what was happening, the appellant threatened him with death and the other man pinned Muia down in an attempt to strangle him. All this time the appellant was beating the deceased, who was screaming. Then Muia heard the appellant saying that the deceased had escaped and the other man alighted from the car and disappeared. It was Muia's evidence that the deceased's injuries were caused by the appellant inside the vehicle.

After alighting from the car the appellant requested Muia to accompany him to Karen Police Station to report that they had been carjacked, which was not true. While still at the scene, three KK security men arrived and the appellant informed them that they had been carjacked, again which was not true. The KK team agreed to take them to Karen Police Station, at which point the appellant requested to go and lock up his car. Instead he escaped and the KK team beat up Muia, accusing him of having assaulted the deceased.

The KK team took Muia back to where the deceased was and found her with the police. She was bleeding profusely from the head and stated

that she had been attacked by the appellant. The police asked Muia to hold the deceased as they drove her home and in the process she lay on his shoulder and his clothes and shoes became stained with her blood. Ultimately they left the de-ceased with her grandmother and Muia was taken to Karen Police Station before being transferred to Riruta Police Station where he rec-orded a statement under inquiry on 10th March 2012, which he pro-duced in evidence as an exhibit.

As we indicated earlier, the trial court, being satisfied that the prosecution had proved its case against the appellant beyond reason-able doubt, convicted him of the offence of murder and sentenced him to death. As for Muia, the court acquitted him under **section 322** of the **Criminal Procedure Code**. The appellant was aggrieved and pre-ferred this appeal.

The appellant's learned counsel, **Mr Seth Ojienda** impugned the judgement of the trial court on seven grounds. We shall consider those grounds though not necessarily in the order in which the appellant presented them.

In the first ground, he submitted that the trial court wrongly admitted and relied on Muia's statement under inquiry which, apart from being accomplice evidence, was not credible so as to support a conviction. Muia's statement submitted, counsel submitted, was recorded contrary to **section 25A** of the **Evidence Act** and **rule 4(3)** of the **Evidence (Out of Court) Confession Rules, 2009**, be-cause no third party was present when the statement was recorded. Counsel added that under cross-examination, Muia stated that he was alone with **CIP Kage** when he made the statement under inquiry. He also argued that PW5 could not have recorded the statement of inquiry from Muia because PW5 stated that he met Muia at Muthan-gari Police Station and did not recall talking to him. Counsel further complained of failure by the prosecution to produce in evidence the appellant's statement under inquiry. HCHie therefore urged us to find that the trial court erred by admitting in evidence Muia's extrajudicial statement. He relied on among others, the judgments in **Kanini Muli v. Republic [2014] eKLR**, **Anyangu & 4 Others v. Republic [1968] EA 241**, **Benjamin Mugo Mwangi & Another v. Republic [1984] eKLR** and **Joseph Odhiambo v Republic, Cr App No 4 of 1980** and submitted that other than being inadmissible, Muia's evidence was accomplice evidence of the weakest kind that required to be treated with great caution, which the trial court failed to do.

In the second ground, counsel submitted that the prosecution case against the appellant was built entirely on circumstantial evi-dence and that the court erred by relying on circumstantial evidence which did not unerringly point to the appellant as the one who mur-dered the deceased. In his view, from the evidence the carjackers, the other person said to have been in the car and even Muia himself could have murdered the deceased. He cited **Mohammed & Others v. Re-public [2005] eKLR, 722**, **Mwendwa v. Republic [2006] 1 KLR 133**, **Mwangi & Another v. Republic [2004] 2 KLR 32**, **Sawe v. Republic [2003] eKLR**, and **Tepper v. R [1952] AC 480** and urged that to base a conviction on circumstantial evidence, it must exclude all co-existing circumstances that would weaken or destroy the infer-ence of guilt.

Next counsel submitted on the third ground of appeal that the trial court erred in relying on the deceased's dying declaration. He argued that the same was neither clear nor reliable because the de-ceased had stated that Muia was one of the attackers, yet the court ignored that aspect of the declaration. Counsel relied on **Choge v. Republic [1984] KLR 1**, **Kihara v. Re- public [1986] KLR 473**, and **Aluta v. Republic [1970] EA 543** and submitted that a death declaration must be approached with circumspection and must be corroborated.

In the fourth ground of appeal the appellant faulted the trial court for convicting the appellant of murder without proof of motive and malice aforethought. Counsel submitted that motive is an im-portant consideration in a case resting purely on circumstantial evi-denced and cited the decision in **Libambula v. Republic [2003] 1 KLR 683** in support of the proposition. In the present case, he added, the prosecution proved neither motive nor malice aforethought on the part of the appellant because he did not know the deceased.

The appellant contended in the fifth ground of appeal that the trial court erred by admitting and relying on DNA evidence obtained in violation of **sections 122A (i), 122B, and 122D** of the **Penal Code**. Citing the decision in **Abiud Muchiri Alex & Another v. Republic [2015] eKLR**, the appellant contended that the above provisions are mandatory and must be complied with before extraction of DNA sam-ples, which was not done in the present case.

Next the appellant contended that the prosecution evidence had many gaps and inconsistencies that it did not prove the case against him beyond reasonable doubt. He argued that the police did not dust his car and the cable that was recovered at the scene, for fingerprints, to rule out the presence of the carjackers in the car and their use of the ligature on the deceased.

Lastly it was the appellant's submission that the trial judge was biased against him by believing Muia's evidence and rejecting his and by overruling his objections, leading to the withdrawal of his counsel and her replacement by a new one who was not conversant with the case. He also contended that the trial judge treated his defence with disdain on the ground that it was not sworn, contrary to the require-ment in **May v. Republic [1981] KLR 129**, that such defence must be considered against the entire evidence and that no adverse infer-ence should be made against an accused person who elects to make an unsworn statement in his defence. On the basis of the foregoing arguments counsel urged us to allow the appeal, quash the conviction and set aside the sentence.

Mr Muriuki learned counsel for the respondent opposed the ap-peat. He submitted that the prosecution proved its case against the appellant beyond reasonable doubt. He contended that there was no dispute that the deceased was in the appellant's car and maintained that she is the one who informed PW1 and PW2, when they found her injured, that she had been attacked in the appellant's car, which turned out to be heavily bloodstained.

Counsel further submitted that the appellant's carjacking story was a mere fabrication and that the evidence of the pathologist sup-ported the prosecution view that the ligature found at the scene was used to strangle the deceased. He added that the blood on the liga-ture, the appellant's clothes, and in the appellant's car matched the DNA of the deceased and that the appellant's explanation of how his clothes had so much blood from the deceased was not credible. The appellant's act of fleeing when he pretended to go and lock his car was also not consistent with the actions of an innocent person.

It was the respondent's further contention that the circumstantial evidence adduced by the prosecution satisfied the requirement in **Abang alias Onyango v. Republic Cr. App. No. 32 of 1990**, **Mwendwa v. Republic [2006] 1 KLR 31**, and **Teper v. R (supra)** and was corroborated in material particulars by the deceased's dying dec-laration in which she named her assault in the appellant's car, as well as by the

accomplice evidence of Muia to the effect that it was the appellant who assaulted the deceased in the car and inflicted the injuries from which she succumbed.

On the dying declaration, counsel submitted that the statement made by the deceased to PW1 and PW2 that she had been assaulted in the pastor's (appellant's) car was a dying declaration which was properly admitted under **section 33(a)** of the **Evidence Act**. As regards the accomplice evidence and Muia's statement under inquiry, counsel submitted that the statement was primary evidence which merely corroborated Muia's evidence in court and showed consistency in his evidence. In counsel's view, **section 25A** of the **Evidence Act** on confessions had no application in the circumstances of this case because the prosecution was not seeking to adduce a confession against Muia.

Turning to the DNA evidence, counsel submitted that for purposes of this case the blood that was subjected to DNA analysis was that of the deceased rather than that of the appellant. Her blood was confirmed to have been on the appellant's car, clothes and the ligature recovered at the scene. Accordingly counsel submitted that there was no violation of the law on collection of DNA samples as alleged by the appellant.

Lastly on malice aforethought, counsel submitted that it was proved by the over ten injuries that the appellant inflicted on the deceased which were well noted in the postmortem report. On the basis of the foregoing, counsel urged us to dismiss the appeal and uphold the sentence.

As we consider the grounds of appeal, we are alive to our duty as a first appellate court to re-evaluate the evidence and subject it to a fresh analysis to come to our own conclusions. In so doing, we are obligated to give due allowance to the fact that unlike the trial judge, we never had the opportunity to hear and see the witnesses as they testified (See **Okeno v. Republic (1972) EA 32**). We shall not therefore readily differ with the trial court on conclusions based on demeanour and credibility of the witnesses.

To start with, we do not understand why the trial court, the appellant and the respondent all describe the prosecution case against the appellant as entirely circumstantial. In **Makau & Another v. Re-public [2010] 2 EA 283**, this Court described circumstantial evidence as follows:

“Circumstantial evidence is evidence of surrounding circumstances from which an inference may be drawn as to the commission of a criminal offence. It has been held in previous decisions of this and other courts that such evidence may in some cases prove a fact with the accuracy of mathematics.”

Subject to what we shall say about Muia's accomplice evidence which the trial court accepted, Muia's evidence was direct evidence as to how the deceased sustained the injuries from which she died. With respect, it is a misnomer to describe the prosecution case in this appeal as one based entirely on circumstantial evidence. Accordingly, while the authorities relied upon by the appellant on circumstantial evidence are a correct statement of the law, they are of little assistance in a case of direct evidence like the present, where the main issue is whether there was other evidence corroborating Muia's accomplice evidence.

Again we do not think there is any merit in the appellant's contention that Muia's evidence was a confession and was admitted in breach of section 25A of the Evidence Act. Section 25 of the Evidence

Act defines a confession as follows:

“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.” (Emphasis added).

For Muia's statement to amount to a confession as defined above, it had to lead to a reasonable inference that Muia had committed the offence with which he was charged. Far from it, Muia never admitted to having murdered the deceased and the prosecution never sought the admission of his statement to prove that he had confessed to having committed the murder. In fact, all that Muia admitted to was being a passenger in the appellant's car when the deceased was assaulted and injured by the appellant and the other passenger who fled after the car stalled. This view is reinforced by section 25A which reads as follows:

“(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice. (Emphasis added).

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

Pursuant to subsection (2) above the Attorney General made the **Evidence (Out of Court Confessions) Rules, 2009**, which this Court noted in **Kanini Muli v. Republic (supra)** is a statutory version of the Judges Rules focusing on the procedure and safeguards to be observed in the recording of confessions by the police. As section 25A makes abundantly clear, it applies where an accused person confesses to having committed an offence and the prosecution seeks to rely on that confession against the accused. As we have noted, Muia never confessed to having committed the offence with which he was charged and the prosecution never sought to rely on his statement as a confession against him. As the **Privy Council (Lord Atkin)** stated in **Pakala Narayana Swami King Emperor [1939] 1 All ER 396**:

“...No statement that contains self exculpatory matter can amount to a confession if the exculpatory statement is of some fact which if true would negate the offence alleged to be confessed.”

We must also point out that Muia's statement in question was a statement under inquiry rather than a statement under charge and caution. That statement was produced, not as a confession taken after due caution, but in support of Muia's sworn accomplice evidence that was given in court and upon which he was cross-examined (See **Rule 5** of the **Evidence (Confessions Out of Court Rules)**. **Kanini Muli v. Republic (supra)** which the appellant relies on has no application in this case. In that decision, the prosecution sought to rely, during the trial of the accused, on a confession that she had made in an inquest confessing to having committed the offence with which she was subsequently charged. The court ruled the confession involuntary and inadmissible. That case cannot therefore be an authority in the circumstance of the present appeal, where there was no confession as understood in law.

The next question we need to answer is whether, from the totality of the evidence and the circumstances Muia was telling the truth about what happened and who caused the injuries from which the deceased died. The evidence on record is that the appellant, who knew Muia, gave him a lift and in the car, Muia found the appellant, the deceased, and another person. It was the appellant and that other person who assaulted the deceased in the car. Even when the KK security team arrived where the appellant's car had stalled, Muia did not, like the appellant and the other person, attempt to flee the scene. At his first encounter with the police, he narrated what had happened and maintained the same story throughout.

Like the trial court, we are satisfied from the totality of the evidence of Muia, the KK security team and the police officers, tested against that of the appellant, that Muia was a witness of truth. There is no material on record to persuade us that Muia's evidence was a fabrication to incriminate the appellant and save his own skin.

The next issue we shall consider is the DNA evidence which the appellant contends was illegally admitted in violation of sections **122A**, **122B** and **122D** of the Penal Code. These provisions were introduced in the Penal Code by the **Criminal Law (Amendment) Act No 5 of 2003** and provide for DNA sampling procedure.

By dint of sections 122A, whenever it is suspected on reasonable grounds that DNA sampling of a person suspected to have committed a serious offence may confirm or disprove commission of the offence by that person, a police officer of or above the rank of Inspector of Police is required, in writing, to order that person to undergo DNA sampling. A serious offence is defined as one punishable by imprisonment for a term of 12 months or more. DNA sampling procedure is defined as a procedure carried out by a medical practitioner and entailing taking of the following samples for test or analysis to confirm or disprove suspicion concerning the identity of the person who committed the crime in question. The samples in question are sample of saliva or a sample by buccal swab, a sample of blood, sample of hair from the head or underarm and sample from a fingernail or toenail or from the nail.

Section 122B of the Code empowers the police, led by an officer of or above the rank of an Inspector, to use reasonable force to effect the procedure if a suspect resists to comply with an order made under section 122A. Section 122C further provides that a suspect may voluntarily accede to the procedure, but his or her consent must be in writing. Lastly, under section 122D, the results of DNA sampling are not admissible in evidence against a suspect in the absence of the order provided for in section 122A or consent of the suspect under section 122C.

Our reading of the above provisions convince us that the order or consent are required when the DNA samples have to be obtained from the body of the suspect. The rationale, in our view, is to protect the dignity and bodily integrity of a suspect which is guaranteed by **Article 28** of the **Constitution**. That provision recognises the inherent dignity of every person and guarantees him or her the right to have that dignity respected and protected. The kind of samples listed in section 122A entail extraction, by a medical practitioner, of samples from the body in a manner that is invasive or intrusive. The reference to resistance and use of reasonable force to obtain the samples further support the view we take of the matter.

In our view the provisions were not intended to hamstring criminal investigations and prosecution of offence by rendering inadmissible DNA analysis of samples obtained, for example, in a scene of crime without violation of the bodily integrity of a suspect. In this case, the samples in question were not extracted from the appellant's body. Instead, the procedure in question entailed comparing the blood stains found on the appellant's clothes, on Muia's clothes and shoes, in the appellant's car, and on the ligature recovered at the scene, with the DNA profile of the deceased.

The judgment of this Court in **Abiud Muchiri Alex & Another v. Republic (supra)**, which the appellant relies upon, cannot therefore avail him in the circumstances of this appeal. In the **Muchiri** case, the DNA samples in question were extracted by a police corporal rather than by a medical practitioner as required by law, and without an order by an officer of or above the rank of inspector. The State conceded as much. That judgment is not an authority for invalidating DNA samples obtained in the circumstances of this case which did not entail extraction of samples from the appellant as contemplated by sections 122A, 122B, 122C and 122D of the Penal Code.

The other issue raised by the appellant is the admission and reliance by the trial court on the deceased's dying declaration. The appellant argued that the dying declaration was neither clear nor reliable. The relevant part of **section 33(a)** of the **Evidence Act** on admissibility of dying declarations provides as follows:

"33. Statements, written or oral, of admissible facts made by a person who is dead...are themselves admissible in the following cases -

(a) 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 case 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 proceedings in which the cause of his death comes into question." (Emphasis added).

In this case, the deceased who was injured and bleeding profusely from the head, informed PW1 and PW2, after she had waved them down near the entrance to Lenana School, that she had been assaulted and injured in the appellant's car. The deceased died about 15 hours later from the injuries she had sustained, as explained by PW10, the pathologist. In our view, the statements by the deceased related to the

circumstances of the transaction which resulted in the injuries from which she died, and were thus admissible as dying declaration under **section 33(a)** of the *Evidence Act*.

In *Choge v. Republic (supra)* this Court considered admissibility of death declarations in Kenya and stated as follows:

“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, how-ever 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.”

More recently in *Philip Nzaka Watu v. Republic [2016] eKLR* the Court stated thus, regarding dying declarations:

“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, state-ments 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 admissi-ble whether the person who made them was or was not expect-ing 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. Notwith-standing section 33(a) of the Evidence Act, courts have consist-ently 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, cir-cumstances 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 cau-tion and to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

The trial judge was alive to the legal requirements regarding re-liance on a dying declaration. She quoted *Choge v. Republic (supra)* and stated that the deceased’s dying declaration was admissible un-der section 33(a) of the Evidence Act as an exception to the hearsay rule. She did not rely on the deceased’s dying declaration alone; she found it corroborated by the appellant’s own evidence that the de-ceased was indeed in his car and was sitting next to him in the front cabin. The learned judge also found the dying declaration corrobo-rated by the evidence of PW2 and PW3 that the deceased was bleeding profusely from the head when she stopped them, meaning that she had just sustained the injuries from which she died. Moreover, the deceased shortly thereafter identified Muia as one of the people in the car when she was assaulted. Both the appellant and Muia indeed ad-mitted that the deceased was in the car with them.

This then leads us to the evidence of Muia, which we have stated was evidence of an accomplice. **Section 141** of the Evidence Act pro-vides as follows on accomplice evidence:

“141. An accomplice shall be a competent witness against an ac-cused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.”

In *Michael Murithi Kinyua v. Republic [2002]eKLR*, this Court ex-plaind the approach as regards accomplice evidence in the following terms:

“Under section 141 of the Evidence Act, Cap 80 Laws of Kenya an accomplice is a competent witness and a conviction based on his evidence is not necessarily illegal or irregular. However, there is a firm rule of practice that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corrob-oration if satisfied that the accomplice witness is telling nothing but the whole truth, and upon the court duly warning itself and the assessors, where the trial is with the aid of assessors, on the dangers of doing so. Before corroboration can be considered how-ever, a court of law dealing with accomplice witnesses must first make a finding as to the credibility of the witnesses. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence, and unless there is some other evidence, the pros-ecution must fail. If the court decides that the witness, though an accomplice witness, is credible, then the court goes further to de-cide whether the court is prepared to base a conviction on the ev-idence of the accomplice witness without corroboration. If this is so, the court must direct and warn itself accordingly. On the other hand, if the court decides that the accomplice witness, though credible, requires corroboration, the court must look for, find, and identify the corroborative evidence.”

In this appeal, the trial judge made a finding that Muia’s accomplice evidence on how the deceased sustained her injuries was credible. However the court did not base the conviction solely on Muia’s evidence; it considered other evidence which it found corroborative of Muia’s. The evidence that the learned judge considered included the dying declaration that the deceased made to PW1 and PW2 that she had been assaulted in the appellant’s car; the appellant’s own evi-dence that the deceased was indeed in the car and seated next to him in the front cabin; the evidence of PW1 and PW2 that the deceased was bleeding profusely from the head when they met her, suggesting that her injuries had just been inflicted and were fresh; the evidence of the pathologist that the deceased died from head injures inflicted in the manner described by Muia; the recovery of a ligature at the scene and the evidence of the pathologist that the neck injuries sus-tained by the deceased were consisted with attempted strangulation; the heavily bloodstained clothes of the appellant; and the DNA report which found the deceased’s DNA profile on the appellant’s clothes; on the ligature and on swabs taken from the appellant’s car.

For our part, we find no basis to fault the conclusion of the trial judge, granted the advantage she had of seeing all the witnesses as they testified. We would add that from the evidence of PW9, the ap-pellant’s shirt and coat were both “heavily stained” with the de-ceased’s blood, while those of Muia’s and his shoes were “lightly” stained, giving credence to Muia’s explanation how the blood of the deceased was on his clothes and shoes. The evidence of *Martin Mwaka (PW8)*, who took scene of crime photographs which he pro-duced as exhibits, was

that the appellant's car had blood stains on the front passenger seat, on the window, on the steering wheel and blood splatters on the inside of the rear roof, caused possibly by gush-ing blood. In his words, "there was evidence of commotion on the front left side where blood was concentrated most." This independent evi-dence is quite consistent with Muia's evidence on where the deceased sat in the car and how she sustained the injuries from which she died, and that clearly points to the guilt of the appellant.

In his defence the appellant suggested that the deceased was injured before the appellant was allegedly carjacked and that as she entered the vehicle, she leaned on him and he felt some wetness. That does not explain the heavy staining of the appellant's clothes with her blood, the presence of her blood on many parts of the car, including as far as the inside rear roof and on the ligature recovered at the scene.

As the trial judge noted, in addition, the fleeing of the appellant from the scene after excusing himself to go and lock his car was not consistent with his innocence. In *Alex Wafula v. Republic, Cr. App No 7 of 2008*, this Court found evidence of flight from the police as constituting corroboration of the prosecution case. The Court stated;

"Some corroboration for that finding, if any was necessary, was found in the conduct of the appellant who had been escaping from the police for about one week and also ran away and had to be chased and arrested by the vigilante group led by Patrick Wepukulu (PW.4). It was not the conduct of an innocent person." (See also *Mangala Somba Maricheni v. Republic [2014] eKLR*).

We are according satisfied that Muia's accomplice evidence was properly admitted and well corroborated and that the conviction of the appellant was properly grounded.

The next issue that the appellant raised was motive, which he submitted was not proved. In our understanding, this ground of appeal was based on the erroneous contention that the case against the appellant was circumstantial. It is in that regard that the appellant relied on *Libambula v. Republic (supra)* where this Court stated as follows:

"We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See section 8 of the Evidence Act cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime." (Emphasis added).

We have already stated that it was a misnomer to characterise the prosecution case against the appellant as one resting entirely on circumstantial evidence. If motive can be drawn from facts, then the evidence of Muia that the deceased was querying what kind of man the appellant was for failing to support his own child, could readily have supplied the motive. Be that as it may, motive is not material to criminal responsibility and that is why **sec-tion 9(3)** of the **Penal Code** provides as follows:

"Unless otherwise expressly declared, motive by which a person is induced to do or not to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."

In *Karukenya & 4 Others v. Republic [1987] KLR 458* and *Ogeto v .Republic [2004] 2 KLR 14*, this Court reiterated that the prosecu-tion does not have to prove motive and neither is evidence of motive sufficient by itself to prove the commission of an offence by the person who posses the motive.

As for malice aforethought, the learned judge found it proved from the nature of the injuries that the appellant inflicted on the de-ceased. This is how she expressed herself:

"As to whether the prosecution have established malice afore-thought, the evidence of the nature of the injuries inflicted and the manner in which they were inflicted is a clear demonstration that the assailants had malice aforethought to cause death to the deceased. The attempt to strangle the deceased, the very severe blunt force injuries on the head which ultimately were the cause of death all demonstrate that the intention of the at-tackers was to cause death."

In coming to that conclusion the learned judge relied on the judgment of this Court in *Daniel Muthee v. Republic [2007] eKLR* where the Court found malice aforethought proved from several vicious panga cuts that the appellant had inflicted on the head of the deceased. We are satisfied that the trial judge did not err in holding that the prose-cution had proved malice aforethought.

On our part, we are satisfied that the conduct of the appellant and the nature of the injuries inflicted on the deceased are clear indi-cations that he intended to kill the deceased or to inflict on her griev-ous injuries. The deceased succumbed to her injuries within a few hours of the assault and we are therefore satisfied that the prosecu-tion proved malice aforethought on the part of the appellant beyond reasonable doubt.

Lastly we do not see any gaps in the prosecution case that would have undermined the appellant's conviction, nor do we find any bias on the part of the learned judge. From the record the trial court care-fully considered the appellant's unsworn defence and having consid-ered it against the totality of the evidence, rejected it as that court was entitled to do. There is nothing on record to show that she disregarded or treated the appellant's defence any less because it was unsworn. As for the withdrawal of the appellant's counsel and her replacement with another towards the tail-end of the proceedings, we think, it was a mischievous act on counsel's part. Counsel withdrew from the trial because the court overruled her objection. Each counsel and party in a trial must expect the court to rule for or against them and the solu-tion for an aggrieved party is to appeal. This ground of appeal too is totally bereft of merit.

In the result we find no merit in the appellant's appeal and dis-miss the same in its entirety. It is so ordered.

Dated and delivered at NAIROBI this 7th day of August, 2020.

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR