



**Republic v Mohamed & 2 others (Criminal Case 3 & 4 of 2020
(Consolidated)) [2022] KEHC 11846 (KLR) (18 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 11846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE 3 & 4 OF 2020 (CONSOLIDATED)
A ALI-ARONI, J
AUGUST 18, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

MUHUMED IDLE MOHAMED 1ST ACCUSED

SIYAT IDLE MOHAMED 2ND ACCUSED

ABDI KHEIR MAHAMUD ALIAS ABEY 3RD ACCUSED

JUDGMENT

1. Muhumed Idle Mohamed, Siyat Idle Mohamed and Abi Kheir Mahamud alias Abey, the accused persons herein are faced with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence are that on the 28th Day of January 2020 at Dashey 2 village in Fafi Location, Fafi Sub County within Garissa County jointly murdered Isse Baraki Ali.
3. The prosecution called five (5) witnesses in support their case. At the close of the prosecution case the Accused were found to have a case to answer and placed on their defence. They did not call witnesses. The 1st Accused gave an unsworn testimony whereas the 2nd & 3rd each gave a sworn testimony.
4. The prosecution case is that the three tied the deceased to a tree assaulted him such that the deceased succumbed to his death

PW1 Ali Abdullahi Kadie testified that he was in the Company of Abdi Hare & Abdi Rahman and looking for his lost cow when he passed through the manyatta belonging to 1st and 2nd accused when he heard someone crying, he checked and it was Isse, he was with three people Siyyat Idle, Mohamed Idle and Abbey Mohamed who were assaulting him. He was lying down and tied. The three accused persons had a rungu, an axe and a panga. He ran away. He, later on, learnt that the deceased was taken



to hospital where he passed on. He told the court that he was familiar with the 1st accused person as his neighbour. He is also familiar with the 3rd accused person.

5. In cross-examination, he told the court that he could see the deceased being assaulted, the time was 5:30 a.m. He was 3-4 steps away from the point where the deceased was assaulted. He is sure of the persons he saw. In re-examination, he stated that there was light hence he could clearly see as there was a bit of light..
6. PW2 Dekow Mohamed Ali testified that on 28th January 2021 at around 7:00 a.m. that two old men Siyat Walu & Mohamed Garat went to his house and informed him that a person had been killed. He proceeded to the scene with two wazees and a woman, where the two lived and found the deceased had a head injury with foam on the mouth. The deceased was alive but in a critical condition. He tried to talk to the deceased but the deceased was unable to respond.
7. The prosecution requested to step down the witness who had reneged on his earlier statement to the police. The Court allowed the application and reminded the witness of his oath.
8. PW2 was recalled when he testified that on receiving the news he went to the scene with Siyyat and Watu in the vehicle belonging to Idris Haret. The scene was at Siyat Idle's house. He found Muhumud Idle standing far and Abbey was equally there. He maintained that the deceased did not say anything. He stated further, that the deceased was placed in Idri's car and taken to hospital.
9. On further enquiry by the court, he testified that he was informed by the people in the crowd that it was the 2nd accused person who caused the injury to the deceased. He confirmed being part of the wazee who conducted maslah. He opined that he thought that the accused would be released thereafter.
10. PW3 Idris Haret a taxi driver testified that on the material date, he left home to go to work at Dashey 2. He went to accused father's home which was the scene where he found the deceased who was not dead but in critical condition. The deceased bled on the head and had injuries on the chest. The deceased could not speak. The wazee asked him to look for the deceased person's family. He took four (4) wazees i.e. Dekow Mohammed, Mohammed Kidiye, Ethow Yusuf and Siyat Watiye who did Malah.
11. He later was asked to ferry the deceased and the 2nd accused person to NHC Refugee Camp Haldane Hospital. He asked the 2nd accused person who killed the deceased. The 2nd accused person informed him that he slept with the deceased on the same bed when the 1st accused person took a rungu and hit the deceased.

Later the witness learnt that the deceased had passed on.

12. PW4 Hisala Aden Abukar father of the deceased testified that he lived with his son and that on the 27th January 2021 his son had gone to the mosque, returned in a vehicle in the company of the 2nd accused person who was his friend, who asked to go with the deceased to his home, they were also in the company of Daud Mathobe. Mathobe went his way and the two left together. On 28th January 2021, while at home Abi Sayat Abdikadir and Abdi Idho went and informed him of the death of his son. He first thought it was a normal assault so he stayed home. Wazees left to the place his son had allegedly been killed and took him to the hospital.
13. He later took another vehicle to the hospital. He found his son in critical condition. The deceased had injuries on his head and he was bleeding from his mouth. He passed on at around 6:00 p.m.
14. PW5 Lilian Wambua registered medical officer working with IRC Abadere. She testified that they do not perform autopsies but give general observation on dead bodies brought to the hospital. She told the



court that when the deceased was taken to the hospital there was no pulmonary activity. His heart was not beating and he was not breathing. The injuries observed were;

- Scalp laceration on the right 2 cm long,
- 3cm laceration on the forehead,
- hard and swelling on the left side of the jaw,
- There was no fracture.

She opined that the cause of death was internal bleeding. She presented the postmortem report as Exh 1.

15. In cross-examination, she testified that one can only ascertain the cause of death by carrying out a full autopsy however preliminary opinion can be carried out by external examination.
16. PW6 PC Sammy Gitau attached to DCI Fafi Sub County narrated the course of the investigation. It was his testimony that during the investigation he got to know that Mohammed Idle had an axe and he cut the deceased on the head. Siyat had a panga and he cut the deceased on the right side of the head. Abdi Mohamud tied the deceased with a rope. The deceased had a deep cut on the head. He also had a cut on the head and a fracture on the right hand. He was rushed to IRC Hagadera in a taxi probox. He was treated but he later on died.
17. The witness Further testified that he did not find the weapons used to commit the crime since the investigation were done after three (3) weeks. He got the information from eyewitnesses.
Further during investigations no-one explained the intention of the death.
18. When placed on their defence the accused persons testified as follows; -
DW1 Muhumed Idle Mohamed gave an unsworn statement. He testified that on the material date he was sick and at home. He denied being with the deceased and his co-accused. He also told the court that the he saw PW1 for the first time when he testified in court.
19. DW2 Siyat Idle Mohammed testified that he stays in Madhax Marut in Fafi and on the 28th January 2020 at around 5 a.m. he was in the bush searching for his goats and was not in the company of the 1st and 3rd accused person at their home as alleged. He denied having murdered the deceased.
20. DW3 Abdi Kheir Mohammed testified that he stays in Madhax Marut and on 28th January 2020 at about 5:30 a.m. to 6 p.m. he was herding his animals in the company of two people Areb and Aden in Saredho, Dashe 2 is 9 kilometres away. He denied being with his co-accused or having met the deceased on the material date.
In cross-examination, he testified being familiar with the 1st and 2nd accused persons. He told the court that the 1st accused person was his cousin and they live together with the 2nd Accused in Madhax Marut. Being a herder they herd in Dash One and Saredho. They sometimes sleep away.
Further on 28th January 2020 he slept in Saredho. He was with Hared Mahamud and Aden Abdi Mohammed. Sometimes he does not herd with his co-accused. The 1st and 2nd accused herd camels. He denied knowing the deceased and Pw1.
21. In re-examination, he testified that the 1st accused is his cousin. The 1st accused stays in Madhax Marub. They do not live together. The 2nd accused is also a cousin but they do not also stay together. He later denied knowing the 1st accused person.
22. At the close of the defence case, parties were directed to file written submissions in support of their respective cases. Only the prosecution filed its submissions. The prosecution submitted that all the



ingredients of murder had been proved beyond reasonable doubt. That PW1 not only placed the three accused persons at the scene, he gave a graphic account of what they were doing, assaulting the deceased. That it is out of the injuries inflicted that occasioned the death of the deceased.

Analysis and determination

23. I have considered the evidence of the prosecution and the accused and the submissions filed. For the prosecution to prove the offence of murder it has to prove the following ingredients; (a) the death of the deceased occurred; (b) that the accused persons committed the unlawful act, which caused the death of the deceased; and (c) that the accused had malice aforethought.
24. On the death of the deceased PW4 presented the post-mortem report. The post mortem report noted that there were lacerations on the scalp and left side of the forehead. It was her opinion that the cause of death of the deceased was due to excessive internal bleeding. The postmortem report was made through general observation. However, despite there not being a full autopsy of the deceased the court finds that the evidence of PW4 and the analysis rendered from the general observation was sufficient prove to establish the cause of death. There is also no dispute that the deceased sustained injuries and succumbed to the same.
25. On whether the accused persons committed the unlawful act, which caused the death of the deceased. PW4 father of the deceased last saw the deceased with the 2nd accused person. PW1 testified that he saw the accused persons assault the deceased at the residence of the 2nd accused person. PW1 was categorical that he saw the three accused persons, armed with a rungu, an axe and panga assaulting the deceased. PW3 on his part informed the court that the 2nd accused person informed him that it was the 1st accused person who caused the fatal injuries. In the course of the investigation PW6 established that the 1st accused person had axe, the 2nd had a panga while the 3rd had a rope. PW6's evidence ties up with PW1 that he was the three together assaulting the accused who lay down tied.
26. The evidence of the prosecution witnesses clearly aligns to the cause of death. The 2nd accused person was last seen with the deceased. He did not rebut this claim. PW1's testified that he saw the accused persons commit the unlawful act. PW1 was four steps away from where the scene of crime; PW1 could see the perpetrators well to be able to identify them. He was indeed an eye witness.
27. The Court also considered the accused persons defence. They all sought to rely on alibi evidence placing them away from the scene on the material day. They did not support their alibi by calling witnesses. They did not raise it at the earliest opportunity and the same appear to be an afterthought on their part
28. The 2nd Accused did not challenge the evidence of P W4 that he left the home of the deceased on the 27th of January 2020 together with the deceased and was last seen with him. Though in criminal cases the prosecution has an obligation to prove the guilt of an accused there are instances when the burden shifts this is one such time where the theory of last seen comes into play.
29. In *Republic v EKK* [2018] e KLR Lessit J (as she than was) quoted with approval the following cases; *Moses Jua V. The State* (2007) LPELR-CA/IL/42/2006. Where the considering the 'last seen alive with' doctrine held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of



any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

A Nigerian case the court considering the same doctrine, in *Stephen Haruna V. The Attorney-General Of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

And from India, where the courts there have developed that doctrine further, in the case of *Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh*, JT 2006 (4) SC 16 the court held:

“that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

30. In this instance the 2nd Accused was last seen with the deceased. The law places a duty on him to make an account of what may have transpired. Such as where they went to and what happened thereafter. The second accused chose to remain mum. This leaves this court with no alternative than to presume that he was indeed one of the killers of the deceased. The lack of information by the 2nd accused goes further to give credence to the evidence of PW1 and PW6 that the 2nd Accused was in the company of the 1st and 3rd Accused armed with crude weapons when the three inflicted fatal injuries upon the deceased that led to his death.
31. Further, the 2nd Accused did not challenge the evidence of PW4 that on their way to hospital he told PW4 that 1st Accused hit the deceased on the head.
PW1 saw all the Accused at the scene, PW2, PW3 & PW4 all placed the three at the scene of crime.
32. On malice aforethought the court considered the nature of the weapon used. In the case of *Republic v Tubere s/o Ochen* [1945] 12 EACA 63, it was held that in determining whether malice aforethought had been proved, the following elements should be considered: -
“The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”
33. The deceased herein was hit in the head, he sustained injuries on the right side of his scalp, on the forehead and on his jaw. These were very serious injuries. The parts of the body targeted appear to have purposely meant to inflict fatal injuries.
34. Based on the above analysis the court finds that the prosecution has proved its case beyond reasonable doubt by placing the accused persons at the scene of crime and went further to prove malice aforethought on their part.



35. Accordingly, the court finds the accused persons guilty of the offence of murder as charged contrary to Section 203 as read with Section 204 of the [Penal Code](#) and hereby convicts them of the offence.

DATED SIGNED AND DELIVERED IN GARISSA THIS 18th DAY OF AUGUST 2022

ALI-ARONI

JUDGE

