



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 6 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ABDIAZIZ HASSAN ABDIOW.....ACCUSED

JUDGEMENT

1. The accused Abdiaziz Hassan Abdiow stands charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence being that on 8th April 2013 at Eladi village, Mandera Central District within Mandera County murdered Halima Mohamed.
2. He has denied the charge. In establishing their case, the prosecution has called several witnesses.
3. PW1 was Kaltuma Hassan Husuma a daughter of the deceased. It was her evidence that her mother left on 8th April 2013 at 9 am going to her home at Manyatta. She later tried to call her on the mobile phone but did not get through and she then received rumours that she had been killed. When she tried to call her again, the call was received by a man who said *"I am the one who killed your mother"* and switched off the phone. They reported the incident to Elwak Police Station. She did not know the man who killed her mother but she identified a Nokia telephone in court and she said she had bought it for her mother for Kshs.1,500/=.
4. In cross examination, she said that the mother visited her every week and on that day, she gave her Kshs.3,000/= before she left. She said that the Manyatta was about 3 hrs walk. She saw the injury on the body of the mother. She said she bought the phone from people who ordinarily sold phones on the streets and did not have a receipt.
5. In re-examination she said that the mother had three cut wounds on the left ribs and below the breasts.
6. PW2 was Mohamed Osman Ali a small businessman. It was his evidence that on 10th April 2013 at 12 noon Abdiaziz (accused) went to his kiosk and asked him to buy a phone and he bought it for Ksh.300/=. He bought the phone which did not have a battery or a line or a cover. On 13th of a month he could not remember, the accused was brought to him at the business by the police. The police took the phone to the police station. He was then told that there were allegations of murder and that the phone belonged to the deceased.
7. In cross examination, he said that at the time he bought the phone he was with Abdullahi Abdikher and also a person by the name Abdinoor. He maintained that the phone was sold to him by the accused person though it did not have any unique feature. He did not use the phone.
8. PW3 was Hasanoor Asman Dache a security guard who on 9th April 2013 around 2 am received information that Halima Mohamed Wario had died on 8th April 2013. At 8 am he went to the mortuary and identified the body of the deceased who was married to his elder brother. He saw two deep wounds on the deceased.
9. In cross examination, he maintained that he identified the body of the deceased but did not see doctors taking blood samples.
10. PW4 was Administration Police Constable Geoffrey Bett from Elwak South Mandera County. It was his evidence that members of the public led by the Assistant Chief Issack Hussein brought a suspect Abdiaziz Hassan to Shiribe Administration Police Post. The suspect was said to have murdered a woman and escaped to Shiribe Fatuma area. He interrogated the suspect but did not recover anything from him.
11. In cross examination, he said that he was given information by members of the public and the Assistant Chief about the incident. He did not investigate the case. He got information about a mobile phone of the deceased from members of the public. He identified the accused as the person who was brought to the police post.

12. PW5 was said by the Prosecuting Counsel Mr. Orwa to be the investigating officer and was stood down.
13. PW6 was Mohamed Abdullahi Adan an elder in the area who testified that on 13th April 2013 he was informed by the area Chief that someone had committed a crime and ran away. He was given the name Abdiaziz Hassan Abdiow. He sent two boys on the motorcycle by the name Samow Abdulla and Siyat Dune Abdiow who arrested the person and brought him to his homestead. He identified that person as the accused in court.
14. In cross examination, he said he knew the accused for a short period before arrest. He did not however know the deceased Halima Mohamed. With regard to the killing, the only information he had was from the Chief.
15. PW7 was Issack Mohamed Batelo who stated that on 8th April 2013 at 8 pm he travelled on a motorcycle from Elwak to Manyatta Adelle, and on reaching Adelle he saw a group of people and someone lying on the ground. That person was a neighbour Halima Mohamed. The people said they did not know how the woman had died and he informed the Assistant Chief Ali Sheikh about the incident and the police came and collected the body. He observed stab wounds on the deceased.
16. In cross examination, he said that he did not see any weapon near the body and he did not know the accused before, he saw him in court. He also did not know about the alleged murder.
17. PW8 was Assistant Chief Mohamed Noor Ali Shee who said that on 8th April 2013 at around 8 pm, Issack Mohamed Batelo called him on phone and said that he had seen a female dead body at Adelle with stab wounds. He then reported the matter to the police at Elwak Police Station but did not go to the scene. The police took the body to the mortuary.
18. In cross examination, he maintained that he was called on the phone by Mohamed Batelo. He said he knew the deceased who came from his location, but the accused was not from his location. He said it was another chief who gave instructions for the arrest of the accused.
19. PW9 was C.I. Absolom Wamalwa who was at Elwak Police Station as OCS. On 8th April 2013 at 2100 hrs he received information from chief Mohamed Noor Shee of a murder of Halima Mohamed. He left the office in a station Land Cruiser with PC Kenga. On arrival at the scene, he found a dead body with two injuries in the chest. They found a knife at the scene which he identified in court. There was also a knife cover near the knife. A phone of the deceased was also nearby. They recovered these items. He instructed PC Kenga to keep the items carefully. PC Kenga also attended postmortem examination. According to him, after the investigations they found that the knife belonged to the accused. It was taken to the Government Analyst for examination and analysis. He also identified the phone and the knife cover.
20. In cross examination, he said he was part of the arresting team. They connected the accused to the offence through investigations. He maintained that the knife was at the scene though he did not touch it or dust it for fingerprints. He said that the accused made a confession to him.
21. He also said he did not know what time the chief saw the body. He said that they recovered the phone on 8th April 2013 with PC Anduku and took the body to the mortuary. He said it was a relative who said that the phone belonged to the deceased.
22. After these witnesses testified, the Prosecuting Counsel asked for adjournment and a number of adjournments were granted. However he later indicated that he was finding it very difficult to get additional witnesses after talking to the OCS Elwak Police Station. He thus ultimately closed his case.
23. When put on his defence, the accused elected to make an unsworn statement. He said that he did not know the deceased Halima Mohamed and knew nothing about the case. On the alleged date he was at Shipiri Faduma, his father's home herding goats. After his arrest he was taken to Elwak and spent a night and then was taken to Garissa where he was informed about the alleged offence.
24. That was the end of the evidence both for the prosecution and the defence.
25. This is a murder case, and the prosecution is required to prove all the elements of the offence beyond any reasonable doubt. The accused has no burden of proving his innocence. He may only raise doubts in the prosecution case. See the case of **Leonard Aniseth vs Republic [1963] EA 206**.
26. The ingredients of the offence of murder are firstly whether the deceased died? Secondly, whether the death was unlawful. Thirdly, whether the accused caused the death of the deceased. Fourthly, if the accused caused the death of the deceased, whether there was malice aforethought.
27. Did the deceased die? The evidence of prosecution witnesses is that the deceased was found with two deep cuts lying dead. She was known by people including the Assistant Chief. The relatives also came and found that the deceased was dead and the police were informed. Body was taken for postmortem examination and was identified for the postmortem examination exercise. However no postmortem doctor has testified in this case.
28. In my view however, even though the postmortem examination doctor did not testify, the prosecution proved beyond any reasonable doubt that the deceased died of the stab wounds in the chest.
29. Was the death of the deceased unlawful? There is no suggestion or proposition that the way the deceased died was lawful. From the facts and circumstances of the case, I find that the death of the deceased was unlawful and caused by unlawful means.

30. Did the accused cause the death of the deceased? The prosecution say so. The accused on the other hand denies committing the offence.

31. The evidence of the prosecution is that they connected the accused to the killing because of a mobile phone of the deceased and also a knife allegedly belonging to the accused. With regard to the mobile telephone, the evidence of the police was that they recovered the telephone near the body. The evidence of the civilian witnesses PW2 Mohamed Osman however was that the mobile phone was sold by the accused to him and he surrendered it to the police. In my view, these are serious contradictions and it cannot be said with ascertainty that the phone belonged to the deceased or that it was sold by the accused person.

32. With regard to the knife, only the police officer PW9 C. I. Wamalwa said that they recovered a knife at the scene, which was said to belong to the accused. No witness tendered evidence in court that he knew that the knife belonged to the accused. The evidence of the police officer was thus hearsay evidence.

33. From the above evidence, it is my finding that the prosecution did not establish beyond reasonable doubt that the accused killed the deceased person.

34. With regard to malice aforethought, since I have found that the accused did not cause the death of the deceased, I also find that malice aforethought was not proved against him.

35. Consequently, I find that the prosecution did not prove the case of murder against the accused person and I find him not guilty and acquit him accordingly.

Dated and delivered at Garissa this 20th day of December, 2018.

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George Dulu

JUDGE