Republic v Farah (Criminal Case 6 of 2020)
[2024] KEHC 11372 (KLR) (26 September 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL CASE 6 OF 2020

JN ONYIEGO, J

SEPTEMBER 26, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

MOHAMED HUSSEIN FARAH ..... ACCUSED

JUDGMENT

1. The accused person herein Mohamed Hussein Farah is charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the charge are that on 11.01.2020 at Bulla ADC Football Field, Garissa Sub county, within Garissa County, he murdered John Mwaka Voya.

2. Having pleaded not guilty to the charge, the matter proceeded to full trial with the prosecution calling a total of eight (8) witnesses in its endeavor to prove its case.

3. PW1, John Muteti Kilonzo testified that on 11.01.2020, he was at the Heller stage within Garissa town in company of the deceased his colleague a boda boda rider. While there, two people joined them seeking to be dropped at a place known as ADC. That in as much as he did not know their names, he knew their faces. However, while talking, a mechanic came and sat on his bike and requested to be taken to Madogo.

4. He testified that, as he left for Madogo, he saw the two prospective passengers he had left, ride on the deceased's bodaboda. Upon him returning from madogo, he heard that the deceased had been killed and so he headed to the scene where the deceased had been found dead. It was his evidence that he reported to the police station and recorded a statement.

5. He further stated that on 17.04.2020, he received a call requiring him to report at the police station. On arrival, he found the deputy OCS who told him that he wanted him to identify a person who had been arrested. That the said deputy OCS had a photograph in his phone which he identified to be that of

one of the assailants. He subsequently attended an identification parade where he allegedly identified the assailant in a parade that consisted eight people. He again attended a second parade with thirty persons. He stated that he managed to pick the assailant as he was a person that he knew so well.

6. PW2, Erick Mbuvi, a petrol station attendant testified that the deceased was his employee as he owned the motor bike registration no. KMCE which the deceased used to ride. It was his evidence that upon receiving a call from a bodaboda rider informing him that his motor bike was at ADC and his employee found dead, he attempted to make his way there. Before reaching there, he learnt that the deceased had been taken to the mortuary and so he went to the mortuary where he confirmed that indeed his employee was dead.

7. He thereafter left for the police station on request by a police officer who had called him. While there, he found his motor bike with deflated tyres. He stated that the police told him to investigate whom the deceased had carried last and upon making enquiries, he found PW1 who reiterated to him his narrative.

8. PW3, John Muthui Voya, the deceased's brother testified that on 11.01.2020 at about 7.00 p.m., he received information in relation to the death of the deceased. On the following day, together with his father, they travelled to Garissa where they identified the deceased's body to the doctor who conducted post mortem.

9. PW4, Kure Boru stated that on 11.01.2020, she was at Bulla ADC visiting her brother who lived with her sick father. That while they were relaxing under a tree, some two children informed them of a man who was lying at the field. Upon visiting the said scene, they found a crowd surrounding a man who was lying down on his stomach. On checking whether he was still alive, they realized that he was already dead. They subsequently informed the police at Garissa headquarters who visited the scene and picked the said body.

10. PW5, Dr. Abdullahi Ahmed testified on behalf of Dr. Ahmed thus stating that a post mortem was conducted on the body of the deceased on 13.01.2020 at 3.07 p.m. That there was a penetrating wound on the lower anterior chest. On the external appearance, there was a posterior cut wound and lower posterior penetrating injury. He stated that the conclusion drawn on the cause of death was a massive internal hemorrhage due to penetrating chest wound extending to the heart.

11. PW6, No. 237574, Inspector Cyprian Kasili stated that he was the officer in charge of the identification parade that led to the identification of the accused herein. It was his evidence that on 17.04.2020, he organized for an identification parade constituting of eight persons with the accused being the 9th one. That the accused herein stood between the 4th and 6th persons and upon calling PW1, he managed to identify him by way of touching. That on the second identification parade, the accused person changed his shirt and stood between the 6th and 8th persons. That the witness was still able to pick on him. He produced the identification parade report as Pex2.

12. PW7, No. 86227 P.C. Martin Gitonga, the investigating officer recalled that on the material day, he was instructed to visit a scene of a suspected murder case at Bura ADC grounds. It was his evidence that he went to the scene together with P.C. Ndiema and Cpl. Abdi and on arrival, they found a young man lying down on his stomach and a motor bike Skygo KPR 863, blue in colour parked next there.

13. He stated that they took the body away to the mortuary and the motor bike to the police station. That no one came out to state what befell the deceased until they came across PW1 who narrated to them his statement. He stated that they continued to look for the accused until sometime in April, 2020 when Salat informed him that the said accused had been charged in Criminal Case No. 254 of 2020 with

the offence of creating disturbance and was in Garissa police station. That the same enabled them to organize an identification parade wherein the accused was identified.

14. He thereafter interrogated the accused person who informed him that the witness who identified him was a boda boda rider and that previously, they had fought and thus held a grudge. He further stated that during the investigation, he realized that this was not a case of a mistaken identity as the accused informed him that he had neither an identification card nor a birth certificate. Additionally, the accused person did not give details about the alleged grudge that existed between him and PW1. That with all the evidence at hand, he was convinced to prefer the charge herein against the accused.

15. On cross examination, he stated that he believed PW1 and therefore had no reason to investigate him. He further stated that, PW1 was not the witness who identified the accused person.

16. PW8, No. 240052 Inspector Abdi Adan stated that on the fateful day, together with his colleagues, they visited the scene of the incident. That they saw a body of Voya Mwaka lying on a football pitch at a place known as ADC football field. A few metres away, was a motor bike KMER 863F Skygo make, blue in colour.

17. That they checked the body of the deceased and noted a stab on the chest with a sharp object. He thus took four pictures: 1st set marked as a-e showing a general view; 2nd set marked as f-g showing the facial side; 3rd set marked as h-j, showing the stab wound; 4th set marked as x-q showing a closer view; 5th set marked r-v showing general view of the deceased's body;6th set marked w-t and 2 a-o showing the general view from far and near. He produced the same as Pex 9 and the certificate as Pex 6.

18. Upon the close of the prosecution case, the court found that a primafacie case had been established hence put accused on his defence.

19. Placed on his defence, the accused testified on oath and stated that he comes from Mombasa Kikambala and that he worked as a casual labourer. That upon arriving at Garissa, he started working as a tout for Gamama Sacco operating at Heller stage. It was his evidence that he was arrested on 17.04.2020 and thereafter accused for creating disturbance. He stated that the case was heard and consequently convicted and jailed for three months. That on 18.04.2020, he was arrested while in court. He denied the commission of the offence herein. He stated that he knew PW1 as they worked in the same stage. He further stated that he has known PW1 since 2015 and there existed some differences between them as they previously differed over customers at the same stage.

20. DW2, Samilla stated that she eked a living as an employee of Umoja rubber and that she lived in Mtwapa Mombasa. She stated that the accused is her nephew and that on the material day, he was in Mtwapa Mombasa. She went further to state that the accused worked as a casual in a hardware known as Bishar Mohamed and that during the material time, the accused stayed with his grandfather. After closure of the defence case, parties were directed to file their submissions.

21. Mr. Kihara for the prosecution submitted orally that the case was proved to the required standard in as much as the same was based on circumstantial evidence. That specifically PW1's and PW8's evidence pinned the accused person herein as the person responsible for the death of the deceased. Counsel urged that the elements of the offence of murder were proved to the required degree to enable this court return a guilty verdict against the accused person.

22. The defence on the other hand filed their submissions dated 1st July 2024. Mr Nyipolo counsel for the accused submitted that there was no proof that the accused was involved in the unlawful act of killing the accused. Learned counsel submitted that the fact that pw1 stated that he saw the accused carry the deceased and another person on his motor bike is not sufficient proof that he was the one who killed

him. That reliance on circumstantial evidence which does not meet the test laid down in the case of R v Kikerring Arap Koske & 2 others (1949) EACA is not enough to make an inference of guilt to convict the accused person.

23. Mr. Nyipolo contended that the circumstantial evidence relied on based on the evidence of pw1 was not corroborated. Counsel opined that being seen last with the deceased person alone was not sufficient as there was need for corroboration. To buttress that proposition, reliance was placed on the case of Chiragu & another v Republic (Criminal Appeal 104 of the 2018(2021)KECA 342(KLR) where the court of appeal held that, it is always desirable for a trial court to exercise caution and look for corroborative evidence to support the evidence of " last seen with a deceased person".

24. On identification, Mr. Nyipolo raised concern on how the accused was arrested and who identified him commit the offence and based on what information as pw1 did not name the accused in his first report to the police nor did he give any physical description of the accused. Counsel submitted that PC Salat who arrested the accused did not testify to shed light on what basis or information he arrested the accused despite the court directing for him to be call as a witness

25. It was counsel's submission that the identification parade conducted was a sham as the parade officer pw6 showed pw1 accused person's photos before conducting the parade implying that pw1 had no idea of the identity of the accused person.

26. On the question of the accused's alibi defence, counsel submitted that an accused person who wishes to rely on an alibi defence should raise it at the earliest opportunity possible. Counsel contended that the accused did raise the same immediately he was arrested. To buttress this position, counsel relied on the case of Republic v GNK (2017) eKLR and Victor v Mwendwa Mulinge vs R (2014) e KLR.

Analysis and determination

27. Accused was charged with the offence of murder contrary to Section 203 of the Penal Code which provides that:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

28. For the prosecution to secure a conviction on the charge of murder, it has to prove four main elements against an accused person. In Roba Galma Wario vs Republic [2015] eKLR], the elements of the offence of murder were listed as follows:

    (a) that the death of the deceased occurred;

    (b) that the death was due to an unlawful act or omission;

    (c) that it was the accused who committed the unlawful act or omission which caused the death of the deceased; and

    (d) that the accused had malice aforethought.

29. On whether there was proof of death and the cause of the said death, the death of the deceased was proved by the evidence of PW1,2,3 and 4 all who saw the deceased's body. PW5, who testified on behalf of the doctor who carried out postmortem on the body of the deceased also confirmed that indeed the deceased was dead. It follows therefore that the element of death was proved by the prosecution.

30. On whether the death of the deceased was caused by an unlawful act or omission, PW5 Dr. Abdullahi Ahmed produced a post mortem report as Pex 1 detailing the injuries found on the body of the deceased

and his opinion on the cause of death as being massive internal hemorrhage due to penetrating chest wound extending to the heart.

31. Article 26 of *the Constitution* is clear that every person has the right to life and that a person shall not be deprived of life intentionally except as authorized by written law. In Gusambizi Wesanga vs Republic [1948] 15 EACA 65 the Court stated:

> " Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property."

[Also see Daniel Nzioka Mbuthi & another vs Republic [2021] eKLR].

32. As stated above, there is no doubt that the death of the deceased was caused by the injuries that he sustained on the chest as was detailed in Pex 1. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted or that it was justified in any way under the law. Further, evidence presented before court irresistibly points to an unlawful act that led to the death of the deceased following an assault. Accordingly, I find and hold that the death of the deceased was caused by an unlawful act.

33. On whether the prosecution proved beyond reasonable doubt that it was the accused person who committed the unlawful act which caused the death of the deceased, the accused denied committing the unlawful act leading to the deceased's death. The question therefore is, who caused the unlawful act that led to the demise of the deceased? Was there positive identification.

34. From the prosecution evidence, there is no direct evidence to connect the accused with the murder of the deceased. The only evidence relied on is circumstantial evidence based on the allegation by pw1 that it was the accused together with another who were last seen board the deceased's bodaboda.

35. From the onset, the burden of proof lies on the prosecution throughout the trial and that burden does not shift to the accused person even if the accused chose to remain silent as that is his constitutionally guaranteed right. [See Article 50(2)(i) of *the Constitution*].

36. In the case of Abanga alias Onyango vs Republic CR A NO.32 of 1990(UR), the Court of Appeal set out the test of determining whether the prosecution had established its case against an accused person on circumstantial evidence based on the following terms:

    i. The circumstances from which an inference of guilt is sought should be drawn and must be cogently and firmly established.

    ii. The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person.

    iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused."

    [See also Simon Musoke vs R {1958} EA71].

37. Therefore, for this court to find the accused person guilty, the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of the guilt of the accused person.

38. Having reviewed the prosecution's evidence in totality, it is clear that the prosecution's case is entirely dependent on the testimony of PW1 who narrated the occurrences of what ensued on the material day

when the deceased met his death. He further testified that he was later called to the police station to help identify the alleged killer of the deceased an act he carried out successfully by touching the accused during the identification parade.

39. It therefore follows that the identification of the accused person herein was by way of identification parade which generally is meant to test the correctness of a witness's identification of a suspect. This position was appreciated in the case of Njihia vs Republic [1986] KLR 422 where the court held that:

> " ...If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect, the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

40. Counsel for the defence faulted the identification parade as a sham and therefore urged this court that the same should not form basis for this court's determination. In my view, this argument at the face value is attractive but the same should be interrogated deeply for the court to reach its own independent decision. I say so for the reason that for an identification parade to be fruitful and of evidential value, the identification rules must be complied with. Failure to adhere to the identification parade guidelines affects the evidential value of a resulting identification.

41. The Court of Appeal in Samuel Kilonzo Musau vs Republic [2014] eKLR had this to say regarding identification parade:

> " The purpose of an identification parade, as explained in Kinyanjui & 2 Others vs Republic (1989) KLR 60, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion." It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."

42. It follows that the procedures governing police identification parades are provided for in the Police Force Standing Orders pursuant to the *National Police Service Act* No. 11A of 2011.These procedures were explained in R vs Mwango s/o Manaa and Ssentale vs Uganda [1963] 3 EACA 29. [1968] E.A.L.R 365 respectively as follows:

    a. The accused has the right to have an advocate or friend present at the parade;

    b. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;

    c. Witnesses should be shown the parade separately and should not discuss the parade among themselves;

d. The number of suspects in the parade should be eight (or 10 in the case of two suspects);

e. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;

f. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

g. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

43. Identification of a suspect in any criminal offence is always a pivotal question and whenever it arises, the trial court has to satisfy itself, before convicting. The evidence must be such that the threshold set by the rules and decided case law has been met. The evidence must leave no doubt that the suspect was positively identified. If the police force standing orders in respect of conducting of identification parades are flouted, the value of the evidence of identification depreciates considerably. [See the case of Ajode vs Republic [2004] 2 KLR 81].

44. The prosecution's case as presented is based on an uncorroborated visual identification evidence of a single witness, and a subsequent identification by the same witness at an identification parade, which parade the accused person said was improperly conducted because the identifying witness was prompted to consider whether or not the accused person was the man who allegedly killed the deceased.

45. In the case of Charles O. Maitanyi vs Republic [1985] 2 KAR 75 the court held that even where the dock identification is preceded by a properly conducted identification parade, the evidence of a single identifying witness must be tested with the greatest care before a conviction is entered. [See also the decision by the Court of Appeal in England in R. vs Turnbull [1976]3 ALL ER 549].

46. PW1's evidence is silent on what he told the police as to the description or identity of the alleged killer of the deceased when he first went to the police station. Such a report, according to decided cases, is crucial in testing the correctness of the identification of the accused. In the same breadth, PW1 testified that before identifying the accused person herein, the OCS showed him the picture of the person that he was to identify. PW7, the investigating officer on the other hand testified that PW1 was not the person who identified the accused and at the same time, he conceded that the said PW1 participated in the identification exercise.

47. In addition to the above, the accused person urged that the reason why PW1 mentioned him as the prime suspect in the offence herein, is that they did not see eye to eye. He proceeded that he has known PW1 since 2015 and there existed some differences between them as they previously differed over customers in the same stage.

48. As a response, the investigating officer stated that he did not see the need to investigate the alleged grudge between the parties as he not only believed PW1 but also, that the accused did not explain the nature of the grudge that allegedly existed between him and PW1.

49. In my view, this was a poorly investigated case with so many loose ends left dangling. I say so for the reason that even despite the court directing that specific witnesses among them PC Salat who caused the arrest of the accused be compelled to testify in this case, the prosecution in its laxity did not see the need.

50. Clearly, the identification parade evidence which would have lent assurance to the correctness of the identification is weak in view of the fact that the only identifying witness, PW1 was shown the accused

person by displaying his photograph prior to the conduction of the parade and further, the accused person was subjected to more than one parade with PW1 as the identifying witness.

51. In general, the conditions under which the accused person was allegedly identified were far from being favourable. Besides, it remains unknown as to why the investigating officer did not see the need to do investigations on the alleged grudge between PW1 and the accused person. PW1 did not deny that he knew the accused person prior but did not state the cause of the alleged grudge and neither did he refute the averments by the accused person that they differed over customers.

52. I do not find the evidence of pw1 credible. His identification parade was not necessary if at all pw1 knew the accused. Why pw1 did not name the accused or give his physical description is questionable thus watering down his testimony. How come that none of the boda boda operators at the busy Heller stage ever saw the deceased carry the accused with another in his bodaboda to corroborate the testimony of pw1. It is my finding that there was need for corroboration. See Chiragu and another v (supra)

53. If indeed pw1 knew the accused before, he had no reason to be first shown the suspect's photos before attending the parade. In a nutshell, there is no evidence to prove beyond reasonable doubt that it was the accused who killed the deceased and with what motive.

54. For the foregoing reasons, it is my view that an attempt to determine mens rea would simply be an academic exercise and as such, I hold the view that the prosecution did not discharge its duty as is required. This is so because it was not shown that the accused person was the one who committed the offence herein.

55. As a consequence of the above holding, it is apparent that the prosecution evidence herein has fallen short of the required degree to prove a case beyond reasonable doubt. Accordingly, accused is acquitted of the charge of murder in accordance with the prescribed law. Accused is therefore set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 26TH DAY OF SEPTEMBER 2024.

J. N. ONYIEGO

JUDGE