



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 34 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

SALIM ADHE DHADHO.....ACCUSED

JUDGEMENT

BACKGROUND

1. The accused Salim Adhe Dhadho stand charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars of which are that on the 17th September, 2012 at Kibuyu village, Tana River District within Tana River County murdered Zamzam Shehe.
2. He has denied the charge, and in supporting their charge, the prosecution has called a number of witnesses.

PROSECUTION'S CASE

3. PW1 was Gamaloku Mwanahamisi Guyo an older sister of the deceased. It was her evidence that she lived at Hola village near a graveyard and that the accused Salim Adhe Dhadho was her brother in-law, the husband of the deceased Zamzam. She stated that the deceased and accused had two (2) children one called Adhe Mohamed and the other called Zulfa Mohamed, who lived in Laza village near the Tana river.
4. According to her, the deceased had been taken back home by her father because of strained relations between her and her husband the accused. On the 19th of September, 2012 at about 7.30 pm she was watching TV news with her daughter Zuhura, a sister in-law Hayaya and her father Shehe Awadh together with her mother Rukiya and some neighbours, when the daughter Zuhura walked out of the house and on seeing people running and shouting called them to come out of the house. When they came out and reached near the scene they were told that somebody had been cut and taken to hospital, and observed blood stains at the scene.
5. She was informed at the scene that the victim was her sister Zamzam who had been taken to hospital, and she thus proceeded to the Hola District Hospital, and on arrival saw her sister in bed with her father on the bedside. It was her evidence that Zamzam then talked and described how she was cut, and complained of feeling cold, and also said that her husband had cut her. She noticed injuries on the head, neck and right side of the chest; the neck appearing like it was straggled. According to this witness also, the deceased said that she was cut with a panga (machete) but did not give the reasons for the assault. Then suddenly the deceased stopped talking but continued breathing.
6. This witness added that on the next day, the doctor advised them to take a vehicle and transport the patient to Malindi Hospital. They did so and on arrival at Malindi Hospital, they were informed that the x-ray machine was not functioning and were advised to take her to Mombasa. They then fueled another vehicle and took her to Makadara (Coast General Hospital). Unfortunately, this was the time when doctors were on a strike, and they were told that the x-ray machines were not functioning and were given a hospital vehicle which they again fueled and took the patient to Jocham Hospital where she was x-rayed before they took her back to Coast General Hospital at night.
7. Then on the next day, the patient was put in the Intensive Care Unit (ICU) where she remained under treatment for two (2) weeks and died during the third week in October, 2018. Postmortem was then conducted at Coast General Hospital and they transported the body to Hola for burial. According to her, the deceased died due to the cuts from the panga (machete).
8. She stated also that the main reason why her sister (the deceased) was taken away from her matrimonial home by the father was because the accused assaulted and threatened her severally. Though the father of the deceased told the accused to keep away from the deceased, the accused waylaid her.

9. It was further her evidence that the children of the deceased at that time lived with their father the accused and only visited the deceased from time to time. She identified the accused in the dock.
10. In cross examination, she confirmed that the incident occurred at 8 pm and that nobody saw the accused and the deceased together. She stated that the machete was not recovered and agreed that it was difficult to identify an assailant at night.
11. She said that the deceased was in serious condition when she saw her and agreed that the accused was a person of moderate height and weight, but insisted that even if it was dark, one could identify her husband.
12. She agreed that the deceased did not get prompt treatment but maintained that the deceased told her and her father that the accused had cut her.
13. She stated also that the home of the accused was not very far away from the home of the deceased's father, and that one could go there on foot. She denied lying in order to get a plot at Laza belonging to the accused. She agreed that she recorded her statement with the police in October 2012 after the death of the deceased.
14. She agreed that there were communal clashes at the time but said that at 8 pm people were walking around normally in the area where the incident occurred. She denied colluding with the investigators to implicate the accused in order to deny him of his plot.
15. She stated that in the police statement, she said that the deceased received a phone call and left the house without indicating where she was going to, however, she was not aware if the telephone set was handed over to the police. According to her, the accused was arrested at Makutano a long distance from his actual home.
16. In re-examination, she stated that her father was now dead and that her brother, made the report of the incident to the police on 17th September, 2012. She maintained that when the deceased talked about the incident, it was only in her presence and in the presence of her late father.
17. PW2 was Khadija Chandra Bashora, a farmer and the mother of the deceased. She had a total of ten (10) children three of whom had already died, the deceased Zamzam being the second last born, and the last born being two twins.
18. It was her evidence that the accused and Zamzam the deceased had two children; a daughter and son who had lived with her for some time but because she left for Mombasa due to high blood pressure, she left them with the mother of the accused.
19. She stated that on 17th September, 2012 at around 8 pm, she was at home with the deceased and after prayers, the deceased left to watch a video at her sister's home. Shortly thereafter, she heard screams from people on the road downhill and then one of her daughters Khadija came to the house with a blood stained shawl which she said belonged to Zamzam, and she fainted because Khadija informed her that the deceased had been cut by "Major" that is her husband the accused. She was unconscious until next morning when she was informed that Zamzam was in hospital and on arrival at Hola hospital she found her daughter not talking and with her eyes closed. She found the deceased with PW1 and the father, with two siblings of the deceased who had spent the night at the hospital.
20. She observed a deep cut on the head and another cut on the left side of the chest. The doctor then advised them to take the patient to another hospital and they paid Ksh.5000/= for vehicle transport and proceeded to Malindi hospital for x-ray. At Malindi hospital, they were informed that there was no x-ray machine and they paid another Ksh.5000/= for motor vehicle transport and took the patient to Coast General Hospital. On arrival at Coast General Hospital, they were referred to Jocham Hospital, where the patient was initially treated and x-rayed and then taken back to Coast General Hospital where she was admitted in the ICU on a Thursday and died the next Thursday.
21. On the day following the death, postmortem examination was conducted and it was established that the deceased had died due to the head injury.
22. It was her evidence that the relationship between Zamzam the deceased and Salim the accused was not cordial as Salim always assaulted the deceased. According to her, this issue was discussed with the father of the accused and because it was not resolved, the deceased relocated to her father's home. According to her, though the father of the accused intervened, and the accused agreed not to assault the deceased again and even put this undertaking in writing, he did not stop. She said that it was for this reason that on 17th September 2012 Zamzam was at her father's home. She said that nobody from the accused's family assisted in medical treatment of the deceased before she died. She identified the accused in the dock.
23. In cross examination, she maintained that Khadija came into the house with a shawl. She stated that at that time, which was about 8 pm it was dark with no moonlight.
24. According to her, the culprit was not seen at the scene as he had run away and nobody witnessed the incident. She said that the deceased informed Khadija that she had been cut by "Major". She opined that maybe if the deceased was x-rayed at Hola Hospital then that night have helped in successfully treating her, and confirmed that x-ray was done three days later.
25. She stated that PW1 was a daughter of her co-wife and that she did not tell her that Zamzam had been called on phone before she went out of the house. She admitted that domestic problems do exist among married people but maintained that such was not a reason to kill.
26. She agreed that the accused was a man of medium height and weight, and also agreed that there was a possibility of mistaken identity at night. She stated that the deceased initially informed her brother Badru that the culprit was the accused, and said that because the accused had killed Zamzam, they intended to take the accused's plot at Hola.

27. In re-examination, she maintained that the accused had killed Zamzam. She also stated that the accused had a residential house at Hola and that they wanted justice to be done not ownership of the plot.
28. PW3 was Hiribae Badru Shehe a brother of the deceased living at Hola near the cemetery and working at Wenje Secondary School as a casual employee.
29. It was his evidence that the deceased and the accused were married for seven years and lived at Hola near the river. He lived about four (4) kilometres away.
30. According to him, on 17th September, 2012 he was with his wife at home about 8 pm when a person informed him that he had seen the deceased beside the road bleeding profusely. He then proceeded there, met many people and talked to the deceased who said that her husband had cut her with a machete and wanted to be taken to hospital. He said that the deceased told him not to ask her many questions. He noticed that the deceased had a cut on the head, face, waist and right side of the back. He called on the phone another brother called Hiribae who had a motorcycle who came with a motor vehicle and took their sister to the hospital.
31. At the hospital they left the patient with another sister Mwanahamisi and proceeded to make a report at Hola Police Station. Next day, they were told that there were no drugs at Hola Hospital and were advised to take the patient to Malindi Hospital. They then transported her in an ambulance to Malindi Hospital where she was treated and the next day taken to Coast Provincial General Hospital. After two weeks he was called on phone by his sister Mwanahamisi and informed that Zamzam had passed away. They then buried her at Hola.
32. He reiterated that the deceased told him that she had been cut by the husband, the accused. It was his evidence also that the accused was in the habit of assaulting the deceased severally in their married life. It was also his evidence that at the time of the incident the deceased was living at her father's home to escape beatings from the accused. He identified the accused in court.
33. In cross examination, he stated that he made a report to the police at Hola on 17th September 2012 and that he recorded a statement with the police on 18th September 2012.
34. He admitted loving his sister and wishing that she lived a good and prosperous life. He said that the husband of the deceased worked for Arid Lands Department but had lost his job. He said that he was aware that the marriage between the deceased and accused had issues but denied that the problem was to do with money.
35. He denied exchanging harsh words at any time with the accused because of his sister. He also denied falsely implicating the accused.
36. He said he was not the first person to arrive at the scene and said that he met about 30 people some of whom he knew only by face not by name. He maintained that the deceased informed him that the accused cut her. He confirmed that he did not witness the incident and also that no weapon was recovered.
37. PW4 was Yahya Issa Komora a driver at Hola who lived in Laza, Hola area.
38. It was his evidence that he was a neighbour of the deceased and the accused and that they were brought up together.
39. It was his evidence that on 17th September, 2012 at around 10 pm while taking tea at home his wife Shalifa went to pray when somebody called "Bahatisha" who is also called "Major" approached him. "Bahatisha" then said something which he could not understand and he advised him to go away as it was night time. He said he saw "Bahatisha" with a machete. Because he advised him to go, "Bahatisha" left saying it was fine. It was his evidence that he advised "Bahatisha" to leave because that was a time of communal clashes.
40. According to him, the next day which was on 18th September, 2012, he heard people saying that "Bahatisha" had cut his wife to death. However he did not meet "Bahatisha" again. He said that the real name of "Bahatisha" was Salim Adhe and pointed at the accused in the dock.
41. In cross examination he stated that the encounter with "Bahatisha" lasted for about 30 seconds and that it was dark. He said however, that "Bahatisha" came near him and one could easily see him and he saw what he was carrying which was a machete. He admitted that many people could have same height and that many people could have the accused's body size. He also admitted that many Muslims kept bear even in Hola town. He maintained however that he saw "Bahatisha" and could not mistake him for another person as he knew him before. He denied being jealous of the accused because he had a wife and a job.
42. PW5 was Chief Inspector Julius Kipkemoi Lagat of Karuri Police Station Kiambu County. It was his evidence that between 2010 and 2012 he was at Hola Police Station incharge of Crime Investigations.
43. It was his evidence that on 18th September 2012 at 8 am he saw a report in the Occurrence Book (OB) of an assault case minuted to him for investigations, in which a report had been made by two people at the police station, Said Awadh and Hiribae Badru. The complaint was that their sister Zamzam Shehe had been assaulted on 17th September 2012 at 8 pm by her estranged husband whom they gave his nickname as "Bahatisha". It was his evidence that he visited Hola Hospital where he was informed that she had been taken to Malindi. He followed up the case and on 19th September 2012 visited the scene and drew a sketch plan with the assistance of the reportees. He was shown the scene where they had collected the victim from and noticed blood stains and signs of a struggle on the ground. According to him, the scene was at the corner of the road about 600 metres from a bar called "My Sisters".
44. He made a rough sketch plan and later a fair sketch plan, which contained the direction of the road, residential houses and an electric

pole. He said that the scene was about 60 meters from “My Sisters” bar and a fixed electric pole about 600 metres away. He produced the sketch plan as an exhibit.

45. It was his further evidence that he made a legend to the sketch plan which he also produced as an exhibit.

46. He also got in touch of the family members of the deceased who said that she was not responding well to medical treatment and on 3rd October 2012 he received information from Hiribae a brother of the deceased that she had succumbed to the injuries.

47. It was his further evidence that with the assistance of the OCS they arranged for the conduct of postmortem examination, which was done on 4th October, 2012 at Mombasa and the body released for burial. He recorded witnesses’ statements. The postmortem examination was conducted in Mombasa, by Dr. Muramba and dated 16th October, 2012, and he received and retained the form.

48. He then looked for the accused who had gone into hiding, whom he later learnt from his in-laws that his real name was Salim Adhe Dhadho. According to him, the accused was arrested on 13th October, 2012 by the public at Kalkacha or Makutano market, which was far from Hola town but about 2 kilometres from the police station.

49. He took the accused into custody and got a statement under inquiry in which the accused said that he had a conflict with his wife because of suspicion of infidelity.

50. According to this witness, the accused said on that day he visited the deceased after they had separated, and had a machete and sat near the “My Sisters” bar and waited for the deceased. When he saw the deceased talking on a mobile phone heading to the main road, he followed slowly, saw her with a man, chased the man but did not get him, and then he assaulted and injured his wife.

51. After listening to this, he took the accused to the Hola magistrate Mr. Obiero for recording a statement, but the magistrate advised him to record the statement. He thus charged the accused, whom he identified in the dock, with the offence of murder.

52. In cross examination, he stated that he visited the scene on 19th September 2012 two days after the incident because relatives were busy running around hospitals. He said that the scene might have been disturbed by the time he arrived there. When they contacted the Assistant Chief, she said that she was not conversant with the scene but managed to get the real names of the accused and where he lived. He agreed that the deceased was initially admitted at Hola District Hospital, and he insisted that he went to the scene though he did not put it in his police diary. He confirmed that when the deceased was taken to Malindi Hospital, she was unconscious as confirmed by family members. He said that the family members said that at the scene, the deceased became unconscious but later recovered consciousness.

53. He stated also that in recording a statement under inquiry, he was required to warn the suspect that he was not obliged to say anything and that any information given might be used in investigations or in court. He said that though the warning herein was on a separate piece of paper, such occurred because of space. He said that there was another statement recorded by the OCS included in the file. He said also that though he took the accused to the magistrate to record the statement, he did not diarise that, and the magistrate declined to take the confession. He said also that the Hola Law Court did not have a functional registry but there was a lady court clerk.

54. In re-examination, he stated that he completed the investigations and brought the accused to court though he did not record everything in the Occurrence Book (OB). He however maintained that the cautionary statement of the accused was clear.

55. PW6 was Dr. Irene Muramba a pathologist at Coast General Hospital. She stated that she was a pathologist Coast General Hospital for the last six years and qualified with a Degree in Medicine and Surgery at Moi University 2004 and then Masters in Human Pathology University of Nairobi 2011.

56. She identified the postmortem form filled in respect of Zamzam Shehe, and stated that she conducted the postmortem examination on 4th October, 2012 and found that the body was of female African well nourished. According to the doctor, the initial brief clinical summary from the file showed that the deceased was referred in Coast General Hospital from Malindi Hospital with a head injury and acute bleeding on the left side of the head. During postmortem both hands had gadgets showing that medicine was administered through the veins. On the front of the head she had a 4 cm healed wound. Internally the right side of the chest cavity had fluid and the right side was smelly. The right lung appeared to have been smaller and attached to the exterior chest cavity. Heart and liver were normal. Spine was soft and uterus normal. There was no skull fracture but the left side of the brain had a collection of blood with bleeding around the brain and the brain appeared to have swollen.

57. She thus concluded that death was due to severe head injury and collection of fluid in the right chest cavity. She filled the postmortem form and signed and produced the same as an exhibit.

58. The witness said that the brain swelling was due to the injury to the head and that fluid in the chest cavity indicated that the patient was unwell for some time and could also have been caused by the fact lying immobile for long.

59. In cross examination, the doctor confirmed that she prepared the postmortem report. She also stated that the copy the defence counsel had was signed by the Head of Department. She stated that the accumulation of fluid in the chest could also have caused death.

60. In re-examination, the doctor stated that she was required to sign the postmortem form and indicate her designation. She also said that the two forms captured the same information except that one was typed and the original was filled in hand, though the information contained therein was just the same. That was the end of the prosecution case.

61. In his defence, the accused DW1 elected to make an unsworn defence statement. He did not call any witness. He said that he came from Laza in Hola Tana River County and was a family man. He said that his parents and brothers were alive and that he had two children and that his wife was deceased.

62. On 17th September 2012 in the afternoon, he was at work making building blocks near the Tana River where wet soil could be obtained, until 4 pm when he went to town. That between 7 pm and 10 pm he returned to the site for making building blocks and was there by 6 pm to ensure that the blocks were not damaged by cows or children. He was there upto 10 pm guarding more than 2000 blocks which he had made for somebody.

63. At 9.30 pm a friend called Mohamed Said approached and informed him that his wife was hit on the road by a motorcycle. He stated that on 15th September, 2012 he had given his wife permission to visit his father who suffered from high blood pressure. According to him, his relationship with his wife was good but by 17th September 2012 his wife had not gone back to him.

64. On receipt of that information about the motorcycle accident, he proceeded to the home of the father of his wife and talked to his wife's younger brother who informed him that his wife had been taken to hospital. He also told him that his wife had been stabbed a distance away from home. At the hospital he came to know that the scene of injury was at Kibuyu.

65. He said that his home was at Laza and Kibuyu was about two (2) kilometres away but about a half (½) a kilometer from the home of the father of his wife.

66. He said that at Hola, different communities; Pokomo, Orma and Wardei lived and sometimes the relationship between them was problematic due to disputes relating to livestock because the Orma from time to time grazed their livestock in Pokomos farms. He said that some Orma people lived near Kibuyu and, according to him; his wife was attacked because of the animosity between Pokomos and Ormas.

67. He said that his two children with the deceased, one aged 9 and the second aged 7 lived with him because it was easier for them to attend school.

68. According to him, on receiving the news of his wife's injury, he went to Hola Hospital, saw his wife and gave her mother Ksh.3000/= but the mother told him to go back home for the children and he thus went back home to cook for the children, and thereafter he lived in Laza town and left his workers to take care of the building blocks and concentrated on taking care of his children as their mother was in hospital. On 13th October 2012 however, he went to Makutano to ask for his money from a person he had supplied building blocks but was not given his money. Instead the chief, to whom he had supplied 100 building blocks and had not paid him, called the police on phone who arrested him. He denied killing his wife and said that he was at the Tana River from 1 pm on the material day and did not leave that place until 10 pm. He asked to be released to take care of his children.

SUBMISSIONS OF COUNSEL

69. At the close of the case for the prosecution and the defence, counsel on both sides made brief submissions in court. Mr. Nyaga for the accused person submitted that the prosecution had not proved their case against the accused beyond reasonable doubt, and that as the case was based on circumstantial evidence and the incident occurred at night, there was a great possibility of mistaken identity. He relied on the English case of **Regina vs Turnbull [1976] 3 AllER 549**.

70. In response, Mr. Balongo who held brief for Mr. Okemwa for the State submitted that the prosecution had proved their case against the accused person beyond any reasonable doubt to warrant a conviction.

CONSIDERATIONS

71. This is a murder case, in which the prosecution is required to prove four elements. Firstly, that the deceased died. Secondly, the prosecution is required to prove that the death was unlawful. Thirdly, the prosecution is required to prove that the accused person is the culprit. Fourthly the prosecution is required to prove that if indeed the above three ingredients are satisfied, the death was caused with malice aforethought. All these four ingredients of the offence of murder have to be proved by the prosecution beyond any reasonable doubt, as this is a criminal case. The accused does not have a burden to prove his innocence, but may only raise doubts in the prosecution case. The burden of proof does not shift to the accused even where he raises a defence of alibi. In the case of **Karanja & Another [2004] 2KLR** the Court of Appeal cited with approval what was stated in the case of **Sekitoleko vs Uganda [1967] EA 53** as follows:-

“(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else.”

72. Did the deceased die? The evidence on record is that Zamzam Shehe the wife of the accused person was attacked on the night of 17th September, 2012 at a place called Kibuyu in Hola township area at around 8 pm, and suffered serious injuries on the head and chest. She was taken to the nearby Hola District Hospital where x-ray machines were not functioning. In the morning, she was transported to Malindi District Hospital, where unfortunately x-ray machines were also not functioning. She was again transported to Coast General Hospital, Mombasa the next day where also x-ray machines were not functioning, as this was a time of the doctors' strike. She was then taken to another smaller private hospital in the same town of Mombasa called Jocham Hospital where she was x-rayed and taken back to Coast General Hospital where she was put in the Intensive Care Unit (ICU). According to the evidence, she was unconscious from the time she was at Hola District Hospital. After spending some days in the ICU at Coast General Hospital, she died on 3rd October, 2012. Postmortem examination was then conducted by a pathologist Dr. Muramba PW6 and the cause of death was recorded as severe head injury with accumulation of fluids in the right lung. The postmortem report was produced in court both in handwritten and typed form.

73. The accused who is also popularly called “Bahatisha” or “Major” does not challenge or have any doubt that his wife died. In my view, it was established that the deceased died. I find that from the evidence presented by the prosecution on record, it has been proved beyond any reasonable doubt that the deceased died and the primary cause of death was the severe head injury. Though the defence suggests that the deceased could have died of an ailment, it is obvious from the facts and evidence on record, that the immediate cause of death was the injuries on the head caused by a sudden attack with a sharp object.

74. The second issue for determination is whether the death was unlawful. There is no suggestion by any prosecution witness or even the defence that the death was lawful. Certainly an attack like the one which caused the death of the deceased could not, by any stretch of imagination, be said to be lawful. The attacker, whoever it was, could not claim to have had any lawful reason to have attack and fatally injure the deceased the way the incident occurred. I thus find that the death of the deceased was an unlawful death caused by unlawful means. The prosecution thus proved this element beyond any reasonable doubt.

75. The third issue is whether the death of the deceased was caused by the accused person. As I have said above, the prosecution was required to prove beyond any reasonable doubt that the accused person and no other person was the cause of the death of the deceased. The incident occurred at night and the accused denied being anywhere near the scene of the incident. He said that he was at Laza near the Tana River guarding his building blocks that night, which was a distance away from Kibuyu where the deceased was fatally injured.

76. The incident occurred on a dark night but the prosecution version was that the deceased mentioned the accused as the culprit before she ultimately became unconscious and was unable to talk. The accused on the other hand gave a long defence explaining what he did that day and continued doing until the day he was arrested at Makutano in October 2012.

77. He also said that his relationship with the deceased his wife was cordial and that he only allowed her to go and visit her sick father and unfortunately she met her death and that the attack must be have caused by pastoralists Orma who had a dispute with farming Pokomos in grazing livestock on the crops. The prosecution version was that the marital relationship between the accused and deceased was strained as the accused continually assaulted the deceased, and that at the time the deceased was attacked, she was actually living at her father’s home because of the strained relationship.

78. This is a case of visual identification in difficult circumstances. I have to bear in mind this is a case based on identification by the deceased at night in unfavourable circumstances. In the case of **Karanja vs Republic [2004] 2 KLR 140**, the Court of Appeal after citing many other cases, at page 148 stated as follows:-

“This court has consistently insisted that test with the greatest care be carried out by the trial court before conviction is based on identification of an accused can be entered.”

79. I have carefully weighed the evidence of the prosecution and the defence, and on the totality of the evidence, I believe the prosecution evidence that the relationship between the accused and the deceased was strained and that the deceased was living at her father’s house because of that strained relationship but not because the accused allowed her to go and see her sick father. Seeing her sick father at the same town of Hola could not, in my view, give a reason for the deceased living there for some time, and for the deceased’s mother even caring for their children before she went to Mombasa for treatment for high blood pressure. The deceased was also found with a healed scar on the forehead, which suggests an element of previous incidence of violence.

80. It is a fact that on the fateful night, it was dark at 8 pm and all the evidence shows that there was no moonlight at the time of the incident. The deceased is said to have mentioned the name of the accused as the assailant to her brother Hiribae Badru PW3 at the scene, and Gamaloku Guyo Shehe PW1 her sister at the Hola Hospital before she ultimately became unconscious. The accused was not present at that time. No witness has suggested that the deceased could not talk before she ultimately became unconscious. Admittedly, it was dark and one would imagine that the deceased could not easily identify the attacker. However, another witness who was an independent witness PW4 Yahya Issa Komora said that shortly after the time of the incident, he saw the accused carrying a machete and they talked and he advised the accused to go home because of perceived insecurity in that area. This witness was not a relative of the deceased.

81. The accused has talked about Orma attacks because of livestock grazing the crops of the Pokomo farmers. It was also his defence that he was at home taking care of his children throughout from the time of the incident to the date of his arrest in October 2012, after just briefly seeing his late wife in Hola Hospital on 17th September 2017, having been told by the mother of his wife to go and care for the children.

82. In my view, it is not believable that the mother of the deceased would have told the accused to go and care for the children and not bother about the injuries of his wife. The children, in my view, could have been taken care of by other relatives while the accused was running around trying to be of assistance in this critical situation of life and death for his wife.

83. The accused said that he stopped taking care of his building blocks and left that duty to his workers, which is also not believable. He further said that he was arrested by a chief whose name he did not mention because, according to him, the chief owed him money which he refused to pay and then turned around to implicate him with this murder. There is however, no indication how the chief who is a government officer could have a personal interest in this murder case. Therefore, in my view, the defence statement of the accused person was a lie.

84. In the circumstances, I find that the evidence on record points to the accused as the culprit, and that he was identified by the deceased as the attacker.

85. The last issue is whether the killing was with malice aforethought. Malice aforethought has a statutory definition under section 206 of the Penal Code (Cap. 63). It is an intention to cause death or do grievous harm even if the person causing those injuries does not care if death occurs or not. Everybody is presumed to intend the natural consequences of his/her acts.

86. From the evidence on record, in my view, malice aforethought was proved by the prosecution beyond any reasonable doubt. Firstly, there

is the evidence of prosecution witnesses of the strained relationship between the accused and the deceased. Secondly, there is the established fact by the prosecution evidence that the deceased had shifted from the matrimonial home because of the strained relationship and was now living in her father's home. Thirdly, there is evidence from the prosecution that the accused used to threaten the deceased with violence. Lastly, the nature of injuries being so severe, in my view, there could have been no other intention by assailant but to cause the death of the deceased.

87. In my view therefore, the prosecution proved the element of malice aforethought beyond any reasonable doubt.

DETERMINATION

88. To conclude, I find that the prosecution has proved beyond any reasonable doubt all the four ingredients of murder against the accused person. I thus find the accused person herein guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and convict him accordingly.

Dated, Signed and Delivered at Garissa this 28th June, 2018.

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George Dulu

JUDGE