



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**State v Ochieng (Criminal Case 40 of 2019)
[2024] KEHC 3888 (KLR) (29 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 3888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE 40 OF 2019
RE ABURILI, J
JANUARY 29, 2024**

BETWEEN

STATE PROSECUTION

AND

OCHIENG STEPHEN OCHIENG ALIAS STEVE ACCUSED

JUDGMENT

1. The accused person Ochieng Stephen Ochieng alias Steve 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 12th November 2019 at Riat area along Kisumu – Kakamega road within Kisumu County, the accused murdered one Jamila Dorcas Ouma. The accused person pleaded not guilty to the charge against him and the matter proceeded to full trial. The prosecution called a total of seven (7) witnesses in support of its case which is summarised herein below.

The Prosecution’s Case

2. PW1 Polycarp Lutta Kweyu the Principal Government Analyst at the Government Chemist in Kisumu testified that on the 21st May 2019, he received the following samples from Corporal Simiyu of Kondele DCI for DNA analysis:
 - i. A light blue long sleeved multiple stripped shirt marked ‘A’.
 - ii. A long pair of jeans trouser marked ‘B’.
 - iii. A kitchen knife with a blue plastic handle marked ‘C’.
 - iv. A cartilage tissue from the deceased marked ‘D’.
 - v. Bucal swab for the suspect Stephen Ochieng.



3. It was his testimony that he carried out an analysis and made the following findings:
 - i. The shirt item 'A' the trouser item 'B' and knife item 'C' were stained with blood of a human being.
 - ii. After the analysis, he generated DNA profiles from these samples and concluded and opined that: -
 - a. The blood stains on the shirt item 'A' and trouser item 'B' generated an identical DNA profile matching the DNA profile of Stephen Ochieng the suspect.
 - b. The blood stains on the knife matched the DNA profile of the deceased.
4. PW1 testified that he prepared the report on 7th May 2020 and signed it. He produced the Report and Exhibit Memo as PEX1(a) and (b) respectively.
5. In cross-examination, PW1 testified that Items A and B had human blood which he found belonged to the accused. It was his testimony that he also found blood stains matching the DNA of the deceased while no DNA of the accused was found on the knife.
6. PW2 Iscar Awuor, the deceased's mother testified that on the 12th November 2019, she received a call from Cecilia Yare telling her that PW2's daughter had collapsed on the road but that when Cecilia tried calling the deceased back, there was no response. She testified that she reached out to her brother who told her that he would go and check on the deceased together with their other brother.
7. PW2 testified that Cecilia then called back saying that PW2's daughter had died and a lady had taken her to the Specialist Hospital. She testified that she was informed that Jamila, the deceased, had said that Steve had stabbed her. PW2 testified that Jamila had previously informed her that Steve was her boyfriend. It was her testimony that she left Nairobi for home where she went to Russia Hospital and found the body of Jamila in the mortuary. She further testified that she identified the deceased's body to the doctor before postmortem was conducted.
8. PW2 testified that the deceased Jamila was aged 20 years and that she had told PW2 that she had a boyfriend called Steve, whom she identified as the accused in court and that she had seen him before.
9. In cross-examination, PW2 testified that on the 12th November 2019, she was in Nairobi and did not witness what happened to Jamila. It was her testimony that Cecilia, her sister-in-law, informed her that Steve had stabbed Jamila. She further testified that Cecilia did not record her statement but that she told her that Angela told her that Steve had stabbed Jamila. It was her testimony that Jamila was still in school and that she, PW2, only knew one Steve, whom the deceased had informed PW2, was her boyfriend. In re-examination, PW2 reiterated that when Cecilia called her, she told her that Steve had stabbed Jamila.
10. PW3 Angeline Akinyi Onyango testified that on the 12th November 2019 at around 2.30pm, she was in her house when she heard screams of a girl so she got out and crossed a fence and saw many people. It was her testimony that when she reached the place and found a girl lying down and asked her 'ni nini mbaya?', 'Nani amekufanyia mabaya haya?', the girl told her, "ni Steve." PW3 testified that when she asked the girl as to who Steve was, the girl told her that he was her boyfriend and further told her that he had escaped. It was her testimony that she asked the girl for Steve's number and the girl gave her the number and that as PW3 had left her phone in the house, she asked a youth at the scene to allow her call Steve but the youth said that she had no airtime. It was her testimony that the injured girl gave her the telephone number 0719XXXX.



11. PW3 testified that the girl had injuries on the knees and blood was coming out of her chest. She testified that she asked her husband to assist her take the girl to hospital but he said that he had no time. She further testified that she went to the road and got a motorcycle on which she was assisted by some boys to place the girl, then rushed her to the Specialist Hospital. PW3 testified that the girl was in a bad state, foaming in her mouth and that on arrival at the Specialist Hospital, she was given first aid on a bed.
12. PW3 testified that she told the Hospital that she neither knew the girl nor her house and that she started walking and asking people whether they knew the girl as PW3 had her slippers. It was her testimony that she met 2 girls who informed her that the slippers belonged to Jamila. She further testified that when she returned to the Hospital, she was informed that the girl had died. She testified that she went to Riat Police Station to report and the police told her that they had arrested Steve and further showed her Steve, the accused herein.
13. In cross-examination, PW3 testified that she did not see Jamila being stabbed but that Jamila told her that Steve had stabbed her. It was her testimony that she relayed this information to the police. She denied being the one who gave the accused's number to the police stating that she did not call the number because they had no airtime. It was her testimony that she knew another Steve, a teacher and owner of a cyber who lived in his plot and who was not arrested in connection with this offence. In re-examination, PW3 testified that she found Steve arrested by the police and that it was in the evening.
14. PW4 George Otieno Owino testified that on the 12th November 2019 at around 2.00pm, he was at work and went to eat in a nearby kiosk when he saw a man emerging from a maize plantation. He testified that he asked the man who he was and why he was emerging from the maize plantation as there was no road there and there had been incidents of insecurity but the man told him not to worry. PW4 testified that he got concerned because he saw the man with blood on his right leg and that the man tried to escape but he held him and that the man identified himself as Steve Ochieng Ochieng which he confirmed from the man's Identity card and a Maseno University Student Identity card.
15. PW4 testified that the man, Stephen Ochieng Ochieng, told him that he was looking for a girl called Winnie but PW4 told him that though he lived in Kajulu, he did not know who Winnie was. It was his testimony that Stephen gave him a phone number which PW4 called then Stephen spoke to the said girl who was on the other side but the girl refused to give particulars of where she was. He testified that he then called the girl who told him that Stephen knew whom he was looking for not her. He further testified that he used his phone because Stephen said he had no credit in his phone.
16. It was PW4's testimony that he returned to where Stephen was and found Stephen had left. He testified that he inquired from the people there as to Stephen's whereabouts and they showed him the path he had followed which PW4 followed and found Stephen squatting. PW4 testified that he asked Stephen what the problem was but Stephen could not explain himself so he decided to escort him to Riat Police Station where he explained to the police officers how he had found Stephen, and PW4's suspicions about the said Stephen, whom PW4 had met, with blood on his leg and how he had emerged from the maize plantation.
17. PW4 testified that a man who worked at a cyber informed him that a girl had been stabbed. It was his testimony that the girl whom he had called after receiving her number from Stephen called him and told him that Stephen had told her that he would go to kill a certain girl called Jamila in Kisumu. He testified that the cyber man then told him that a girl called Jamila had been stabbed in the area.
18. In cross-examination, PW4 testified that he arrested Stephen because Stephen had emerged from the maize plantation and appeared scared and suspicious. He testified that he did not require expertise to know that a person was tense. He further testified that he did not hear screams from the area and further



- did not witness the accused assault anyone. He further testified that he saw blood on the accused's leg but could not tell if the accused was injured.
19. PW5 Dr. Ombok Lucy testified and produced the postmortem report filled on 19th November 2019. It concerned the body of Dorcas Ouma a female African aged 18 years old of fair physique, 159cm in height as PEX2. It was her testimony that externally, the body had a penetrating cut wound on the chest measuring 4cm and a cut wound on the left knee.
 20. She testified that internally, there was a penetrating deep cut wound on the liver causing massive bleeding whereas other systems were essentially normal. She further testified that she formed the opinion that the cause of death was massive haemorrhage due to deep cut wound of the liver. She issued a Death Certificate No. 11XXXX.
 21. PW6 Akinyi Lorna Mboya testified that she knew Stephen Ochieng who used to be her boyfriend and that they had a child together. She testified that on the 2nd November 2019, she had travelled to her home in Siaya leaving the accused person in her house. She testified that she received a call to the effect that the accused had brought a girlfriend in her house and that the two had fought. It was her testimony that she returned on 3rd November 2019 and asked the accused as to what had happened but that he said that nothing had happened. She testified that she looked for her kitchen knife but it was missing in the house and when she asked the accused, he denied seeing it.
 22. PW6 testified that they continued staying together with the accused as he had claimed that he had disagreed with his father at home. She testified that on the 8th December 2019, she went to work in the morning and on her return, the accused was not present. She testified that she called and texted the accused but he never responded. She further testified that she found her cooking gas and soap missing from the house which she ignored as the items were minor and did not report their loss.
 23. It was her testimony that on the 20th December 2019, she was called by the in-charge at her work place and told of an abrupt meeting. She testified that she went and was surprised to find criminal investigations officers who introduced themselves and told her that they were investigating the accused and that the accused had told them that the knife that was used in the offence came from the house of PW6. She testified that she was shown the knife with a blue handle which had blood and also, she was shown the accused's dirty clothes. That she recognized the knife as hers and the clothes of the accused. PW6 testified that the investigating officers informed her that a girl was killed at Riat. It was her testimony that she had known the accused since they were young.
 24. In cross-examination, PW6 testified that despite lack of markings, she knew that the knife shown to her by the investigating officers was hers. She further testified that she did not know where the accused was on the 12th November 2019. She further testified that she did not know Jamila and that she only heard that the accused used to bring Jamila to PW6's house in the latter's absence.
 25. PW7 No. 64353 Corporal Richard Simiyu testified that on the 12th November 2019 at 6.00pm, he was called by CIP Simbiri who informed him that he had sent some officers with whom he was to attend to a scene of murder. He testified that he met his colleagues at Riat Police Post and these included PC W Joyce Wawira and PC Sessy whom they worked together. He testified that he was informed by IP Chepkwony that a suspect had been arrested and was being held at the Police Post so they interrogated the suspect and learnt that he had earlier been arrested by members of the public while fleeing from the scene of murder and was forcefully taken to the Police Post.
 26. PW7 testified that they revisited the scene along Kakamega-Kisumu road near Riat area, a residential area. He testified that Inspector Chepkwony showed them where the murder weapon, a kitchen knife with blue handle was recovered from, a few metres from the scene upon the suspect disclosing to them



where he had thrown the murder weapon. He further testified that while at the scene, he met Akinyi, who told him that she responded to an alarm raised by the deceased after being stabbed with a knife saying 'Niokoe nakufa.' It was his testimony that he also interrogated the suspect fully who informed him that he had directed the police officers who had gone and recovered the knife and further that the accused told PW7 that he got the knife from his second girlfriend in town, Akinyi Lorna.

27. PW7 testified that he took the details of the accused's 2nd girlfriend so that he could trace her later to be a witness. He further testified that the accused informed him that the deceased was his girlfriend but that they had disagreed and that she was about to quit their relationship so he was unhappy and had been branded a drug dealer and user so he decided to meet the deceased for the last time. He further testified that the accused had clothes which were blood stained including the black trouser and shirt so he took possession of the accused's clothing and surrendered the same to the Government Chemist, Kisumu for further analysis to establish if the blood on the cloths could match the deceased's DNA. He testified that he also took blood samples from the deceased's body to the Government Chemist for comparison.
28. PW7 testified that at the scene of murder, the deceased had told those who went to her rescue that Steve had stabbed her and further, that the deceased had given the accused's mobile number to those who went to rescue her. He testified that he saw a stab below the deceased's right breast and that the knife was about 10cm long, capable of penetrating deep. PW7 produced the recovered kitchen knife with a blue handle as PEX 3, the light blue shirt that the accused was wearing as PEX 4 and the blue jeans the accused wore at the time of arrest as PEX 5.
29. In cross-examination, PW7 testified that in the course of his investigations, he did not get an eye witness to the murder nor did he use the phone number given to trace the accused person. He testified that the accused was arrested the same day of the murder following a report by Angela. It was his testimony that the number of the phone given by Jamila to Angela also linked the accused to the deceased and further that the deceased also revealed that the accused was responsible for stabbing her. He admitted that he did not write to Safaricom to verify that the phone belonged to Steve.
30. PW7 testified that the accused was well known to the parents of the deceased and that the murder weapon was recovered and handed to him by IP Chepkwony after interrogating the suspect. He further testified that the accused told them where he had left the murder weapon. He testified that the accused never made any report of the incident. The prosecution then closed its case.

The Defence Case

31. Placed on his defence, the accused person elected to give sworn testimony and stated that on the 12th November 2019 at 11am, he was at Riat in Kisumu walking when he met a guy, whom he later learnt was called George, and who started questioning him on who he was, where he was from and where he was going which he, the accused, did not answer as he did not know the rationale for the questions. The accused testified that George informed him that there were people who had been stealing in the area and so he just wanted to know if the accused was among them. It was his testimony that he told George that he was a student and did not know much of the area and also that he told George to take a photo of his ID card or report to the police.
32. The accused testified that he started walking away but after 2 minutes, George called him saying he was not so sure of what he, the accused, had told him and that they should proceed to the police station, which they did. It was his testimony that on arrival, George reported and was told to leave but he refused to go. He testified that the officers then started querying him about a girl to which he responded that



he had no idea about it. He testified that George returned and told the officers about a girl who had been killed and that he, the accused, was suspected to be the killer.

33. The accused testified that he was placed in the cells for about five minutes during which he saw a girl come to report the murder of a girl. It was his testimony that the girl left only to return to the police station saying she had heard that somebody, a suspect in connection with the murder, had been arrested. It was his testimony that the girl came and started talking to him despite him not knowing her.
34. The accused denied knowing the deceased or ever meeting her. He further denied handing over the knife to the police or telling the investigators of where the knife was. It was his testimony that all that the investigators and witnesses said about him were incorrect.
35. In cross-examination, the accused testified that he used to live with Lorna and that he was with her in November. He denied knowing the lady who went to see him at the police station following his arrest. In re-examination, the accused denied that the number given in court was his.

Analysis and Determination

36. I have carefully considered the evidence adduced in this case and the arguments in submissions by the accused's counsel that the prosecution had not proved its case against the accused person beyond reasonable doubt hence the accused person should be acquitted of the charge of murder. The accused faces a charge of murder contrary to section 203 of the Penal Code. That section defines murder as follows:

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

37. To sustain a charge of murder, the prosecution must adduce evidence to establish, beyond reasonable doubt that there is death, that the cause of that death is known, that the said death was unlawfully caused, that it was the accused who caused the unlawful death of the deceased and finally, that the unlawful killing was with malice aforethought. The essential ingredient for the offence of murder is malice aforethought. The circumstances which constitutes malice aforethought are described under Section 206 of the Penal Code as follows:

“ 206. 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.”



38. The first issue for consideration is proof of death. PW2, the deceased's mother testified that she identified the deceased's body prior to the postmortem being carried out. PW3 testified that following the incident, she took the deceased to Specialist Hospital where she left her and, on her return, she was informed that the deceased had passed on. Dr. Ombok Lucy, PW5, who carried out the postmortem on the body of the deceased as identified to her and produced the report as PEX2 testified that the deceased's death was caused by massive haemorrhage due to deep cut wound of the liver. Accordingly, it is my finding that the prosecution has satisfied the two elements of proof of death and the cause thereof, beyond reasonable doubt.
39. The next question is whether the death of Beverlyne Akinyi Otieno alias Cassie Akinyi was caused by an unlawful act or omission. Article 26 (1) of *the Constitution* guarantees every person the right to life. The postmortem report revealed that the deceased sustained a deep cut wound on the chest measuring 4cm, a cut wound on the left knee and a deep cut wound penetrating the liver. This, if caused by an individual, then, no doubt, amounted to an unlawful act as no-one has the right to deprive another of their life. As there is no evidence of self-inflicted fatal injuries, in the circumstances, I am persuaded beyond reasonable doubt that the deceased person, Jamila Dorcas Ouma died out of an unlawful act.
40. The other question is whether it was the accused who unlawfully caused the death of Jamila Dorcas Ouma. None of the prosecution witnesses actually saw the accused unlawfully kill the deceased. In essence, the prosecution case was based on circumstantial evidence.
41. In *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:
- “However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
- “It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”
42. In the same above case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:
- “Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:
- “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should from a



chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

43. In this case, none of the prosecution witnesses was an eye witness to the attack that left the deceased dead. PW3 testified that she heard a girl scream and rushed to the scene where she found the deceased who on inquiry told her that ‘Steve’ had stabbed her. PW6, a lady who was the girlfriend to the accused and with whom they had a child testified that on the 2.11.2019, she travelled to her home in Siaya leaving the accused in her house that she rented and that she received a call to the effect that the accused had brought his girlfriend to the house and that they had fought. She testified that the following day, the 3.11.2019, she returned to her house and noticed that her kitchen knife was missing and upon inquiring from the accused where her knife was, the accused denied seeing it. She testified that she continued living with the accused till the 8.12.2019 when she went to work and on her return to the house, she found the accused missing and her gas and soap also missing.
44. PW6 further testified that on the 20.12.2019 she was called to work where she found investigations officers and the accused waiting and that the officers showed her a knife with a blue handle and with blood that they had recovered from the accused, which knife she identified as hers which had gone missing when she returned from her home in Siaya.
45. PW4 testified that on the 12.11.2019, he saw the accused emerging from a maize plantation and so he got concerned as the accused had blood on his right leg and he appeared tensed. He testified that he subsequently arrested the accused and took him to Riat Police Station.
46. PW2 testified that she knew the accused as the deceased, her daughter, had introduced him to her as her boyfriend Steve.
47. In his defence, the accused denied knowing the deceased or ever meeting the deceased. He however admitted to knowing Lorna, PW6, and stated that he used to at times live with her, including the month of November, 2019.
48. I have considered the evidence as adduced hereinabove and, in my view, the evidence as summarized above irresistibly points to the accused person as the person whom the deceased referred to as Steve who had stabbed her. Despite the accused denying that he knew the deceased, PW2 testified that she was introduced to the accused by the deceased as her boyfriend. Further, the knife PEX3, produced by PW7 was identified by PW6, the accused’s ex-girlfriend, as her kitchen knife which she noticed was missing upon her return from Siaya on the 3.11.2019 and which on asking the accused, he denied knowing about it. The evidence by the police officers that it was the accused who led them to the place where they recovered the knife which when subjected to forensic examination showed that it had the DNA of the deceased, in my humble view, was corroborated by the evidence of PW6 that the knife was hers and that it had left her house during the time that the accused had lived with her. I find no reason to doubt the evidence of PW6 who continued living with the accused even after being told that the accused had brought a girlfriend in her house and that they had fought. She even forgave him after he allegedly took away her gas and soap and it was not until after this incident that the two met after her knife was recovered and suspected to have been a murder weapon. The circumstantial evidence as summarized above provides a continuous link between him, the deceased and PW6. In my view, the accused’s testimony was a mere denial.
49. Albeit what the accused told the police leading to the recovery of the killer knife cannot be said to be a confession, I find that the police could not have found the killer weapon had the accused not given them a hint and which hint went further to identify the owner of the killer knife, a fact the police had no other means of knowing had the accused not given them the information about PW6 who was



traced and she confirmed that the knife was hers and that it had disappeared from her house during the period that she lived with the accused in her house. I further find no reason to doubt the testimonies of the police officers who in the course of their investigations established that indeed there was a linkage between the accused and PW6 and as PW6 was not a spouse to the accused person, she was a competent and compellable witness.

50. Additionally, I have considered the testimony of PW3 who found the deceased at the scene and inquired from her as to who had injured her and the deceased remarked that it was 'Steve'. PW2 had testified earlier how the accused was introduced to her as 'Steve' by the deceased. These two witnesses were steadfast and I find no reason to doubt their testimonies.

51. As to whether the statement made to PW3 amounts 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....”

52. 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.”

53. The court reiterated those principles in the cases of Charles Njonjo Gituro v Republic [2019] eKLR; and Moses Wanjala Ngaira v Republic [2019] eKLR where it was stated as follows:-

“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 Ewunyu (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.”
54. In this case, the statement by the deceased to PW3 related to the events that eventually led to her death, albeit the witness did not know the deceased or even the accused person herein before that day and I am therefore satisfied that it amounted to a dying declaration. I found PW3 to be a credible and trustworthy witness and I have no reason to find that she lied against the accused.
55. Contrary to the accused’s testimony that he did not know the deceased and that he had nothing to do with her death, it is clear that the accused knew the deceased and from the testimony of PW2, the accused had been positively introduced to the deceased’s mother as the deceased’s boyfriend by the deceased herself who introduced him as Steve.
56. It is my finding that the accused person’s defence though sworn was not believable or credible and that the said defence did not in any way shake the prosecution’s case. Albeit the accused person’s counsel in



cross examination of PW3 tended to suggest that the Steve whom PW3 was referring to was a different one, and whereas I agree that people share names, there is sufficient evidence in this case to demonstrate that the Steve who was being referred to by the deceased was her boyfriend and that boyfriend is the one whom the deceased introduced to her mother. I am therefore satisfied beyond reasonable doubt that it was the accused herein who unlawfully killed the deceased.

57. On whether the accused had malice aforethought when he unlawfully killed the deceased, under 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
- (c) an intention 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.”

58. The prosecution has a duty to prove malice aforethought in any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a-e), malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of Republic v Tubere S/O Ochen [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

59. In the instant case, evidence adduced by the prosecution shows that the aim of the deceased’s attacker was clearly to cause grievous harm. This is further established by the nature of injuries suffered by the deceased which were as follows: a deep cut wound on the chest measuring 4cm, a cut wound on the left knee and a deep cut wound penetrating the liver. Dr. Ombok Lucy testified that she concluded that the cause of deceased’s death was a massive haemorrhage due to a deep cut wound of the liver.

60. It is clear that the deceased’s attacker had the ultimate intention of eliminating the deceased although the motive is unclear. Nonetheless, motive is immaterial in proving one’s criminal responsibility. That is clear from Section 9(3) of the Penal Code which provides that:

“Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility.”

61. In the case of Joseph Wambirwa Mwanthi v Republic, Criminal Appeal No 63 of 2005 (CA Nyeri), the Court of Appeal stated that “Generally speaking, motive is not essential to prove a crime.”



62. However, the same court stated in *Lubambula v R* [2003] KLR 683 that:

“Motive becomes an important element in the chain of 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.”

63. In *David Kipkemboi Ngetich v Republic, Nakuru Cr. Appeal No. 276 of 2006 (CA)* the Court of Appeal stated that the relevance of motive is “is to contextualize the circumstances in which the offence charged was committed.”

64. In this case, as motive for the unlawful killing of the deceased was not clear from the evidence adduced, this court will not speculate on the same. Only the accused knows why he attacked and unlawfully killed the deceased.

65. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person and that proof is beyond reasonable doubt.

66. Accordingly, I find the accused person Ochieng Stephen Ochieng alias Steve GUILTY of the offence of murder as charged contrary to section 203 of the Penal Code. I convict him accordingly.

67. Sentence shall be pronounced after records, mitigation and victim impact statement. The probation officer to file a pre-sentence report on the accused person.

68. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

