



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO 1 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MOHAMED HAKAR ABDIRAHMAN.....1<sup>ST</sup> ACCUSED**

**ADEN ALI FARAH.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

1. The two accused persons Mohamed Hakar Abdirahman and Aden Ali Farah stands charged with two offence of murder. The particulars of count 1 being that on 10<sup>th</sup> October 2011 at Bura Waberi Location in Garissa County jointly with others murdered Siyat Abdullahi Ali. They also stand charged with the second count of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence being that with others not before the court on 10<sup>th</sup> October 2011 at Bura Waberi Location in Garissa County jointly murdered Khalif Muse Shurie.

2. They denied both the offences and the prosecution called several witnesses to prove their case.

3. PW1 was Ruaraka Ali Ismael of Bulla Tawfiq in Garissa County. She was a housewife and in 2011 had a small canteen at Soko Ngombe near Garissa University College. She knew Siyat Abdillahi Ali as a relative and also Ali Muse Shurie as a neighbour all of whom lived at Bulla Tawfiq in Garissa. According to her, Muse Siyat came from the Aulihan clan together with Khalif Muse and herself. Mohamed Hakar Abdirahman is a person she knew well. She then changed and said she did not know Mohamed Hakar well but had seen him. She also said that she saw Aden Ali Farah one day at Soko Ngombe selling goats but did not know him well.

4. On 10<sup>th</sup> October 2011 between 4 and 5 pm a crowd of people went to the place where she was and were in fighting mood. She was with neighbours and children and many others like Habiba Hassan and Fatuma Maalim and Batula Taqar. At that time she was breastfeeding. They were joined by Siyat who later died. As they were sitting they heard shouts and saw a crowd coming screaming towards them with knives and swords from different directions. She took her baby and came out and saw many people coming from different directions. People ran for safety. She helped one person who was killed called Siyat. Siyat was killed using stones and sticks. She stated that the accused Mohamed Hakar and pointed at Mohamed Hakar in the dock. She stated that she heard Siyat saying "Mohamed don't kill me." She said some of the attackers were Haret, Noor, Ali and Aden. According to her, Aden was a different person from the accused Aden Ali Farah whom she did not see at the scene.

5. The attackers said that the woman who was making noise should also be beaten and she was hit with stones on the leg. They covered Siyat with a cloth and called for help. Neighbours ran away and escaped and Siyat was seriously injured. Later relatives came and police also arrived later at night. The injured was carried to Garissa town. According to her the attackers also killed Khalif who was blind but she did not see them kill him. She maintained that she saw Mohamed Hakar among the attackers but did not see Adan Ali Farah one of the accused.

6. In cross examination she said that they had a meeting outside the house when the attack occurred. She maintained that the men who came were about 50 to 60 even if the police statement said something else. She said the house had a small fence, with a compound. She first heard screams from Amasuwago and then saw a crowd approaching. The attackers came straight and surrounded them. Around 20 people surrounded them. She admitted that she feared when she saw people coming and throwing stones. She maintained that out of 40 or 60 attackers she recognized Mohamed Hakar and also recognized others who were not arrested like Haret, Noor, Ali and Aden. She maintained that she didn't see Aden the other accused at the scene. She merely learnt that her neighbour Khalif Muse Shurie had been killed. She said that Siyat was attacked and surrounded by many people.

7. PW2 was Hussein Ibrahim Iftin who came from Tawfiq Waberi ward in Garissa township. He knew Khalif Muse Shurie as a neighbour in Garissa for about 15 years. Siyat Abdullahi Ali he also knew him as a neighbour for about 15 years. He said Khalif Muse and Siyat Abdullahi Ali were dead.

8. According to him, on 10<sup>th</sup> October 2011 at 4 pm people came to their settlement and attacked them. Some people ran away but the attackers killed Siyat and Khalif. He ran away and when he came back he saw Khalif in a hopeless situation and gave him milk. He saw those who killed Siyat, one of them according to him was Mohamed Hakar who hit Siyat with a stone and when he fell he hit him with a machete. According to him he also saw the attackers who killed Khalif Muse, who could not run away because he was blind. He also said that Mohamud is the person who killed Khalif Muse together with many others. He said he stood 40 metres away. He saw Haret, Noor, Yusuf and Dunto attack the deceased. According to him, the chairman of the attackers was Aden Dera the 2<sup>nd</sup> accused who commanded the group while carrying a stick with a machete. He said that Dera means "tall". He saw him hit Siyat and the other person who died. According to him other residents ran away. They gave Siyat milk but he died shortly thereafter, before the police came and started their investigations. He identified the accused in the dock as some of the attackers.

9. In cross examination, he said that the police asked questions and they were given names of the attackers but some of the attackers ran away. He maintained that he was Bulla Tawfiq between 5.30 pm and that the attackers were about 60. He agreed that Wakatho was a neighbour and a cousin. He said the women ran away after hearing screams. The attackers moved in a group and some wore black clothes and others tied pieces of clothes on their heads. He maintained that both the 1<sup>st</sup> and the 2<sup>nd</sup> accused were part of the group that attacked the deceased.

10. PW3 was Adow Mohamed Aden of Bulla Tawfiq a brother of Khalif Muse Shurie who died on 10<sup>th</sup> October 2011. Siyat Abdullahi was also his brother in law who died on the same day. He knew Mohamed Hakar Abdirahman for many years as a businessman who sold cows and goats. He also knew Aden Ali Farah for about 2 years as a village elder at Bulla Sagara.

11. He stated that on 10<sup>th</sup> October 2011 at 10 am he was at home at Bulla Tawfiq when two motor vehicles passed by his house one of which he knew the owner as Dakane. It was a black Land Rover. The vehicle stopped on the nearby road and then moved a short distance and the driver alighted, walked around and entered the vehicle and drove off. At 5 pm, people attacked the homestead and he heard screams from a neighbour Wakatho Ali saying "escape escape". He locked himself in the house for about 10 minutes and then came out with a stick. He found many people. He ran for a short distance and saw people attacking Siyat. He approached Khalif Muse and noticed an injury on the head. One of the attackers was Noor Ares who was not in court. He approached the place where Siyat was attacked and knew one of the attackers as Mohamed Hakar who had a machete in the hand and hit Siyat on the head. He ran and hid somewhere and survived by the grace of God. He said however that he went very close to Siyat. According to him, there was fighting between two sub-clans; Abdulwak and Ahulian over land. The attackers were Abdulwak sub-clan. He said he saw Aden Ali but did not see him hit anybody. He was however one of the attackers.

12. In cross examination, he said that he had lived at Bulla Tawfiq for more than 8 years. He maintained that there was a dispute over land and that on that day two vehicles passed by before the incident. He stated that Dakane was one of the drivers. He said he initially locked himself, then opened the door and ran away. He maintained that Aden Ali was one of the people who attacked. He said that the 1<sup>st</sup> accused attacked Siyat though he was not alone. He said he came out from hiding immediately after the attackers left. He maintained that the 2<sup>nd</sup> accused was present in the attacking group but did not see him attack anybody.

13. In re-examination he said that Mohamed Hakar was holding a machete. He also saw Aden who threatened to kill him.

14. PW4 was Superintendent Julius Mbatia currently the Personal Assistant of the Inspector General of Police. It was his evidence that in 2011 he was stationed at Garissa DCIO Headquarters when he received a telephone message from the District Officer Garissa Central. This was on 7<sup>th</sup> October 2011 when he was told to transport members of Abdulwak clan who had been removed from a disputed land to Bulla Waberi which was said to be a no-man's land. They considered the matter and decided that the Abdulwak clan should move on their own to Tana River where they came from. The following day which was 8<sup>th</sup> October 2011 they received information about tension again and security officers were sent to restore peace and security. No injury had occurred.

15. On 10<sup>th</sup> October 2011 there was a report that three people had been assaulted, these were Omar Ali Abdi, Idris Hussein Mohamed and Abdullahi Ali Mohamed, all from the Abdulwak clan who had settled on the land owned by Ahulian clan. The OCS visited the scene and investigations commenced. The District Security Committee later visited the scene and the District Commissioner told them to live harmoniously. A major public meeting was organized same day at 2 pm at Soko Ngombe which ended 5.45 pm. Though a lot of effort was made to have peace between the two communities, they received information the same night that two people had been killed at Bulla Waberi on the disputed land.

16. The District Security Committee then visited the scene. During the peace talks, the chairman of the Peace Committee a Mr. Dakane was stabbed in the stomach and was taken to Garissa General Hospital. Two bodies of the deceased people were taken to the mortuary for postmortem examination and security officers were dispatched to the area. He stated that Khalif and Siyat were from Ahulian clan. He said that the arrests of the two accused were done by police officers from Nairobi.

17. In cross examination, he stated that he only attended the first security meeting. The other information he was given by the DCIO and he only met the accused person in court.

18. PW5 was Fatuma Maalim Ibrahim who lived near Nassir School Garissa County. She knew Khalif Muse Shurie who was blind and poor. She also knew Siyat Abdullahi Ali who is also dead. They lived together at Bulla Waberi. According to her she attempted to put a semi-permanent building at Bulla Tawfiq where she had a plot and she was threatened. She ran away in fear. She saw Siyat who was hit with a stone and he fell. She was also hit. One of the attackers was Haret alias Abdalla. Another was Hassan Abdi Noor, another was Noor Ares, another was Omar Dugow. She did not see Mohamud but his friend Siyat was mentioned by the deceased. According to her, the 2<sup>nd</sup> accused supplied the machetes. They tried to give first aid to Siyat but he died. She confirmed that people ran away but came back later then the DC and the police came. She said that Mohamed Hakar Abdirahman and a person called Aden Derre were part of the attackers.

19. In cross examination, she said that the incident occurred about 3 and 4 pm. She said that initially she did not see the attackers but she

came out and saw them. Some were masked and others were not. She did not see any of the accused persons attack anybody. She escaped and hid somewhere until police arrived.

20. PW6 was Farah Abdullahi Ali, who said Siyat was his elder brother, and was now dead together with Khalif a relative. He knew both Mohamed Hakar and Aden Ali Farah. On 10<sup>th</sup> October 2011 he could remember there was a peace meeting addressed by the District Commissioner. After the meeting he went to take tea and Bilathow Abdullahi called him on the phone and gave the news of Siyat's death. He proceeded to the scene and saw many people. He saw the two bodies of the deceased. His brother had many injuries. The other body of Khalif had a spear injury on the upper chest. People insisted on burying them at the site but later the two bodies were taken to hospital mortuary. Some names were given of the attackers such as Mohamed Hakar and Aden Ali. According to him the cause of the attack was a dispute between Ahulian and Abdulwak clan over land.

21. In cross examination he said 1<sup>st</sup> accused was a good friend. He heard about the two accused from others and he mentioned the 2<sup>nd</sup> accused to the police in the statement.

22. PW8 was Mohamed Yusuf Jama a Religious Teacher at Bulla Hagar in Garissa. He is from the same family with Siyat and Khalif who were dead. He said that on 10<sup>th</sup> October 2011 he was called by Jimal Ali who said that two people Khalif and Siyat had been killed. He was told to go and take the bodies to bury. He proceeded there. Government officers also came and ordered that the bodies be taken to the mortuary. He was aware of the clan clashes. He did not know the culprits.

23. PW9 was Cpl. Nicholas Warui currently of DCI Embakasi and formerly of DCIO Garissa. On 11<sup>th</sup> October 2011 he was assigned to investigate a murder case by C.I. Mbatia. He was to do that with PC Bedford Muriuki. The deceased were Khalif and Siyat. They joined members of the family to the mortuary and postmortem examination was done by Dr. Wangui the same day.

24. They made a sketch plan of the scene, looked for witnesses and recorded statements. It came out from the statements that on 10<sup>th</sup> October 2011 there was a revenge attack, after the Abdulwak clan was relocated from Tana River to Bulla Waberi which was claimed by Ahulian clan. The land dispute was thus the cause of the conflict. They conducted the investigations and arrested the two accused persons on being led by members of the public. They charged the accused persons in court.

25. In cross examination he confirmed that the dispute was over land. He stated that he talked to about 40 people and that it was the public who guided them to where the accused were. He said he learnt about the land dispute from his boss. He did not visit the home of the 1<sup>st</sup> accused. They arrested him at Soko La Ngombe.

26. PW10 was Dr. Ernest Amos Siwo from Garissa General Hospital. He testified on a postmortem report made by Dr. Jecinta Wangui who was currently in Nairobi. They worked together and he knew her handwriting. One of the postmortem form was for one Khalif Muse Shurie who died of deep visible injury. The other one was for Siyat Abdullahi Ali who had a deep left side wound and fracture of the side of the head. That was the cause of the death. He produced the two postmortem reports.

27. When the accused were put on their defence, each made a long unsworn statement and called witnesses. Mohamed Hakar Abdirahman testified as DW1. He gave unsworn defence testimony that on 10<sup>th</sup> October 2011 he was at Soko Ngombe. Prior to that day a customer from Ukambani, Morris Muthui asked him to avail him 30 sheep for purchase. He told him that there were not many sheep that day but he came and they bought 3 sheep. Then the chairman of Soko Ngombe phoned him and told him to assist him in taking chairs for a meeting and he did that. They attended the meeting convened by the District Commissioner and they decided to look for additional sheep the next morning. The public meeting ended about 6 pm and he took his visitor to a place where he boarded a motorcycle. The next morning they managed to buy a total of 20 sheep which his visitor loaded to go to Ukambani. He continued doing his activities of buying goats and selling. After selling 14 goats and as he was taking the other goats home, he was arrested by armed people and was informed that they were police officers. They later charged him with the offences which he knew nothing about them.

28. The 2<sup>nd</sup> accused Aden Ali Farah also gave unsworn defence as DW2. He said that on 10<sup>th</sup> October 2011 the chief called him as the chair of the peace meeting and told him to ensure chairs and tents were available. He talked to the 1<sup>st</sup> accused who assisted him to get the chairs and they waited for the DC who came at 2.30 pm. The DC was called Samson Macharia.

29. At the meeting, peace was discussed and he also managed to make a speech and call for peace. The meeting ended at 6.30 pm and he went home. However, as the meeting was about to close the DC was called on the phone by people in the villages who said that two people had died in the bush and the DC and the CID went to the scene and he went home. He said he did not know anything about the killing and that the police went for him on 13<sup>th</sup> October 2011 and arrested him. They took him to Nairobi and charged him in court. He said he was an elder for 30 years and wanted the court to consider that.

30. DW3 was Morris Muthui Nzoka from Mwingi who stated that he knew the 1<sup>st</sup> accused and that on 10<sup>th</sup> October 2011 he arrived at Garissa at 12.30 pm to buy sheep from Mohamed Hakar. They only bought 3 sheep. He helped Mohamed to take chairs for a public meeting and attended the meeting where he saw both accused persons. He also participated in returning the chairs to where they had taken them from. He was escorted by his host to a place where he got a motorcycle and went to sleep. The next day they managed to get a total of 20 sheep and he got transport and transported his sheep to Ukambani at about 2 pm. On the 18<sup>th</sup> October 2011 he called 1<sup>st</sup> accused on the phone and it did not get through. When he phoned his wife, he was told that Hakar had been arrested.

31. In cross examination he maintained that he bought sheep through the 1<sup>st</sup> accused. He said also that the 2<sup>nd</sup> accused addressed to the public peace meeting.

32. DW4 was Aden Mohamed of Soko Ngombe Garissa. It was his evidence that on 10<sup>th</sup> October 2011 he was at Soko Ngombe at a public

meeting starting at 2 pm. He saw both the accused persons whom he knew before at the meeting. The 2<sup>nd</sup> accused even addressed the meeting. The meeting ended at 5 pm and the people left. He did not know anything that happened in the homes of the accused persons.

33. In cross examination he stated that there was no commotion at the meeting. He did not know Khalif Muse Shurie or Siyat Abdullahi Ali. He said he left the meeting slightly earlier and he did not know what happened after he left.

34. This is a murder case. The prosecuting has the burden of proving the accused guilty beyond any reasonable doubt. The accused do not have any burden to prove their innocence - see the case of **Leonard Aniseth vs Republic [1963] EA 206**. The accused herein were charged with two offences of murder and the prosecution was required to prove each of the two offences against each of the accused persons.

35. The prosecution is required to prove whether each of the deceased in the two offences died. Secondly, the prosecution is required to prove that the death was unlawful. Thirdly, the prosecution is required to prove that the accused persons caused the death of the deceased. Fourthly, if the answers to the above are of the affirmative, then the prosecution is required to prove whether the death was caused with malice aforethought.

36. Did Siyat Abdullahi die? Did Khalif Muse Shurie died? All the evidence of the prosecution witnesses is that the two persons were serious injured in a clash by attackers in their residence. They were seriously injured and died on the spot. Serious injuries were visible with the naked eye. Bodies were taken to Garissa General Hospital and postmortems were conducted which confirmed the death. In my view, the prosecution proved beyond reasonable doubt that each of the two deceased persons died of injuries inflicted by clubs and sharp objects like knives and machetes.

37. Were the deaths unlawful? No lawful reason has been given to justify the two deaths. There is an allegation of some revenge mission over a land dispute. However the deceased from the evidence on record were attacked unexpectedly and they were defenseless at the time of the attack. One of them Khalif was actually blind. I find that the death of the two deceased persons were unlawful and caused by unlawful means.

38. Did the accused cause the death of the deceased? The evidence of the prosecution witnesses were that the attackers were many around 50 in number. It was said that this was a clan dispute over land. The attack was abrupt and everybody was scared for their dear life. Some witnesses; PW1 Ruraka Ali Ismail and PW2 Hussein Iftin said that they saw both the accused persons during the attack and described what they did. They also mentioned other attackers who are at large.

39. The accused on the other hand said that on the day in question, they attended a DC's **Baraza** on peace at Soko Ngombe. They left that meeting and went home. However after the meeting, news of an attack was heard by the government officials who proceeded to the scene the same evening of 10<sup>th</sup> October 2011. The accused were arrested after the incident, not on the same day.

40. In my view, if indeed the two accused were identified on the day of incident as the culprits and they did not ran away, they would have been arrested the same night or early the next morning. It appears to me, that the reason they were arrested was that there were prominent personalities from the attacking clan. It looks as if there were reflections on the matter and then when the real people escaped, whose names were given by the prosecution witnesses, these two accused persons were arrested. In my view, there is a high probability of mistaken identity. For that reason I find that the prosecution did not prove beyond any reasonable doubt that any of the two accused committed the two offences or killed the deceased persons.

41. Having found that none of the two accused killed any of the two deceased persons, I find that the prosecution did not prove malice aforethought against any of the two.

42. To conclude, I find that the prosecution did not prove that the accused or any of them committed the offences of murder charged. I find them not guilty and acquit each of them under section 215 of the Criminal Procedure Code (Cap. 75).

**Dated and delivered at Garissa this 19<sup>th</sup> day of December, 2018.**

.....

**George Dulu**

**JUDGE**