



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL CASE NO. 4 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**HUSSEIN ABDI KOLO.....ACCUSED**

**JUDGEMENT**

1. The accused Hussein Abdi Kolo stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 20<sup>th</sup> January 2013 at Gubatu village, Madogo Division, Bura District, Tana River County within Coast Province murdered Hussein Kuno Tonga.

2. He denied the offence. To prove their case, the prosecution called a number of witnesses.

3. PW1 was Khadija Gutu Kuno. She stated that on the date Hussein Kuno was killed, she did not witness the murder but was informed by Abdishurie the chief who called the police who took the body to Nairobi. She said that Hussein Kuno was her son and when she arrived at the scene, he could not speak and had injuries on the head. The deceased was admitted for seven days at Garissa General Hospital and later to Kenyatta National Hospital but died on 27<sup>th</sup> January 2013. She later came to know the person who caused the injuries.

4. In cross examination, she maintained that the deceased was her son. She did not find any machete at the scene. She said that the accused volunteered himself to the chief and said he had injured somebody.

5. PW2 was Ware Issa Galole. On 20<sup>th</sup> January 2013 while asleep at night, he heard a bang and woke up and then went back to sleep. Again he heard a bang and took a torch, went outside his house and about 10 metres away found the accused standing next to the deceased. He was familiar with both and the accused then left and went away. The deceased was lying down and he flashed a torch and saw him and called Yakub Abdi the brother of the deceased. The chief was then called and the police came later and picked the injured person who was taken to Garissa Provincial Hospital, then to Kenyatta National Hospital and later died.

6. In cross examination, he said that the incident occurred at 4.30 am. He knew the deceased as a person who was married in their manyatta. According to him, the deceased had gone to the homestead of his in-laws late at night.

7. PW3 was Yakub Abdi from Sombo in Tana River. He stated that on 20<sup>th</sup> January 2013 at 4.30 am Issa Galole woke him up and said that Hussein Kuno and Hussein Kolo were fighting. He went there and found Hussein Kuno on the ground but he did not see Hussein Kolo who was his brother. He asked Issa to call elders. He however fainted and was taken back home and he did not know what happened thereafter. He was told later that the deceased died at Kenyatta National Hospital.

8. In cross examination, he stated that he did not see a machete at the scene. He did not know of any grudge existing between the deceased and the accused.

9. PW4 was Osman Galana Damasa the Assistant Chief Sombo Sub-Location. On 20<sup>th</sup> January 2013 at 5.30 am he was called on the telephone by the chief Abdishurie who said that Hussein Abdi Kolo had assaulted Hussein Kuno Tongo who was critically injured. He was told to report the incident to Madogo Police Station for help and he did so and the OCS sent police officers in a vehicle and he was among them. When they reached the compound of Yakub Abdi Kolo they found the deceased in the house lying on the ground. He was alive but could not talk. They put him in the vehicle while Hussein Abdi Kolo had gone to the AP Camp. They found Abdi Kolo at the AP Camp and took him to Madogo Police Station, and placed him into cells. The deceased was taken to Garissa Provincial Hospital with an injury on the head. He was later taken to Kenyatta National Hospital and died.

10. In cross examination, he said that the accused was a resident of his area and that he knew Hussein Kuno Tongo. He was aware that the deceased was married from accused's family. According to him the deceased had gone to the family of the accused because his children were there. He found the accused at the AP Camp. He did not agree that the deceased invaded the home of the accused.

11. PW5 was Andrew Kanyi Gachiye a consultant pathologist at Kenyatta National Hospital Nairobi. He testified on a postmortem report which he conducted with a colleague on 12<sup>th</sup> February 2014 on the body of Hussein Kuno Tongo at Kenyatta National Hospital. They formed the opinion that the deceased was assaulted. Body was fairly well preserved and was of a male person aged between 20 to 25 years. They noted multiple injuries mainly on the head and significant bleeding on the right ear. The lungs were heavy with a lot of blood in them. They removed some brain materials. They found a fracture at the base of the skull. According to him, the deceased died of repeated blows to the head.
12. In cross examination, he maintained that the injuries were mainly on the base of the skull which supported the brain.
13. PW6 was Mariamu Maanza was stood down before she testified.
14. PW7 was C.I. Joseph Asugo Obare. He remembered 20<sup>th</sup> January 2013 he received a report from the chief Sala Sub-Location, Sombo Location of an assault. He sent officers who found the deceased lying unconscious. They brought the victim and the accused to the police station and the victim was taken to Garissa Provincial Hospital. This witness was stood down because the statement of the accused was challenged by the defence, and a trial within a trial was held.
15. At this point, Judge Mutuku was transferred and I took over the conduct of the case and started with the same witness.
16. He later testified before me that on 27<sup>th</sup> February 2013 he went to the GK Prison Garissa in a Land Cruiser vehicle and they met the incharge a Mr. Jilo and they asked for the accused person. He went there with PC Mureithi to record a statement from the accused. He was in the company of a brother of the accused by the name Ali Abdi Ali. The accused was brought by the incharge of prison and they sat with him and Ali Abdi. He made inquiries from the accused about the incident and asked whether he needed any assistance of his brother. He told him about the offence and that he was free to give a statement or not to do so. The accused elected to give a statement in Kiswahili which police officer recorded and he read back to him. The accused signed the statement together with Abdi Ali Abdi his brother. He sought to produce the statement. He was examined on the same and this court admitted the said statement.
17. PW8 was Jocktan Komora Jilo a Superintendent of Prison at Mandera but previously he was at Garissa Prison. He stated that the OCS Madogo Police Station came to the prison and recorded a statement from the accused person.
18. He was cross examined.
19. At that point, the Prosecuting Counsel closed his evidence in the trial within a trial.
20. The accused gave his response in unsworn statement. He said that he told the Inspector that he did not fight anybody. However, the inspector promised him that if he admitted he would not be punished. The inspector then took him aside and gave him a document to sign. Because he was not educated, he agreed that the inspector should sign on his behalf and that is what happened. Therefore according to him, the confession statement was signed by the police officer on his behalf.
21. The court delivered the ruling admitting the statement of the accused. Thereafter, the prosecution found it difficult to call additional witnesses and they closed their case.
22. When put on his defence, the accused gave sworn testimony. He said that on 20<sup>th</sup> January 2013 at 2.30 am, he went to sleep and did not know the things that happened thereafter. He did not see Hussein that night. He denied recording any statement with the police. He was stood down and then later proceeded and stated that towards 4 am he was outside the house, where people used to loiter and steal goats and he was keeping watch when he saw a person in the darkness coming from the bush. He observed that person who came and held him by the color. That person had a machete and thinking that he had a bad motive he ran into the house and the person followed him. He then picked a stick and hit that person, entered the house and escaped through the window to the chief and informed him about the incident and the chief restrained him. He was later picked by police officers. He did not have previous dispute with the deceased whom he merely hit with a piece of firewood which was used as a walking stick. He emphasized that he was the one who reported the incident.
23. In cross examination, he agreed that he hit the man who died. He agreed Mariamu the wife of the deceased was his close relative and had been taken back home by the father.
24. At the close of the prosecution and the defence evidence, counsel on both sides made final submissions which I have considered.
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. See the case of **Leonard Aniseth vs Republic [1963] EA 206**.
26. Did the deceased die? The evidence of the prosecution and the defence is that the deceased was injured by the accused who reported the incident to the chief. The deceased was taken to Garissa General Hospital, then to Kenyatta National Hospital in Nairobi and died a few days later. Cause of death was established and documented in the postmortem report form. I find that the prosecution proved beyond any reasonable doubt that the deceased died.
27. Did the accused kill the deceased? Again on this, though the accused denied his cautionary statement to the police, in his oral sworn defence he admitted hitting the deceased and then escaping through a window of his house and reporting the incident to the chief. The deceased was found unconscious that early morning before day break. He was taken to Garissa Provincial General Hospital, later to Kenyatta National Hospital where he died of injuries sustained in the head. In my view, there is no doubt that the injuries that caused the death were occasioned by the accused person. I find that the death of the deceased was caused by the accused person.

28. Was the death caused with malice aforethought? This will go hand in hand with whether the death was unlawful. The accused has said that the deceased was an aggressor armed with a machete and that he hit him with a stick without an intention to kill him. He initially thought that the deceased was a livestock thief.

29. In my view, the defence of the accused person as to how the death occurred is an afterthought. One can see a lot of contradictions even in his sworn defence statement where he starts saying that he does not know anything about the offence and later says that he hit the deceased and then escaped through a window and made a report to the chief. I appreciate that the deceased went to the scene at night but there is also evidence that he was married from that family. The time, 4.30 am also in the Muslim community is not in the dead of night as it coincides with the time of the early morning prayers. I will however give the benefit of doubt to the accused as he did not use a sharp weapon. The death was unlawful. However, I find that there was no malice aforethought or premeditation to kill the deceased.

30. Taking into account my above findings, I hold that the prosecution has failed to prove the offence of murder but has instead proved the lesser offence of manslaughter against the accused person. I thus find the accused guilty of manslaughter contrary to section 202 of the Penal Code and convict him accordingly.

**Dated and delivered at Garissa this 20<sup>th</sup> day of December, 2018.**

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**George Dulu**

**JUDGE**