



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT MERU)**

**(CORAM: NAMBUYE, KIAGE & SICHALE J.J.A)**

**CRIMINAL APPEAL NO. 80 OF 2013**

**BETWEEN**

**PETER KIMATHI KANGA .....**  
**APPELLANT**

**AND**

**REPUBLIC .....**  
**RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J) dated 15<sup>th</sup> December 2011*

**IN**

**H.C.CR.C. NO. 63 OF 2008)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The appellant PETER KIMATHI KANGA was arraigned before the High Court at Meru on a charge of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, on an information that alleged that on the 6<sup>th</sup> day of April 2008 at Kithaene Sub-location, Kithetu Location, Igembe District of the then Eastern Province, he murdered **Stephen Ntanjara**. The deceased was his father-in-law.

After hearing the prosecution case presented through **four** witnesses, and the appellant's sworn testimony, **Lesiit J**, found the charge proved. She accordingly convicted the appellant and sentenced him to suffer death as by law provided.

That verdict and sentence aggrieved the appellant, and he in the first instance filed some nine self-crafted grounds of appeal. These were abandoned by his advocate, **Miss Nelima** who filed a Supplementary Memorandum of Appeal containing six grounds which are to the effect that the conviction was against the weight of evidence, the ingredients of Murder were not proved and that the learned judge erred by convicting the appellant on the basis of;

- **unreliable and contradictory evidence,**
- **a dying declaration that fell short of the requisite standard of proof,**
- **identification evidence that was not free from error,**
- **extraneous matters and her own theory.**

Expounding and elucidating on those grounds, **Miss Nelima** contended that the prosecution's evidence was contradictory in that the two eye witnesses who testified, namely **Douglas Munya alias Yusuf** (PW1) and **Seberina Katheu** (PW2) gave conflicting evidence as to the exact location at which the appellant hacked the deceased to death. The former, stated counsel, said it was a little past Kithetu Primary School while the latter said it was at Kilichu Primary School.

Counsel also assailed the learned Judge's admission of a dying declaration made by the deceased to **Peter Mutheru Kirinya** (PW3) mentioning the appellant as the one who had killed him. According to counsel, the deceased may well have been mistaken as it was not shown how he recognized the appellant. She also termed the dying declaration unreliable because it was made in the appellant's absence and was not subjected to cross-examination.

Counsel reiterated that the identification of the appellant by PW1 and PW2 was not free from the possibility of error and that the learned Judge should not have acted on the evidence of the two witnesses. She concluded her submissions by asserting that as no reason was given as to why the appellant killed the deceased, then malice aforethought was not established. She dismissed the learned Judge's reference to the separation between the appellant and his wife (the deceased's daughter) as no more than a theory by the Judge herself.

In opposing the appeal, **Mr. Mugo**, the learned Prosecuting Counsel first stated that malice aforethought as defined by **Section 206** of the **Penal Code** was well-proved in that the appellant declared to the deceased that he was going to kill him and proceeded to hack him numerous times, even when urged to stop. Counsel also defended the admission of the evidence of the dying declaration. That evidence was reliable in that the deceased's death was imminent and he had a strong compulsion to speak the truth as was restated by this Court in **CHOGE –VS- REPUBLIC [1985] KLR 1**, which the learned Judge referred to in her judgment. He stated that it was moreover corroborated by the evidence of PW1 and PW2 who saw the appellant attack the deceased, so that the entire prosecution evidence was firm and consistent justifying the appellant's conviction.

In her rejoinder, Miss Nelima scoffed at the claims that the evidence was consistent by reiterating that the eye-witnesses saw different things and were not reliable. She also pointed out that mistakes in identification do occur and could not be ruled out in this case where the incident occurred when "***the sun was almost setting***" and visibility was poor.

A first appeal such as this proceeds by way of a re-hearing in which the Court subjects the entire evidence to a fresh and exhaustive re-evaluation and analysis with a view to drawing its own inferences of fact and drawing its own conclusions as to the guilt or otherwise of the appellant. See **Rule 29(11)** of the **Court of Appeal Rules; OKENO –VS- REPUBLIC [1972] EA 32**. As we do not have the advantage the trial court had of hearing and observing the live witnesses as they testified, we accord that court's findings on the credibility of witnesses a deserved degree of deference, departing only where they are not based on evidence, are plainly wrong or are otherwise perverse.

Upon our own assessment of the evidence as tendered in entirety, it appears quite incontestable that the appellant confronted, threatened and viciously attacked the deceased with a panga. That attack was witnessed by PW2 who had been walking with the deceased before the appellant accosted them with menaces. She saw the appellant cut the deceased on the forehead, then on the hand and then the leg, felling him to the ground. That attack was preceded by the appellant's clear threat to the deceased: "***Today I am going to kill you***". As the appellant hacked the deceased, PW2 screamed for help and took to her heels.

PW3 also came upon the appellant in his murderous act. He saw the appellant continuing to cut the

deceased, who was unarmed, even as he pleaded with the appellant to stop. His pleas fell on deaf ears. The appellant's chopping strikes amputated the deceased's left hand and left leg in PW1's seeing before he went to seek help. On returning, the appellant had fled the scene and he disappeared for some two months.

There is absolutely no doubt that the two eye witnesses saw the horrible scene that unfolded and it was perpetrated by the appellant who was a neighbour very well-known to them. PW1 had known him since childhood. The appellant's counsel's submission that there may have been mistaken identity is quite easily dispelled by the cogency of these two witnesses' evidence and the surrounding circumstances it being still light, the case being one of recognition of a well-known neighbour, the appellant having held a conversation with them from very close quarters and the detailed description given of the appellant's blood-cuddling attack.

All of these left no room for doubt as to the identity of the appellant.

The identification or recognition evidence apart, the deceased himself did reveal to PW3, another son-in-law, the identity of his killer. After PW3 got to the scene having heard at his kiosk that his father-in-law was being killed, he found the deceased still able to talk even though he had sustained numerous bodily cuts, which PW3 put at an astonishing thirty-five. The deceased clearly confided in him the identity of the killer;

***“Muthee you have arrived. If I die, it is Peter Kimathi who has killed me.”***

Dying declarations are a legally accepted exception to the rule against hearsay. Their statutory basis is in **Section 33** of the **Evidence Act** which provides that a statement of a person who is dead whether written or oral is admissible when it relates to the cause of his death. It is instructive that the statement (referred to as a dying declaration) is admissible under the Act whether or not the deceased was at the time of making it under expectation of death.

Courts have on their part formulated rules to guide the reception and weight to be attached to dying declarations and it is sensible that one made when death is imminent will be accorded a high degree of credit since in the extremity of life's ebbing away, it is expected that one has a strong motive to be truthful. In the interests of fairness to an accused person, a rule has also developed that a court should approach a dying declaration with caution and act on it only if satisfied as to its veracity and if there is corroboration, but only as a cautionary rule of practice, not a legal requirement. See **CHOGE –VS- REPUBLIC** (Supra); **PIUS JASUNGA s/o AKUMU –VS- REPUBLIC** [1954] EACA 331 and **MUSILA –VS- REPUBLIC** [1991] KLR 322.

In the case of the appellant, there was sufficient corroboration of the dying declaration in the itself-sufficient testimony of PW1 and PW2 who were eye-witnesses. The conduct of the appellant in fleeing the scene and neighborhood and disappearing for some two months all add to the credibility of the dying declaration. The dying declaration was properly admitted by the learned Judge and there is no requirement that it be first made in the presence of the mentioned killer or that it be first subjected to cross-examination as was submitted by the appellant's counsel.

Turning now to the issue of malice aforethought, we think it is easily disposed of by reference to **Section 206** of the **Penal Code**;

***“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 cause 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.”***

The appellant’s express threat to kill the deceased, followed immediately thereafter by multiple, repeated and unending chopping at the deceased, oblivious of all the pleas for him to stop, demonstrates a fixed intention not only to cause grievous harm but to actually kill the deceased. We have no doubt whatsoever that the appellant was possessed of the legal malice aforethought as he killed the deceased and so with exceptional and depraved cruelty. That there was no obvious or plausible explanation for the killing is quite immaterial as the senselessness of it is not a negation of malice aforethought.

We have said enough to show that the appellant’s conviction was well-founded and we must leave it undisturbed. This appeal is without merit and it is accordingly dismissed.

***Dated and delivered at Meru this 17<sup>th</sup> day of December, 2015.***

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**P.O. KIAGE**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

*I certify that this a*

*true copy of the original*

**DEPUTY REGISTRAR**