



REPUBLIC OF KENYA



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**State v Olangó (Criminal Case E024 of 2023)
[2025] KEHC 904 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 904 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E024 OF 2023
RE ABURILI, J
JANUARY 31, 2025**

BETWEEN

STATE PROSECUTION

AND

SAMUEL OGOLA OLANGÓ ACCUSED

JUDGMENT

Introduction

1. The accused person Samuel Ogola Olangó is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 19th September 2023 at Chulaimbo Area in Kisumu West sub county within Kisumu County, he murdered Peter Caleb Bwana.
2. The accused person pleaded not guilty to the charge against him and the case proceeded to full trial. The prosecution summoned a total of seven (7) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

3. PW1 Grishom Wawire Wanyama from Navakholo in Kakamega County testified that he came to Chulaimbo to work as a farm hand for the deceased in August. He testified that on the 19th September 2023 at 9am he was slashing at the deceased's gate when someone called the deceased from the road side. He testified that one Ogolla came and started quarrelling the deceased in Dholuo. PW1 testified that the deceased went towards Ogolla who had a cable which he started whipping the deceased with. It was his testimony that he moved near to try and help and further that he saw Ogolla stab the deceased with a knife on the abdomen. PW1 clarified that he saw Ogolla, the accused herein holding a knife in the hand then saw the deceased bleeding from the abdomen after which he fell on the ground.



4. It was PW1's testimony that he got a motorcyclist who helped him take Peter to the Chulaimbo hospital but Peter informed him to go back home and an ambulance came and took him to Kisumu as he returned home. PW1 testified that he called Peter's son, Ryan, and updated him on what had happened. PW1 testified that he later learnt from the deceased's daughter Sussy that the deceased had passed on.
5. PW1 testified that he knew Ogolla well prior to the date of the incident as he was the deceased's neighbor. PW1 identified the dagger which he said the accused used to stab the deceased. He testified that he was the one who picked it from where the accused had dropped it then placed it aside
6. In cross-examination PW1 reiterated his testimony and further testified that he could not tell the cause of disagreements. It was his testimony that he was the one who took the dagger using a rug which was nearby and placed it aside.
7. PW2 David Michael Owuor Otieno, a farmer from Kisian testified that on the 19th September 2023 at about 7am he was at the home of his cousin, John Oluk, who informed him that the deceased, Peter Bwana, had informed him that Ogolla and his mother wanted to eliminate him. PW2 testified that his cousin gave him Kshs.100 transport to go to Peter Bwana's home and see what happens and subsequently inform him of the same. He testified that he went and reached Chulaimbo where he met Peter Bwana by the roadside speaking to a lady and they started walking towards Peter's house.
8. PW2 testified that Ogolla came and started whipping Peter using an electric cable on the head and that they started struggling holding each other. It was his testimony that suddenly he saw Peter Bwana holding his stomach then he fell and that Peter said 'Ogolla has stabbed me' so PW2 called boda boda and they took Peter to Chulaimbo hospital. It was his testimony that Peter's workman was also present and that Ogolla followed them to the hospital where he informed the doctors that it was Ogolla who had stabbed Peter using a knife.
9. PW2 testified that the doctors referred Peter to Russia Hospital and that later his cousin called and informed him that Peter was dead. It was his testimony that he was present when Ogolla stabbed Bwana. PW2 identified the weapon which he saw on the material day which he identified as a sword. It was his testimony that when the accused stabbed the deceased, the sword was bend the way it is. He reiterated that he was present and saw the accused stab the deceased using the sword. PW2 testified that he knew Ogolla prior to the incident as Peter's family and that he knew that Ogolla as Peter's brother. He identified Ogolla as the accused in court.
10. In cross-examination PW2 testified that Peter was not armed and that he was the only one who bled not Ogolla. He further testified that even at the hospital the doctors informed Ogolla that he had no injuries so he could not be treated. PW2 testified that he was in the company of the deceased when he was stabbed by the accused who pulled the sword from his trousers and stabbed the deceased.
11. PW3 John Gwara Ondu, the deceased's uncle testified that the deceased was the eldest son of his sister but had not built on his father's land due to a disagreement with his wife while the accused was the younger son. He stated that the father to the deceased always wanted the deceased to build a house on the land saying he wanted his elder son to construct a house before his said father dies. It was his testimony that when the deceased wanted to build a home in his late father's home, the accused and his mother were against this and at one point the accused threatened to kill the deceased by whatever means. PW3 testified that at the same time, the accused and his mother went and reported to the police at Maseno that a stranger was building on their land prompting the police to arrest the deceased and that he, PW3, went and bailed the deceased out.



12. It was PW3's testimony that on the 18th September 2023 the deceased called him stating that he had reported the land issues to the chief but the accused and his mother had refused to proceed to the chief's place and instead told the deceased that they would kill him in less than two days. PW3 testified that the deceased had informed him that he had reported the threats to the police and the chief and that the parties were to meet at the Chief's office the following day on the 19th September 2023.
13. PW3 testified that on the 19th September 2023 at about 8am, the deceased called him stating that the accused had come from Siaya at night and was ready to invade him, that the accused had 2 other people on the deceased's fence. PW3 testified that he then sent his cousin David Michael Otiende, PW2, and sent him Kshs.100 to go and find out what was happening to Peter who was raising an alarm of being attacked by Ogolla. PW3 testified that he went to pick his vehicle then PW2 called him saying that he should rush because Ogolla had stabbed Peter with a knife.
14. PW3 testified that he went and met the ambulance carrying Peter then proceeded to Maseno Police Station to report the incident. It was his testimony that he then proceeded to Russia hospital where he met Peter who informed him 'Ogolla has stabbed me and I have money in my long...' after which he died. He testified that the doctors then completed the sentence saying money was in the deceased's trouser so he took the money. He testified that Ogolla was then arrested.
15. PW3 testified that he and Seda witnessed the postmortem on the deceased's body on the 29th September 2023. PW3 testified that he knew Ogolla from his youth as Ogolah used to live in the deceased's house in Kisumu.
16. In cross-examination, PW3 testified that he was not at the scene of crime and thus did not see the accused stab the deceased. It was his testimony that being the deceased's uncle, he and other members of the family used to pressurize Peter to construct a house on his father's land but he told them that his step mother had tried to kill him so he was scared. He testified that they could not believe these claims as the deceased's step-mother appeared very polite but that was until the deceased's step-mother Florence, and the accused uttered in the meeting of the clan elders that they were going to kill Peter. PW3 further testified that PW2 called him on the morning of 19th September 2023 and told him that Ogolla had first whipped Peter then stabbed Peter with a knife. He testified that he later saw that knife.
17. PW4 Rasto Seda Ondu testified that on the 19th September 2023 his wife Eunice Seda called him and informed him that Ogolla had stabbed Peter with a knife. He testified that he went to Chulaimbo Hospital where Peter had been taken and saw Peter after which Peter was put in an ambulance. He testified that he accompanied Peter to Russia Hospital where Peter died shortly thereafter. It was his testimony that on the 29th September 2023, he witnessed the postmortem on the body of the deceased with John Ondu, PW3.
18. In cross-examination, PW3 testified that on 11th August 2023 he was present in the elders meeting which resolved on where Peter was to build a house on his father's land but Ogolla and his mother protested and said that even if the elders decide the matter, after all, the elders would go away and leave the three, Peter, Samuel and Samuel's mother in that homestead.
19. PW5 Alvin Cheruto Katukoi a Senior Government Analyst working at Kisumu Laboratories testified that on the 5th October 2023 he received an exhibit Memo escorted by No. 119646 PC Elijah from DCI Kisumu marked as (PMFI 1). It was his testimony that he also received a checked shirt in a brown envelope marked 'A' (PMFI 2), a knife/dagger with metallic handle marked 'B' in a brown envelope marked as (PMFI 3) (bend) and a buccal swab of Samuel Ogolla, accused marked 'C'.



20. It was his testimony that on observation, he found that the checked shirt 'A' and the knife were moderately and heavily stained with blood of human origin. PW5 testified that they were requested to establish the genetic relationship between the items submitted and the origin. He testified that he did an analysis and the outcome was: -
 - a. The DNA profile generated from the checked shirt 'A' and the knife 'B' were identical and belonged to a single unknown male person.
 - b. The DNA profile generated from the Reference buccal swab of Samuel Ogolla Olango did not match with any of the DNA profiles generated from the above items.
21. PW5 produced the report signed on 24th January 2024 as P. Exhibit 1.
22. In cross-examination, PW5 testified that the exhibits were submitted to them by PC Elijah from Kisumu DCI. He testified that they did not receive any samples from the deceased and that according to the exhibit memo, he received a checked shirt said to belong to the deceased but they did not receive any sample of the deceased's blood hence, they could not link the DNA profiles to the deceased. He reiterated that his results were based on the analysis that he carried out.
23. PW6 Benard Ouko Agengo from Kisian testified that on the 19th September 2023 at around 9am he received a call from his friend David from Chulaimbo who informed him of an incident at Chulaimbo, between Peter Bwana and Samuel Ogolla. He testified that he went to the scene on a motorbike and near the gate of Peter Bwana he saw a knife. It was his testimony that people were surrounding the knife and that there was no police officer around.
24. PW6 testified that he took the knife and a shirt and took it into the house of the deceased and in a sack. It was his testimony that he called his brother John Ondu and informed him that he had recovered the knife alleged to have been used to kill Peter Bwana. He testified that he also picked a shirt. It was his testimony that his brother John Ondu came and took them to Maseno Police station. PW6 identified the knife and shirt he recovered from the scene.
25. In cross-examination, PW6 that he though he knew the deceased, on the day of the incident he had not seen him and thus could not tell which cloth he wore although he recovered a shirt which people said he was wearing on that day. It was his testimony that he wore gloves when he picked the items and placed them in the sack and that he did not give the items to the police. PW6 testified that his informer told him that Peter and Ogolla were fighting.
26. PW7 No. 119646 PC Elijah Thotho of DCI Kisumu West, the investigating officer testified that on the 19th September 2023, at about 1100 hours he was within DCI Kisumu West when he received a report made by Florence Aoko to the effect that her son Samuel Ogola and her step son Peter Caleb Bwana had started fighting and the latter had been seriously injured and that when the members of the public got wind, they regrouped, went and burnt down her house and that of her son Samuel Ogolla.
27. It was his testimony that on the same day at about 9pm he received information that Peter Caleb Bwana who had been taken to Chulaimbo Hospital and referred to Jaramogi Teaching and Referral Hospital had died. He testified that he was then instructed by DCI Paul Langat to begin investigations.
28. PW7 testified that he established that the accused and deceased were step brothers and that when the accused saw the deceased cleaning bushes and cutting trees at the home of their late father, an argument arose and the two fought with both sustaining injuries. He testified that on the 20th September 2023, he received a witness John Ondu with Benard Ouko who came with a blood-stained shirt and dagger which was also blood stained and told him that they recovered the two items from the crime scene and



preserved them at the deceased's house. PW7 produced the blood-stained shirt as P. Exhibit 2 and the dagger as P. Exhibit 3.

29. It was his testimony that during his investigations, he established the cause of the fight to be a land dispute between the accused and the deceased. He further testified that on the 1st October 2023, the accused Samuel Ogolla was escorted by his cousin to Maseno police station and that he rearrested the accused and charged him with the offence of murder.
30. PW7 testified that he took the shirt and dagger to Government Chemist though he did not take the blood sample of the deceased to the Government Chemist because the officer who was at the DCI and who attended the post-mortem did not know that he was to get blood sample for DNA tests. He testified that after submitting exhibits to the Government Chemist, he received a report from the Analyst. PW7 identified the accused in the dock as the person he re-arrested.
31. In cross-examination, PW7 reiterated his testimony and further testified that he found out from statements he recorded that there was a land dispute between the deceased and his step mother, the mother to the accused. He further testified that the area Assistant Chief informed him that the deceased had severally visited his office seeking for assistance over the dispute over land. He also testified that he found that the accused also went to Chulaimbo Hospital for treatment but with the intentions of continuing with assaulting of the deceased and he was turned away so he went to seek treatment elsewhere. He testified that he was not present when the body of the deceased was identified to the doctor but that the family of the deceased and his colleague identified the body to the doctor.

The Defence Case

32. Placed on his defence, the accused testified as DW1. It was his testimony that on the 19th September 2023 he had an event at his home as his father, Kenneth Edward Olango his father had died. He testified that he was making a cow shed for his mother as the deceased was cutting trees so he went and asked him why he was cutting down trees and the deceased replied that he, the accused, was a young boy who could not question him of his actions. The accused testified that the deceased slapped him with a panga on his face and that he bent and the accused cut him. The accused reiterated that he went away and the accused followed him and cut him. The accused testified that he got down, there was a knife which stabbed the deceased on the abdomen, the accused stated that 'kisu ilimgusa kwa tumbo'.
33. The accused testified that he proceeded to hospital where the deceased followed him alleging that he had stabbed him and as the deceased was in the company of his uncle and other people, he left and went to Masaba Hospital where the same people followed him forcing him to proceed to Quinteric Hospital in Bondo where he was treated.
34. It was the accused's testimony that his mother was present during the incident as she was planting maize on the land. The accused testified that only his mother was present during the incident. The accused denied having an electric cable but that the deceased had a panga which he was using to cut trees and which he used to slap him on the right side of the face near his left eye. The accused reiterated that he did not carry the knife. The accused testified that after the accused slapped him on the face, he bent down and saw the knife on the ground then the deceased said 'nimedungwa'. The accused testified that his intention was to defend himself.
35. In cross-examination, the accused admitted that he was not happy with the decision to apportion the deceased land after their father died. The accused further admitted that he knew PW2 and that he saw him on the day of the incident, the 19th September 2023 and that PW2 was standing where the deceased was cutting trees. The accused further testified that he never had a knife and that he only saw it on the



- ground on the date of the incident. The accused insisted that the knife must have been brought onto the farm. The accused also testified that he was present at the scene with his mother as well as DW2.
36. DW2 Florence Aoko Achieng, the accused's mother testified that she did not know the deceased in this case. It was her testimony that on the 19th September 2023 she was at her farm planting maize when she heard screams from the roadside and on checking what was happening, she saw the deceased cutting the accused using a panga so she screamed. It was her testimony that people came and they took the accused to Chulaimbo Hospital but the accused was refused entry so he proceeded with his wife to Masaba Hospital as she went home to pick money.
 37. It was her testimony that at home, people started breaking the windows to their houses so she rushed to Maseno Police Station to report the same and when she returned to the scene, she found the accused's house burnt down and her house being doused with petrol.
 38. DW2 testified that she did not know who else was at the farm when the incident happened but that the deceased was cutting trees that her late husband had planted for herself and her children. She testified that she did not see the accused carry any weapon.
 39. DW3 Eston Charles Ogeta Opondo a clinical officer at Bondo Sub-County Hospital testified that he worked at Quinteric Hospital and that on the 19th September 2023 the accused was admitted at the Hospital and discharged on 24th September 2024. He testified that the accused was bleeding from the head, hand, was confused and had general malaise. DW3 testified that a full heamogram was done, X-ray of humerus and skull done, stitching and dressing done, transfusion of blood done. He was discharged on medication and one-week sick off given.
 40. DW3 testified that the probable cause of the accused's injury was both blunt and sharp object and that on the head was blunt object due to bruises while on the hand was a sharp object because there was a cut. DW3 produced the patient card for the accused from Bondo sub-county Hospital as D. Exhibit 2 and the discharge summary as D. Exhibit 3.
 41. In cross-examination, DW3 testified that he personally attended to the accused who never gave him the history of the injury. He testified that the accused looked sick, dizzy and confused. In re-examination, DW3 testified that the patient card contained the history of being assaulted on the 19th September 2023.

Submissions by the defence

42. The defence counsel Mr. Okanda filed written submissions and conceded that there was evidence of death and its cause established sufficiently by the post mortem report produced and the testimony of the Doctor, PW8 who conducted the post mortem of the deceased.
43. It was however submitted that the prosecution had totally failed to link the accused person to the death of the deceased as well as proof of malice aforethought thereof. It was submitted that while all the prosecution witnesses including the investigating officer point to the accused as the person who committed the unlawful act, none of all those witnesses was able to lead evidence to demonstrate malice aforethought on the part of the accused person. Counsel relied on the case of Republic v Juma Kituko Mwambegu [2020] eKLR citing the case of Hyam v DPP {1974} A.C where the Court held:

“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.”



44. It was further submitted that the circumstances leading to the death of Peter Caleb Bwana do not demonstrate malice aforethought on the part of the accused in this matter. To buttress this argument, this court was invited to examine the testimonies of PW 7, PC Elijah Thotho who was the investigating officer in this case as well as the testimonies of the accused person and his mother DW2 one Florence Aoko Achieng, who all, according to counsel, gave a consistent account of what may have transpired leading to the death of the deceased.
45. It was submitted that the evidence by the accused demonstrated that the accused suffered injuries as a result of the assault by the deceased using the panga, as per the testimony of the investigating officer and the accused person's mother Further, that in a bid to defend himself from the assault, the accused picked an object from the ground which at the time of picking it, he was not aware what it was owing to the circumstances at the time, with a view of defending himself and that he only learnt later that the object was a weapon.
46. On the basis of the above account, it was submitted that the accused had no pre-meditated plan to assault, injure or kill the deceased. Similarly, that being that the accused, in the process of being assaulted sought to defend himself with an object which at the time of picking it had no idea what it was, cannot be said that he was aware that the attack on the deceased using the said object would cause death or bodily injury to the deceased.
47. On this account, it was submitted that the prosecution had not proved the ingredient of malice aforethought, which is a critical ingredient in the offence of murder. Reliance was placed on the Court of Appeal in the case of Peter Kiambi Muriuki v Republic [2013] eKLR citing the case of Nzuki v Republic(1993)KLR in which the Court held that "malice aforethought is a term of art" and emphasized that.
- "Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:-
- i. The intention to cause death;
 - ii. The intention to cause grievous bodily harm
 - iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as a result of those acts....."
48. Further, that the same Court proceeded to hold that "the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder."
49. In the circumstances, it was submitted that the prosecution failed to demonstrate any motive on the part of the accused person in so far as the death of PETER CALEB BWANA, the deceased is concerned.
50. It was therefore submitted in conclusion by the defence counsel that in the absence of providing proof of motive or failure to prove malice aforethought on the part of the accused, the prosecution have failed to prove the ingredients of murder. In the circumstances, we urge the Court should acquit the accused person of the said offence.



Analysis and Determination

51. I have considered the evidence adduced by both parties and the submissions by the defence counsel and the issue for determination is whether the prosecution has proved all the elements of murder against the accused person beyond reasonable doubt to warrant a verdict of guilt and a conviction of the accused person.
52. The offence of murder is created by section 203 of the Penal Code in the following terms:
- “ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
53. The onus of proving a criminal offence like this one before the court lies with the prosecution who must prove the offence beyond reasonable doubt. The ingredients of murder that must be proved by the prosecution to that standard are: Proof of death, its cause, that the death was caused by an unlawful act or omission, identification of the perpetrator of the offence and finally, Malice aforethought as defined under section 206 of the Penal Code.
54. I have examined the evidence by the prosecution witnesses. It confirms without a doubt that the deceased, Peter Caleb Bwana, died. Though no post-mortem report was produced due to the Doctors’ strike which made it impossible for Dr Ombok from Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) to testify, PW4 testified that he and PW3 witnessed the post-mortem that was carried out at JOOTRH on the 29th September 2023 on the body of the deceased. All other witnesses for the prosecution including PW3 the deceased’s uncle testified that they saw they saw the body of Peter Caleb Bwana Ogola.
55. The defence did concede that there was proof of death being attributed to “massive hemorrhage as a result of a stab wound.” This was from the copy of postmortem served on the defence by the prosecution as part of the evidence the prosecution intended to rely on. Here, I must state that failure to produce a post mortem report is not fatal to the prosecution’s case. The evidence on record by PW1, PW2, PW3 and PW7, was that the deceased sustained a stab injury to the abdomen. It is without a doubt that the death of the deceased resulted from an unlawful act.
56. In the case of Republic V Mohammed Wanyoike & Another [2017 eKLR, the court stated that:-
- “ A postmortem is normally conducted in murder cases so as to determine the cause of death. The mere fact that a postmortem is not conducted does not mean that the cause of death cannot be determined. If robbers invade a house and in the process shoot their victim dead using a rifle and he passes on, the absence of a postmortem report cannot be a good defence if the robbers are ultimately apprehended and charged with the offence of robbery with violence or murder. A postmortem report is not a condition pre-requisite to the offence of murder.”
57. It was therefore not necessary in the instant case to produce the post-mortem report. The death of the deceased has been proved by other evidence. Also see Republic versus Joseph Mulupi Okwiri [2018]eKLR, where the court held:-
- “
- “ 24. The second issue for determination is whether the prosecutions’ failure to avail the doctor who performed the postmortem examination in this case is fatal to



the prosecution's case. This question is critical for the simple reason that in a murder case, the prosecution must not only prove the fact of death but must also prove the cause of such death. In the case of *Ndungu versus Republic* (Supra) the Court of Appeal said that "in some cases death can be established without medical evidence." This case, taken together with *Republic –versus – Cheya* [1973] EA 500 were cited with approval by the Court of Appeal in *Dorcas Jebet Keter & another versus Republic* [2013]eKLR where the appellants were found guilty, convicted and sentenced to death for the murder of one Hillary Malakwen who was found to have been tortured and burnt to death by the appellants and their accomplices, despite the prosecutions failure to produce a postmortem report. The Court of Appeal quoted the following passage from the Cheya case in reaching the conclusion that failure to adduce medical evidence is not necessarily fatal to the prosecution's case –

"Of course, there are cases, for example, where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be obvious that the absence of a postmortem report would not necessarily be fatal. But even in such cases medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence as supporting evidence of the cause of the death in the circumstances relied on by the prosecution."

58. The identity of the person that caused that death is also not in doubt. Evidence points to the accused as the perpetrator. PW1 testified that he saw the accused attack the deceased with an electric whip then he saw the accused with a knife and then the deceased was bleeding from the knife. This version of events was corroborated by PW2 who went on to add that the deceased informed him that 'Ogolla has stabbed me.'
59. PW3, the deceased's uncle testified that following the incident, he went to visit the deceased at JOOTRH where the deceased informed him that, 'Ogolla has stabbed me and I have money in my long,' after which the deceased passed on.
60. Even in his own defence, the accused stated that in his struggle with the deceased he saw a knife on the ground which knife stabbed the deceased on the abdomen. The accused stated that 'kisu ilimgusa kwa tumbo' meaning that the knife touched the deceased on the abdomen.
61. Is it logical for the accused to try and convince this court by his testimony and submissions by his counsel that the knife magically stabbed the deceased in his abdomen? All evidence presented before the court by PW1 and PW2 point towards the accused using the knife to stab the deceased in his abdomen.
62. The other fact was the statement the deceased made to PW2 and PW3 that the accused was the one who had stabbed him. These two witnesses were very steadfast and I find it a fact from the evidence that the deceased indeed made the statements to them. As to whether the statements amount to a dying declaration Section 33 (a) of the *Evidence Act* (Cap 80) states that: -
 33. Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, ... 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.....”

63. The principles governing dying declarations were considered by the Court of Appeal in the case of Philip Nzaka Watu v Republic [2016] eKLR. The court 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.”

64. The court reiterated those principles in the case of Charles Njonjo Gituro v Republic [2019] eKLR; and in the case of Moses Wanjala Ngaira v Republic [2019] eKLR where it held inter alia: -

“

“19. The situation in Kenya is, however, different as exemplified in section 33 of the *Evidence Act* (supra). There is a catena of authorities from this Court on the nature and the manner of receiving and considering evidence of dying declaration. We take it from Choge v Republic [1985] KLR 1, citing the predecessor of this Court in Pius Jasanga s/o Akumu R (1954) 21 EACA 331:

“In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to dying declarations in this country must,



consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (Republic v Muyovya bin Msuma (1939) 6 EACA 128. See also Republic v Premanda (1925) 52 Cal 987.)

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:

“The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed...The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (Ramazani bin Mirandu (1934) 1 EACA 107; R v Okulu s/o Eloku (1938) 5 EACA 39; R v Muyovya bin Msuma (supra). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).

It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (R v Eligu s/o Odel and another (1943) 10 EACA 9; Re Guruswani [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in R v Eligu s/o Odel and Epongu s/o Ewuny (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (R v Said Abdulla (1945) 12 EACA 67; R v Mgundulwa s/o Jalo (1946) 13 EACA 169, 171).”

See also R v Eligu s/o Odel (1943) 10 EACA 90, Okethi Okalo v Republic [1965] EA 555, Aluta v Republic [1985] KLR 543, and Kihara v Republic [1986] KLR 473.

20. The law in this area is clearly articulated in the case of Nelson Julius Karanja Irungu vs. Republic [2010] eKLR which was cited to us by learned counsel for the appellant. It is clear however that this case does not support counsel’s contention that the deceased’s statement does not qualify as a death declaration because she was not under contemplation of imminent death. We do not therefore need to discuss the details as to whether the deceased was in imminent danger of death when she made the statement in question. The statement is clearly admissible in evidence.”

65. In this case, the deceased made a statement to PW2 and PW3 on separate occasions that it was the accused who had stabbed him. Albeit he made the statement to PW2 earlier while at the scene of the incident and after being rushed to the hospital, he made the same statement to PW3 after which he passed on.
66. The statements by the deceased to the two witnesses related to the events that eventually led to his death and I am therefore satisfied that they amounted to a dying declaration. Whereas a dying declaration does not require corroboration, in this case, the same was made to two different people whom I found credible and trustworthy witnesses as they had no reason to lie against the accused. The deceased was very consistent in his mention of the accused as the one who stabbed him and it is my finding that this leaves no doubt that the accused committed the unlawful act of fatally stabbing the deceased.



67. Those statements were corroborated by the testimonies of PW1 and PW2 who were present and saw the accused stab the deceased.
68. I am therefore persuaded beyond reasonable doubt that there is sufficient evidence to prove the elements of death by an unlawful act and identity of the victim and the identity of the perpetrator.
69. I now turn to the element of malice aforethought. The defence counsel submitted that there was no proof of motive and malice aforethought to warrant a conviction and that if there was stabbing of the deceased by the accused, it was in self defence since the deceased slapped the accused using the panga, according to the investigating officer and the accused persons' mother who testified as DW2.
70. Section 206 of the Penal Code defines malice aforethought in the following terms:
206. Malice aforethought
- 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.
71. In *Republic v Benjamin Kyalo Mulonzi* [2019] eKLR, the Court had this to say concerning malice aforethought:
- “ 30. It is therefore clear that malice aforethought is the conscious, premeditated intent to kill another person, without any provocation or just cause. The Court of Appeal in the case of *Republic –vs- Tubere S/O Ochen* (1945) 12 EACA63 held that an inference of malice aforethought can be established by considering the following: -
- a. The nature of the weapon used.
 - b. The manner in which the weapon was used.
 - c. The part of the body targeted.
 - d. The nature of the injuries inflicted either single stab/wound or multiple injuries.
 - e. The conduct of the accused before, during and after the attack.”
72. In this case, the nature of the weapon, a sharp bend knife was used. The knife was used by the accused to stab the deceased in the abdomen. By stabbing the deceased's abdomen, the intention was to kill the deceased. It is also not lost on this court the evidence adduced by the prosecution witnesses specifically PW2, PW3 and PW4 that the accused and his mother had threatened to kill the deceased as a result of



- a land dispute over land left by their father. The animosity that the accused had towards the deceased was self-evident even in his defence where he insisted that the deceased had no right to use the land and stated “I was not happy with the decision to give him land. The land belonged to my father. The trees were on my father’s land” while his mother claimed that she did not know the deceased yet she reported to PW7 that her step son, the deceased and by name, had fought with her son, the accused.
73. The accused defence that he does not know how the knife that was on the ground stabbed the deceased’s abdomen is far-fetched. It makes no sense given that the incident occurred in the presence of the accused and the deceased and in daylight in the presence of PW1 ns PW2. A knife is an inanimate object and cannot move on its own. His mother gave evidence that she did not know the deceased, which was a big lie, considering the evidence that she was one of those who threatened to kill the deceased for claiming a share of her husband’s land, which threats were uttered in public when the matter was being attended to by elders who were trying to resolve the dispute. Furthermore, how could she not know someone who had come and constructed a house on her land.
74. On the claim that the accused acted in self defence, I find no material to support that defence as the evidence of PW1 was clear that Peter was not cutting any trees. I had the slasher while Peter was using a panga to cut grass. Ogolla beat Peter using electrical cable. I did not see Peter cut Ogolla with a panga. PW2 who also witnessed the incident made it clear that the accused was never injured by the deceased and that he must have harmed himself because the blood he had on him was from the deceased.
75. He stated “I went and reached Chulaimbo. I met Peter Bwana by the roadside speaking to a lady. We started walking towards Peter’s house. Ogolla came and started whipping Peter using an electric cable on the head. They started struggling holding each other as brothers. Suddenly, I saw Peter Bwana hold his stomach and he fell...”
76. As earlier stated herein, the evidence presented by the prosecution was that there was a land dispute between the deceased on the one hand and the accused and his mother on the other hand . Evidence was presented that the deceased had reported of a threat to his life from the accused and his mother. Therein lies the accused’s motive. The accused intended to cause grievous harm on the deceased. I find the element of malice aforethought and a predetermined intention to eliminate the deceased proved.
77. Having considered the evidence adduced by the prosecution as a whole, I am satisfied that it was the accused that stabbed the deceased on the material day and with malice aforethought, the motive being that the deceased had come to occupy land which he had been given by his father who had just died and with the intervention and encouragement of clan elders. I am satisfied that the prosecution discharged its burden of proof and has proved the charge of murder against the accused beyond any reasonable doubt.
78. I find the accused Samuel Ogola Olangó guilty as charged of the offence of murder contrary to section 203 of the Penal Code and I convict him accordingly.
79. Sentence to be pronounced after mitigation.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JANUARY, 2025 VIA MICROSOFT TEAMS

R.E. ABURILI

JUDGE

