



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CRIMINAL CASE NO.1 OF 2018**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**ABU ALI KALILI.....ACCUSED**

**JUDGMENT**

The accused is charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code Chapter 63 Laws of Kenya. The particulars of the offence are that the accused on the night of 4<sup>th</sup> and 5<sup>th</sup> March 2018 at unknown time at ANONA sub location in SOLOLO sub county within Marsabit County murdered **WARIO HALAKE ROBA**.

Seven witnesses testified for the prosecution. **PW1 ABDUL RAHAMAN SORA** had employed both the deceased and the accused to take care of his cattle and those of PW2. On 5<sup>th</sup> of March 2018 at about 1.00am he got a phone call from GEDO GUYO (PW2) who informed him that one of the herders had been killed by his colleague. GEDO GUYO's cattle used to be taken care of by the deceased and the accused. PW1 took an ambulance and went to the scene. He found many people at the scene. The deceased was wrapped in a yellow paper. He was told that the assailant had ran away. The deceased had a long cut on his left side of the head up to the mouth. The deceased was taken to Sololo mission hospital but they were referred to Marsabit general hospital. He did not travel with the deceased to Marsabit hospital. PW1 reported the matter at the police station in the morning. The deceased had worked for them longer than the accused. The deceased was also older than the accused. The accused had worked for them for about two months. When he went to report the matter at the police station he was informed that someone had already reported the incident. It turned out that the reportee was the accused. The deceased had told him that he wanted to leave employment because he was not in good terms with the accused.

**PW2 GUYO GEDO** comes from Sololo. He knew the deceased and the accused. On 5<sup>th</sup> March 2018 he got a phone call from GALGALO DADACHA who informed him that the two herders had attacked each other and one was in critical condition. He informed his father (PW1). They went to the scene and saw the deceased was unconscious. PW1 went with the deceased in an ambulance to Sololo mission hospital. They were referred to Marsabit hospital. The deceased died on the way. The deceased and the accused were living together. The accused was not at the scene. In the morning the police called and informed them that the accused was at the police station. The deceased had worked for them for three years while the accused had worked for two months. The deceased had complained that the accused was chewing miraa at night and was disturbing him. The deceased wanted to leave the employment. PW1 had promised to talk to the deceased and the accused to sought out their disputes.

**PW3 GALGALO DADACHA** comes from Sololo. He knew both the accused and the deceased who were his neighbors. The two had been employed by PW2. On 4<sup>th</sup> of March 2018 PW2 informed him that the deceased and the accused had disagreed. PW2 informed him on phone that he would go in the morning to resolve the dispute. At about midnight he heard screams and went out and saw the deceased. He started screaming and many people went to the scene. The deceased and the accused were living in the same house. The house was owned by one GUYO DABASO who was not living there. The accused was not present at the scene. The deceased had been cut on the neck. The deceased was taken to Sololo and was referred to Marsabit hospital. He was then referred to Nairobi hospital but died before reaching Nairobi. The accused surrendered to the police. The two had lived in the same compound for about one month. He had not experienced any other dispute between the accused and the deceased.

**PW4 HUSSEIN HALAKE** also come from Sololo. The deceased was his brother. On 4<sup>th</sup> of March 2018 at about midnight he was at his home at Sololo when he got a phone call from PW2 at about 12.30am. PW2 informed him that the deceased had been cut on the neck. He went to the scene and found many people. The deceased had a cut on the neck. There was also a cut on the mouth including the tongue. The deceased was still alive. He was taken to Sololo hospital but was referred to Marsabit hospital. At Marsabit hospital the neck was stitched. They were referred to Nairobi hospital. On their way to Nairobi the vehicle had an accident. PW4 did not travel to Nairobi. At the scene where the deceased was assaulted there was miraa. There was blood stains from the sitting room to the bedroom. The accused surrendered to the police in the morning.

**PW5 CORPORAL GRACE WANJIRU MATATA** was attached at the Makuyu police station. On the 5<sup>th</sup> of March 2018 at about 6.00pm an accident occurred along Sagana - Thika road. It involved an ambulance belonging to Marsabit County Hospital which was ferrying a patient on transfer to Kenyatta national hospital. She went to the scene and made arrangements for another ambulance to transfer the patient to the hospital. The patient already had a head injury out of his initial incident. He was taken to Thika District Hospital and was admitted. He died that night. PW5 attended a post mortem on the 6<sup>th</sup> of March 2018. Two witnesses identified the body to the doctor. The doctor's opinion was that the deceased died due to the head injury caused by assault and not the injuries caused by the accident. The accident involved the ambulance and a lorry.

**PW6 SERGENT JACOB ROTICH** was attached to the Sololo police station and investigated the case. On the 5<sup>th</sup> of March 2018 at about 8.20am PW1 reported at the police station that one of his employee had been assaulted by his work mate. The victim had been rushed to hospital for treatment. Shortly the accused went to the police station and surrendered. They interrogated the accused through the assistance of an interpreter. The accused was arrested and as they were preparing a charge for attempted murder they got information that the victim had died. He visited the scene at ANONA which is on the Kenya -Ethiopia boarder. The two were living in a semi-permanent house belonging to one BORU DABASO who was away. There was blood on the floor of the living room. They recovered a yellow paper bag and a pink kikoi. They did not recover any weapon. He was informed that the ambulance that was carrying the deceased had been involved in an accident at Makuyu. The deceased was taken to Thika level five hospital but was pronounced dead.

It is PW6 evidence that the deceased and the accused were living together while taking care of PW1's animals. He did not see the deceased before he died. The deceased sustained a cut as a result of the assault. The mouth and tongue were cut. He visited the scene of crime and there was evidence of struggle. It was like there was a fight between the accused and the deceased at the scene. There was no eye witness at the scene. When the accused surrendered he had no visible injuries. During his investigations he found that the deceased had been threatened by the accused.

**PW7 DR. JOHN MATHAYA NJAU** is a consultant pathologist in Kiambu county based at Thika level five hospital. On 6<sup>th</sup> of March 2018 he performed post mortem on the deceased. The circumstances of the death were that the deceased had been cut with a panga and was being transported from Marsabit to Kenyatta National Hospital for specialized treatment. On reaching Makuyu area the ambulance was involved in an accident. The body had an admission number and the clothes were blood stained. The deceased was between 50 to 55 years. Externally there was evidence of medical intervention. Facial lacerations had been stitched. There were multiple needle puncture marks for purposes of infusing fluids. The recent injuries were multiple facial and head lacerations. The deceased had a cut from the left temporal region above the ear to the zygomatic area (above the cheek) to the mandible up to the chin. The cut measured 43cm. There was another cut running to the mouth measuring 5cm. There was oblique lacerations to the left side of the neck measuring 10cm. The cuts had smooth margins. Due to religious grounds the body was not opened. There was injury to the left facial artery which supplies blood to the face and it had been severed. There were deep lacerations of the tongue. The entire tongue was almost amputated from its normal side. The left temporal bone skull and mandible were fractured. There was dislocation of the left mandible joint. There was visible Extra Dural hemorrhage at the fracture site. The Spinal column had no injury.

It is PW7's opinion that the deceased died of the initial injuries. He did not sustain any serious injuries as a result of the accident. The initial treatment had stabilized the deceased. He opined that the cause of death was severe head injury due to forced sharp trauma on the head consistent with assault. He issued a death certificate. The accident destabilized the initial treatment.

The accused tendered sworn evidence. He comes from Ethiopia. He was employed by PW2 as a herdsman. He knew the deceased. He met him at PW2's place. The deceased had worked for PW2 for two years. The accused was employed in January 2018. On the material day he was not at his place of work as one of the cattle was missing. He had gone to his employer's place which is far from where the cattle were being kept. It had rained. It was on 3<sup>rd</sup> February 2018 when he went to his employer's place. While at PW2's place he heard that someone had been killed. Someone knocked at PW2's place on the day the deceased was killed. The deceased was killed on 3<sup>rd</sup> February 2018. He had only seen PW1 once when he went to where the cattle were and took one cow. The deceased was his friend and he mourned his death for three months. He was not present when the deceased was killed. There was no existing grudge between him and the deceased. He had left where the cattle used to be kept because one cow was lost. He was attacked by people and that is why he went to the police station for his safety. He slept at PW2's place. He did not commit the offence and was framed. That night when the deceased was killed he did not sleep where the cattle were being kept. He had a good relationship with the deceased. He is surprised as to why PW2 is accusing him. The crowd which attacked him also threw stones at the police station. He denied informing the police that he had killed the deceased. He told the police that he was attacked by a mob on suspicion that he had killed someone.

Mr. Nyenyire Counsel for the accused relies on the record. Similarly, Mr. Ochieng, Prosecution Counsel, opted not to submit and relies on the record.

The issue for determination is whether the accused murdered the deceased. There is no dispute that both the accused and the deceased used to work for both PW1 and PW2 as herders. The accused in his defence evidence did confirm that he used to live with the deceased but maintain that on the material day he had gone to PW2's home since one cow was missing.

The charge sheet states that the offence occurred on the night of 4<sup>th</sup> and 5<sup>th</sup> March 2018. The accused's evidence is that he left for his employer's place on 3<sup>rd</sup> March 2018 and while there someone knocked at night and informed them about the killing. Both PW1 and PW2 stated that the incident occurred on the night of 4<sup>th</sup> and 5<sup>th</sup> March, 2018. The evidence proves that the incident occurred on the night of 4<sup>th</sup> to 5<sup>th</sup> March 2018. The deceased was taken to Marsabit hospital. He was referred to Kenyatta National Hospital after receiving treatment in Marsabit. PW5 testified that an accident occurred on 5<sup>th</sup> March 2018 at about 6.00pm involving the ambulance that was ferrying the deceased to Nairobi. The post mortem was done the following day 6<sup>th</sup> March 2018 at Thika Level five hospital. The sequence of events therefore confirm that the deceased was attacked on the night of 4<sup>th</sup> of March 2018. He was being transferred to Kenyatta National Hospital during the day on 5<sup>th</sup> March, 2018 when the ambulance was involved in an accident. The accused's position that the death occurred on the 3<sup>rd</sup> of March, 2018 cannot be true.

According to PW3 he heard screams at about midnight. PW3 had informed PW2 that the deceased and the accused had disagreed. PW2 informed PW1 who was to go and sort out the dispute the following morning. The same night PW3 heard screams and went to where the deceased and the accused used to live. He found the deceased had been injured and the accused was not at the scene. PW2 was informed by PW3 that night that the deceased had been injured. According to the investigation officer, PW6, there was evidence of struggle at the scene. It cannot be held that the deceased's killer sneaked into the premises, attacked the deceased and left.

In his defense the accused contend that he was not at the scene. PW2, his employer testified and did not tell the Court that the accused was inside his house as PW3 called to notify him about the killing. PW2 was not cross examined to confirm that the accused was at his house that night and not where the cattle used to be kept. PW2 was notified about the killing on phone and its not true that someone went to his house that night to pass over the information as per the defence evidence.

It is clear from the prosecution evidence that the accused was together with the deceased on the night of 4<sup>th</sup> and 5<sup>th</sup> March, 2018. The accused's contention that he was at PW2's place on the night the deceased was killed is just but an afterthought. The defence evidence does not displace the prosecution evidence that the accused and the deceased were together on the material day and night and had even disagreed.

From the evidence on record, I do find that the accused was together with the deceased on the night of 4<sup>th</sup> and 5<sup>th</sup> March, 2018. The evidence of PW3 is that he heard screams and went to the house where the accused and the deceased were living. He found the deceased had sustained injuries. Although no one saw the accused assaulting the deceased, the circumstantial evidence irresistibly points at the accused. There is the evidence that the two were living together, the evidence that the deceased wanted to leave employment as he was not in good terms with the accused, the fact that the deceased sustained injuries, the evidence of PW3 that he heard screams at about midnight and went to the scene, the fact that during the day or that evening the accused and the deceased had disagreed and PW3 had notified PW2. PW2 informed PW1 who was to go the following morning. The appellant surrendered to the Police the following morning. All this evidence points to the accused. I do find and hold that it is the accused and no any other person who attacked the deceased.

The other issue is whether the accused had intention to kill the deceased. Section 203 of the Penal Code states as follows: -

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

Section 206 defines malice aforethought as follows:

***Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-***

***a) An intention to cause 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.***

The evidence of PW7 is that the deceased suffered serious injuries as a result of the initial assault which injuries must have been caused by a sharp object. It is PW7's opinion that the cause of death cannot be attributed to the injuries sustained as a result of the accident. PW5 did not give details of how the accident occurred and whether other people either from the ambulance or the lorry apart from the deceased suffered injuries. It is however clear that the ambulance the deceased was travelling in was involved in an accident and the deceased sustained injuries. The deceased was taken to Thika Level five hospital instead of Kenyatta National Hospital where he was initially being taken. The evidence of PW1, PW2 and PW3 is that the deceased had a cut on the head extending to the mouth. The tongue was also cut and these seems to be the major injuries that were suffered by the deceased. The assault injuries caused the fractures on the temporal born. There was deep laceration with smooth margins running from the left temporal region, zygomatic maxillary mandible upto the right mandible region measuring 43cm long. According to PW7 these injuries had smooth margins that were caused by a sharp object. I do agree with the expert opinion of PW7 that the initial treatment at Marsabit had stabilized the deceased. The accident only destabilized the treatment and the patient died out of the initial injuries. The deceased was in critical condition after the attack at the scene at Anona.

According to PW6 the scene showed some signs of struggle. The postmortem report indicates the apparent age of the deceased as between 50 to 55 years. The deceased was therefore not elderly. The mental assessment report from Meru Teaching and Referral Hospital indicate that the accused is not sure of his age. He is not married and has not been to school. PW6 told the court that there was a fight between the accused and the deceased after he assessed the scene. He went on to add that the accused overpowered the deceased. There is the other evidence that the accused had made threats to the deceased. However, PW3 who was the immediate neighbour had not experienced any disagreement between the accused and the deceased.

The evidence on record proves that it is indeed the accused who assaulted the deceased. The evidence further proves that the deceased died out of the injuries suffered as a result of the assault and not the road traffic accident. The issue is whether the accused had malice aforethought when he committed the offence.

In the case of **MUGOMA & ANOTHER V REPUBLIC, (2003)KLR, 382**, the Court of Appeal held:-

***The burden was on the Prosecution to prove malice aforethought and that burden had not been discharged and as such a***

***conviction of murder could not stand.***

It is clear that the accused inflicted the grievous injuries on the deceased. Can it be said that the accused knew that the injuries would have caused the death. The answer to this question depends on the circumstances under which the injuries were inflicted. No one witnessed the incident. It could be possible that it was the deceased who was armed and wanted to inflict injuries on the accused. PW6 testified that the accused overpowered the deceased. It is possible that after overpowering the deceased the accused hit back on the deceased. I am alive to the case of **OKETHI OKALE & OTHERS V REPUBLIC (1965) E.A. 555** where it was held as follows:

**“(1) in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial judge to put forward a theory not canvassed in evidence or in counsel’s speeches”.**

Since the evidence of the prosecution is to the effect that the scene exhibited a fracas incident and in view of the fact that it is not proved by the prosecution evidence as to who started the fracas and further taking into consideration the fact that the Court cannot conclusively find that it is the accused who started the fracas and without any provocation assaulted the deceased, I am unable to conclude that the prosecution has discharged its burden of proving the offence of murder against the accused beyond reasonable doubt. It is true that the injuries inflicted upon the deceased are quite vicious. However, the injuries on their own cannot be proof of murder.

Section 207 of the Penal Code states as follows:-

***When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.***

The evidence on record establishes that the accused and the deceased were together on the night of 4<sup>th</sup> and 5<sup>th</sup> March, 2018. The investigations by the prosecution further confirm that the two used to disagree. The accused in his defence maintain that the deceased was his friend and he mourned his death for three months. This contention is contradicted by the evidence of PW1, PW2 and PW3. According to PW3, the accused and the deceased had disagreed and he had informed PW2. Further, it is the evidence of PW1 and PW2 that the deceased wanted to leave employment because the accused was disturbing him.

Taking the totality of the evidence and the fact that the crime scene exhibited some form of a struggle between the accused and the deceased, I am satisfied that the killing occurred in circumstances which fall within the provisions of Section 207 of the Penal Code. There is no evidence that the accused armed himself with a panga and assaulted the deceased. The two were struggling as per the evidence of the investigation officer and the accused overpowered the deceased. He inflicted the fatal injuries on the deceased.

In the case of **NJERU V REPUBLIC, (2006) 2KLR, 44** the Court of Appeal held *inter alia* that:-

***A killing of a person, could only be justified and excusable where the action of the accused which caused the death was in the course of averting a felonious attack and no greater force than was necessary was applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.***

Was the accused acting in self defence? Can it be held that the accused used excessive force than necessary. There was no eye witness. The accused opted to give an alibi defence which I find to be false. The accused was at the scene of crime. The accused further contend that he was assaulted by a mob on suspicion that he had killed someone. He then ran to the Police station for his own safety. Since the death occurred quite far from where the accused alleged to have gone, how did the mob know of the death. The deceased died on 5<sup>th</sup> March 2018 in the evening yet the accused went to the Police station at about 8.20a.m on that day. The accused’s defence does not displace the prosecution evidence. He was the last person who was with the deceased. It appears to me that the weapon used to attack the deceased was sharp. Its not proved that it is the accused who had the weapon before the incident.

In the case of **WARUI V REPUBLIC (2002) 1 KLR**, the Court of Appeal held *inter alia* as follows: -

***The fact of the appellant having been the last person seen with the deceased while he was alive coupled with the finding of incriminating evidence was sufficient to support conviction.***

Given the evidence herein, I do find and hold that the prosecution has not proved the charge of murder against the accused beyond reasonable doubt. I am satisfied that the deceased’s cause of death was as a result of the injuries he sustained after he was assaulted and not the injuries sustained during the accident at Makuyu. I am further satisfied that it is the accused who inflicted the fatal injuries on the deceased. The accused’s defence does not raise any doubt on the prosecution evidence.

In view of the fact that the deceased and the accused seems to have been fighting as per the prosecution evidence, I do find that the accused had no malice aforethought when he committed the offence. The killing was committed in circumstances which qualifies the offence to be that of manslaughter as opposed to murder.

The upshot is that the accused is not found guilty of the offence of murder as charged. The accused is however found guilty of the offence of manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code and is accordingly convicted of that offence.

**Dated, Signed and Delivered at Marsabit this 20<sup>th</sup> day of June, 2019**

**S. CHITEMBWE**

**JUDGE**