



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE NO 4 OF 2018

REPUBLIC.....RESPONDENT

VERSUS

HUSSEIN SULEIMAN YUSUF.....ACCUSED

JUDGMENT

The accused is charged with the offence of murder contrary to section 203 as read with section 204 of Penal Code Chapter 63 Laws of Kenya. The particulars of the offence are that the accused on the 22nd day of August 2018 at Moyale Township in Moyale sub county within Marsabit sub county murdered **HUSSEIN ADEN IBRAHIM**.

The state summoned six(6) witnesses in support of its case. **PW1 KIPRONO SANG PETER** is a prison warden who was attached to the Moyale prison. On the 22nd of August 2018 he left Moyale town at about 8.30pm with a friend. When they reached the prison gate they found the night commandant who informed them that someone who was suspected of having stabbed another person had entered into the mosque inside the prison. They were asked to assist in arresting that person. They went to the mosque and found the suspect being interrogated by the Muslims faithful. People were baying for his blood. They searched the suspect and recovered a knife which was blood stained. They took the suspect to the police station. The following day two blood stained shoes and a Muslim cap were recovered by the mosque cleaner and they were also taken to the police.

PW2 SULEIMAN YUSSUF IBRAHIM is the accused's father. It is his evidence that he brought up the deceased who was 26 years old like his son. The deceased and the accused are drunkards. They sniff glue, chew miraa and even smoke cannabis. On the 20th of August 2018 the deceased and the accused quarreled over clothes. The accused was alleging that the deceased was wearing his clothes. He told them not to quarrel. He left for the Mosque as they used to pray at 6.28pm. On his way to the Mosque he met the accused who had miraa and a knife. He asked the accused to go with him to the mosque but the accused told him that he would join him later. While preaching in the mosque after prayers he was informed that the deceased had been stabbed. He went home and he was told that the victim had been taken to Moyale hospital. He went to the hospital and found that the deceased had passed on. It is his evidence that the deceased and the accused used to live harmoniously despite the quarrels. The two had built their own house in the compound as they used to come home late. The accused left school at standard seven. He is 18 years old.

PW3 Sergeant HUSSEIN ABDI BONAYA was also attached to the Moyale prison. On the 22nd of August 2018 he was inside the mosque within the prison. They heard people talking from outside saying the killer had entered inside the mosque. He called for reinforcement from fellow prison warders. He arrested the accused and took him to the prison to avoid the public from assaulting him. The accused was later taken to Moyale police station.

PW4 MOHAMMED NOOR ABDI was heading home on the 22nd of August 2018. He saw the deceased walking but had been badly injured. He knew the deceased as he was a barber. The deceased was falling as he walked. The deceased told him that it was the accused who had injured him. The deceased also used to sell miraa. He took the deceased in a vehicle to a nursing home but they were referred to the main hospital. The deceased was taken to Moyale general hospital. The accused is normally called by his nickname **QAWA**. The deceased told him that it was QAWA who had stabbed him. The deceased was bleeding as he was walking. **PW5 ALI NOOR ISACC IBRAHIM** is a brother to the deceased. He identified the deceased's body for post mortem purposes at the Moyale district hospital on 23rd August 2018.

PW6 CORPORAL BENSON MUTUA was stationed at Moyale police station. He was instructed to investigate the case on 23rd August 2018. By then the accused had already been arrested. He went to the mortuary and saw the deceased's body. A post mortem was conducted. He caused the accused to be charged with the offence. The knife recovered from the accused was taken to the government chemist for analysis. The analysis confirmed that the blood on the knife matched the deceased blood. During the investigations PW2 informed him that the deceased was brought up in the family for 15 years and was like a brother to the accused.

The accused gave sworn evidence. He testified that he is 19 years old and comes from Moyale township. He was brought up together with

the deceased from the time he was young. On the 22nd of August 2018 he went out to look for manual jobs. He was engaged to do some painting work. He returned home at about 1.00pm. At 2.00pm he crossed over to Ethiopia and returned at 5.00pm. He smoked bang and also was drunk. He met the deceased at 5.30pm. He quarreled with the deceased over clothes. The deceased was wearing his trouser which he had used for Idd prayers the previous day. The trouser was on the washing line. The deceased slapped him and attacked him with his fist. The deceased then removed a knife from his waist and tried to stab him. The deceased was also drunk. He managed to take the knife from the deceased and in the process of defending himself stabbed the deceased. He then ran to the mosque as he was shocked.

Mr. Kiogora, counsel for the accused submit that the prosecution failed to prove its case beyond reasonable doubt that it is the accused who murdered the deceased. Counsel urged the court to acquit the accused. On his part, Mr. Mwangangi, prosecution counsel, submit that the prosecution witnesses proved that it is the accused who committed the offence. The accused's defence does confirm that he is the one who killed the deceased.

The Prosecution evidence does prove that the late Hussein Aden Ibrahim died on the 22nd day of August, 2018. The deceased was aged 26 years and the cause of death as per the post mortem report dated 23rd August, 2018 is a stab wound on the lower one third of the chest. The stab wound led to cardiopulmonary arrest due to severe hemorrhage. The deceased was pronounced dead upon arrival at the Moyale General hospital.

The issue for determination is whether it is the accused who caused the deceased's death. The evidence of PW1 and PW3 who are Prison warders is that the accused ran to the Prison mosque at about 7.00pm on 22nd August, 2018. In his defence, the accused admit that he went to the Mosque for prayers that evening. According to PW1, they searched the accused and recovered a knife that was blood stained. The knife was subjected to analysis at the Government Chemist and a report dated 7th May, 2019 confirm that the blood stains on the knife that was produced as prosecution exhibit number 3 matched the deceased's blood.

There is the evidence of PW4, Mohamed Noor Abdi. He met the deceased while alive. The deceased was bleeding and told PW4 that it is the accused who had stabbed him. PW4 took the deceased to Afya Nursing home and they were referred to the Moyale General hospital. The deceased was pronounced dead upon arrival at the hospital. According to PW4, the deceased told him that it was Qawe who had stabbed him. PW4 testified that Qawe is the accused's nickname.

Section 33(a) of the Evidence Act Cap 80 Laws of Kenya states as follows:-

33. Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-

(a) 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 and 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.

In the case of **CHOGE V REPUBLIC [1985] KLR, I** the Court of Appeal held as follows on dying declarations:-

The general principle of which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death.

There need not be corroboration in order of the dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.

Similarly, in the case of **KIHARA V REPUBLIC [1986] KLR 473**, the Court of Appeal held:-

"Before a dying declaration is relied upon, it has to be shown that death is imminent and directly related to the incident."

The deceased was pronounced dead a few minutes after telling PW4 that it was the accused who had stabbed him. The deceased's statement qualify as a dying declaration as death was imminent and the cause of death can be traced to the stab wound.

The appellant's defence is that he quarreled with the deceased. The deceased was armed with a knife. He managed to take the knife and stabbed the deceased. The deceased tried to stab him but he managed to snatch away the knife from him. Both of them were drunk.

Given the Prosecution evidence, I do find that it is the accused who stabbed the deceased on the chest using a knife. The deceased succumbed to the injuries about less than one hour after he was stabbed. The defence evidence does confirm that indeed it is the accused who caused the deceased's death.

The next issue is whether the accused had the intention of killing the deceased. Section 203 of the Penal Code provides that if the accused had malice aforethought and in the process caused the death of another person through an unlawful act or omission, then he is guilty of murder. Section 206 of the Penal code 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 defence evidence raises two issues namely that the accused acted in self defence and that he was provoked by the deceased. It is the evidence of PW2 that the deceased and the accused quarreled over clothes. The accused testified that the deceased had put on his trouser and when he tried to talk to him, the deceased slapped him and also attacked him using his fists. The deceased then drew a knife from his waist. The deceased was older than the accused. No one witnessed the incident. The Court cannot simply disagree with the defence evidence and dismiss it as that of someone who is trying to save his life. The defence evidence is not very different from the prosecution evidence. The prosecution evidence is to the effect that it is the accused who stabbed the deceased. The accused does confirm that it is true that he stabbed the deceased but he was defending himself and that it is the deceased who was armed with a knife.

In the case of **MOKWA V REPUBLIC [1976-80]KLR 1337**. The appellant was attacked by four men. In the process he drew his knife and stabbed one of them leading to his death. The trial Court held that although the accused acted in self defence, he used excessive force and was convicted of manslaughter. On appeal, the Court of appeal allowed the appeal and held:-

The Judge came to the conclusion that the appellant was acting in self-defence but that he had used more force than was necessary in the circumstances. The onus was on the prosecution to prove this. This onus was not discharged. The number of blows inflicted is not the only criterion. The assault has to be judged in the context of the affray. The onus was also on the prosecution to prove, in the circumstances of the attack upon the appellant in which four men who rushed towards him with the aim of doing violence (which one of them in fact did), that there was time for reflection and the appellant could have both counted and aimed his blows in a manner considered reasonable by the judge. This onus was also not discharged.

It is the evidence of PW2 that both the accused and the deceased used to drink alcohol, chew miraa and smoke bhang. The two were living in the same house which they had built outside PW2's home since they used to arrive home late. Further, the two used to quarrel over clothes. The accused's contention that they quarreled over his trouser can be taken as true but I am not satisfied that that could have provoked him. Such quarrels were common.

From the evidence herein, I do find that the accused acted in self defence. However, there is no evidence that the accused suffered any injuries. The accused could have as well managed to escape and ran away. There is the evidence that the accused and the deceased were drunk and the accused had smoked bhang. In my view the accused's state of mind does not make him qualify for the defence of intoxication under Section 13 of the Penal Code. The accused knew what he was doing as soon after the incident he ran to the Mosque.

I am satisfied that the Prosecution has not proved beyond reasonable doubt the charge of murder against the accused. However, having found that it is the accused who caused the deceased's death and taking into account the circumstance of the case, I do find that the accused is guilty of the lesser charge of manslaughter under Section 202 of the Penal Code. The accused could have escaped from the scene without stabbing the deceased since the two knew each other and lived in the same premises. Even if it was the deceased who had the knife, the accused could have avoided the confrontation with the deceased and escape. I am not satisfied that the accused's state of having been drunk could not have enabled him to walk away from the scene unhurt.

In the end, the accused is not found guilty of the offence of murder as charged. However, the accused is found guilty of the lesser 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 25th day of July 2019

S. CHITEMBWE

JUDGE