



Republic v Guul (Criminal Case 13 of 2016) [2023] KEHC 21709 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21709 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE 13 OF 2016**

JN ONYIEGO, J

JULY 28, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

ABDIRIZACK MOHAMED GUUL ACCUSED

RULING

1. Accused herein is charged with the offence of Murder contrary to Section 203 as read out with Section 204 of the *Penal Code* (Cap 63) Laws of Kenya. Particulars are that on October 30, 2016 at Dadajabula location in Habaswein Sub-County within Wajir County, murdered George Opiyo Onyango.
2. Having returned a plea of not guilty, the matter proceeded to full trial with the prosecution calling a total of 8 witnesses.
3. Pw1 PC Paul Wanjala Mucha was on October 30, 2016 at his work place of work at Habaswein Dadajabula police post when he heard noise from the nearby market centre. That after a short while he saw people running towards different directions. On trying to checkout, he saw a man who introduced himself as Simon Thuku running towards him while bleeding from the upper arm. That the said Simon informed him that he was with one George Oduour Onyango (deceased) taking supper.
4. He told the court that he informed CPL Osman the in charge their post who mobilized more officers and proceeded to a Somali makeshift hotel where they found a man lying on the ground with cuts on his head, ears and arms. That the injured man was not able to talk. Their effort to look for the culprit were unsuccessful. That they took him to a health center nearby but he died at 11.30pm.
5. On the following day, Pw1 and his colleagues went back to the market to find out on what had transpired the previous day. They were allegedly informed how a Somali man entered the hotel where Simon and the deceased were and started cutting them using a panga. That some young men there told them it was Mohamed Guul who attacked and cut the deceased and Simon. On the following day, that



- is November 1, 2016 they got information that the suspect had been spotted at Diff near Somalia – Kenya border.
6. He said that, following that information, he and IP Bett proceeded to Diff where the suspect was and arrested him.
 7. On cross-examination, he stated that he did not record any statement from Simon and that Simon only mentioned that the perpetrator was a Somali man. He further stated that he did not know nor identify the person who named Mohamed Guul (accused person). That he did not record the physical description of Mohamed Guul.
 8. Pw2 PC John Njau Wangui corroborated the testimony of Pw1. He accompanied PW1 to the scene of the incident and eventually took the victim to the hospital where he was pronounced dead. That he accompanied IP Bett to Diff where they arrested the accused person.
 9. Pw3 PC Geoffrey Kiile stated that on October 31, 2016, he and PC Bett were instructed to escort the body of the deceased to Nairobi for postmortem. That on November 1, 2016 they attended a post mortem examination on the deceased's body in the presence of the father. PW4 John Okello an uncle to the deceased identified the body of the deceased for post mortem examination.
 10. Pw5 Aggrey Onyango father to the deceased received sad news from his sister's husband that his son was hurt while in Moyale. He later talked to a police officer who informed him that his son had been killed. He identified the body of the deceased for post mortem.
 11. Pw6 CPL Dennis Gitonga of Habaswein DCIO's office basically told the court how he investigated the case. He said that, he was informed how a Somali man had attacked the deceased while eating in some hotel. That one Simon told him how he and the deceased were attacked and that the hotel owner one Fatuma named Mohamed Guul as the perpetrator.
 12. Pw7 Dr Oduor Johansen did a post mortem examination. He confirmed that the body of the deceased had fractures on the head leading to bleeding from the brain, had stitches on the neck, left shoulder and upper back. He found that the cause of death was head injury due to penetrating wound.
 13. Pw8 Fatuma Ali Omar the owner of the hotel where the deceased and Simon were attacked said that on October 30, 2020 she was in her hotel when she heard noise from outside. That when she got outside, she saw a man lying on the ground bleeding. That later police officers took the injured person to the hospital. She confirmed that she knew Abdirizack (accused) but she was not sure whether he was at the hotel on the material day and time. On cross examination she denied ever seeing Abdirizack in her hotel that day. That Abdirizack did not visit her hotel at the material time.
 14. At the close of the prosecution case, the state filed its submissions. MR Mwalimu for the accused however did not file any submissions.
 15. The state represented by Bidan Kihara filed their submissions on April 5, 2022 submitting that prosecution had established a prima facie case to require the accused tender his defence.
 16. I have considered the evidence tendered by the prosecution together with their submissions. Accused herein is charged with the offence of murder which attracts death penalty. However, the death penalty is not mandatory pursuant to the Muruwatetu one case which declared the mandatory death penalty unconstitutional.
 17. It is trite that at the close of the prosecution case, the court is duty bound to examine the evidence as a whole and make a finding whether a prima facie case has been established to warrant the accused being put on his defence. In the case of *Ramanlal Bhatt v Republic [1957] EA 333* the court held that at the



close of the prosecution case the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The case must be one which on full consideration might possibly be thought sufficient to sustain a conviction. That it is perilously near to suggesting that the court would not be prepared to convict if no defence is made, but rather hoping the defence will fill the gaps in the prosecution.

18. In the case of *Ronald Nyaga Kiura v Republic [2018] eKLR*, the court had this to say;

' A Primafacie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person.'

19. For the prosecution to prove the offence of murder, it must establish the actus mens (act of murder), mens rea (intention to kill or malice aforethought) and the identification of the perpetrator. Malice aforethought is defined under Section 206 of the penal code as follows:

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.

20. Therefore, in a charge of murder, the prosecution must prove these three key elements inter alia; the act that death occurred; that the act of death occurred as a result of an unlawful act and; that the identification of the perpetrator. In the case of *Chiragu & another v Republic (Cr Appeal No 104 of 2018 [2021] KECA 342 (KLR)* (crim) the court had this to say;

' The prosecution in an information of murder has a singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred,



that the death was caused by an unlawful act of commission or omission by the accused and; that the accused had malice afterthought as he committed the said act.'

21. Similar position was held in the case of *Sammy v Republic (Criminal appeal 120 of 2019) [2022] KECA4(KLR) (4 February 2022)* (judgment) neutral citation [2022] KECA4(KLR) where the court of appeal held that'

' On proof of elements of murder, as found by the trial court, the fact and cause of the deceased's death is not disputed. There is also no doubt that from the nature of injuries found on the deceased's body, whoever killed her had the requisite malice aforethought as there was a clear intention either to kill her, or to cause grievous bodily harm. Elements of malice aforethought as defined in section 206 of the Penal Code were satisfied.'

22. It is worth noting that the guilty of an accused person can be proved through either direct or circumstantial evidence. Direct evidence is based on the testimony of those witnesses who claim to have witnessed the offence being committed while circumstantial enables a court to deduce a particular fact from circumstances or facts that have been proved. See: *Abamed Abolfatbi Mohamed & another v Republic [2018] eKLR*.
23. In the instant case, PW1 was at the police post being his place of work when he heard noise from the trading centre nearby. Shortly, he saw people running away. While going to check, he met with Simon running away while bleeding. Simon told him that they had been attacked and that George whom he was taking supper with was in the hotel. Pw1 and PW2 rushed to the said hotel and found George (deceased) lying in a pool of blood.
24. From their physical observation, the accused had cuts on the head, ears and arms. Pw2 confirmed the existence of the injuries. Pw7 Dr Oduor Johansen did a post mortem examination. He observed stitches on the head, neck, left shoulder and upper back. That there was a fracture on the head and bleeding in the brain. The cause of death was classified as head injury due to penetrating trauma.
25. From the nature of the injuries, the person who injured him had the intention of causing grievous harm. This is clear from the multiplicity of cuts suffered. The perpetrator knew that such injuries would cause grievous harm or lead to death as defined under Section 206 of the Penal code. The question whether the deceased died out of the said injuries is not in dispute. The element of means rea (Intention) is clearly discernable from the injuries sustained.
26. The key question however is the identity of the perpetrator. Out of the 8 witnesses who testified, none of them show the person who attacked the deceased leading to his death. PW1 and PW2 (Police officers) told the court that they were told by members of the public that it was one Mohamed Guul (accused) who cut the deceased. That they got that information from one Fatuma the hotel owner. However, Fatuma (Pw8) denied she had seen the accused that evening. With this evidence, the evidence of Pw1 and Pw2 remains nothing but hearsay evidence as the source has been disowned.
27. The other evidence relied on to charge the accused is the information leading to the arrest of the accused. Pw2, Pw3, Pw4, Pw6 the investigating officer did not disclose the source of the information that led to the arrest of the accused. What descriptions did they use to identify the accused before arrest? In a nutshell, I do not find any direct or circumstantial evidence which would connect the accused even remotely with the offence.
28. In the circumstances, I do not find any good reason to put accused on his defence. He has no duty to prove his innocence as its the duty of the prosecution to prove its case beyond any reasonable doubt.



He has no duty to fill gaps where the prosecution has no evidence to fill by itself. Accordingly, accused is acquitted under Section 306 of the *Criminal Procedure Code* for lack of evidence.

Right of appeal 14 days.

Dated, signed and delivered in open court this 28th day of July 2023

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J.N. ONYIEGO

JUDGE

