



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 17 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ISMAEL BARRE WEIRAH.....ACCUSED

JUDGEMENT

1. The accused Ismael Barre Weirah stands charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 29th September 2013 at Dirisha Sub-Location, Dirisha Location, Balambala Division within Balambala District of Garissa County murdered Amina Siyat Yussuf.
2. He has denied the charge. To prove their case the prosecution has called several witnesses.
3. PW1 was Khadija Dirie Diis the aunt of the deceased. It was her testimony that Ismael Barre Weirah killed her daughter Amina Siyat. Amina Siyat was a daughter of her relative and lived with her for 3 years helping her in herding goats and milking the animals in the evening.
4. It was her evidence that the deceased slept in her house, and in the mornings took the animals for herding at Bulla Kuro and in the evening brought back the animals, milked them and brought her the milk.
5. She knew Ismael Barre Weirah the accused because at one time he herded her camels for two months, at a salary of Kshs.3,000/= per month, then said he wanted to go, and after 3 months killed the girl.
6. After he left, Amina took over the herding of the animals.
7. On the day Amina died she slept where livestock were and while at home she heard people screaming and got information that the camels were lost. Her son Mohamed Osman went to look for the camels and came with them at 9 am but did not find the girl.
8. The next day they reported the matter to the chief and people went to carry out a search in the bush, and they searched for a week in vain. In the meantime, Ismael disappeared from his brother Salat Barre's home where he lived. The brother gave information to Chief Farah that Ismael escaped with a machete and knife, both blood stained. She only saw Ismael later in custody.
9. The goats' herdsman later saw the lower leg of a person, as well as the palm and the bone of a leg with burnt flesh. When people visited the site they noticed signs of a fire and ashes. She also went there and saw the clothes, trousers, shoes and jericans and sticks all tied together and hanging from a tree – and she identified them as belonging to the deceased, but with no blood stains.
10. The chief then took the items to the police. She heard that the accused informed the police that he had killed the girl, when he recorded his statement. She identified the accused in court.
11. In cross-examination, even when she was told that in the police statement the accused said that he did not kill the girl, she maintained that she heard the accused say he killed the girl with a knife. She said that other witnesses such as the chief would say where the knife was, as she saw the accused with a blood stained knife.
12. She stated that there was no dispute or disagreement between accused and deceased. Accused came back to collect some items after leaving work in a peaceful manner. She maintained that the accused disappeared from his brother's home a week after the girl disappeared. According to her the body was burnt, not eaten by wild animals. She said that the chief and police would explain where the recovered items were kept.

13. In re-examination, she said that the police did not allow them to touch the items, but she could identify them if shown. She was stood down to come and identify the items.

14. She later identified a partly burnt dress MFI-1, a trouser with red stripes MFI-2, knife with black handle MFI-3, headscarf maroon in colour MFI-4, sleepers green at the bottom MFI-5, stripped grey belt MFI-6 – which according to her belonged to Ismael Barre the accused. She clarified that it was the scarf (shawl) which was partly burnt not the dress. According to her the police did not take the yellow jerican which was partly burnt. According to her also Amina the deceased wore the clothing items when she last left home.

15. In cross-examination, she said she went to the scene with many people, and saw the knife at the police station. She pointed at what she called a knife cut on the dress.

16. She maintained that the belt and knife belonged to Ismael as she had seen them before. She however did not see the deceased herding stick at the scene.

17. PW2 was Police Inspector Charles Ayaro who was OCS Balambala Police Station on 17/10/2013, and the investigating officer assisted by PC Bernard Nderitu.

18. It was his evidence that on 7/10/2013 at 11.15 hours while at the police station he received a report from Balambala chief Aden Ibrahim who came to the police station and reported that a body had been sighted in Mardafa area Pamba Sub-Location.

19. The report was booked in the OB and together with PC Benjamin Nzibo, Bernard Nderitu and area chief proceeded to the scene about 10km from the police station, on foot as there was no passable road arriving at 12.30 hours.

20. At the scene in a thicket they saw a partly burnt skull, partly burnt limb bones and ribs, foot shoes, and partly burnt clothes. They collected the body parts and clothings and brought them to Garissa Provincial General Hospital Mortuary arriving at 18.30 hrs and handed same to mortuary attendants. On 8/10/13 at 12.00 hrs postmortem examination was performed by Dr. Maingi. The clothes and sandals of the deceased were put in police custody as exhibits.

21. According to him the mother (aunt) of the deceased identified the clothes of Amina who turned out to be the missing person who had been reported on 2/10/13 as a 13 years old girl who went missing while grazing camels.

22. On 9/10/13 the accused was arrested at Riyale area Balambala and brought to police station. During arrest he was found with a knife which was also taken by the police to Government Analyst by PC Angaya with an exhibit memo MFI-8. At the scene they recovered a head scarf, pink dress, short trouser blue with red stripes, piece of burnt clothes – all taken to the Government Chemist. They did not recover anything else.

23. They recovered the belt from the accused, as that was where he attached the knife. He produced all the recovered items as exhibits.

24. He identified the accused in court.

25. In cross-examination he stated that he did not record the accused's statement. He suspected the accused because of witness statements, and did not recover the knife from the scene, nor the belt. He stated that they did not see blood stains on the knife. No blood stains were detected on the knife. He merely relied on a witness who said she saw the deceased and accused together.

26. He did not know the whereabouts of the deceased on 7th, and nobody saw the accused kill the deceased. He did not know the identity of the man who reported to the chief about discovery of the body. The bones were not taken to the Government Chemist to confirm if they were from a human being.

27. Though he collected a jerican from the scene, it was not taken to the Government Chemist – as it had no smell of paraffin. Though there were burnt tree branches he did not dig and take a soil sample to the Government Chemist. He was present during postmortem examination, and the identification of the deceased was through clothes recovered.

28. In re-examination he stated that they relied on a statement from a girl who grazed with the deceased – who saw the deceased together with the accused.

29. PW3 was Rahma Abdi Mohamed a minor whose age could not be ascertained as she had not been to school, but tendered evidence on oath.

30. It was her evidence that she herded camels with the deceased Amina Yussuf. She knew the accused Ismael Barre Weirah when he herded camels which were later herded by Amina Sayat.

31. According to her on 29/9/2013 in the morning she was in the bush with her sister Leila and Amina Sayat. They herded cows while Amina herded camels.

32. As they sat under a tree, someone who sat at a nearby tree came and told them to go and look after the camels, because he wanted to kill Amina. Then Amina left to go for the camels and the man followed her. They looked after their cows and then went home in a different direction, and that was the last time they saw Amina.

33. When shown the items recovered she said they were the clothes and slippers Amina wore that day.
34. She identified the accused as the person who followed Amina that day.
35. In cross-examination, she said she saw the accused from the time he herded the camels of the aunt of the deceased. On that day they saw him sitting under a tree doing nothing. He merely came and told the deceased to move the camels to a better place and then followed her. She did not know how far Amina went. She was aware other people grazed in the area, and that the people who lived there were only her relatives. The following day she received news that Amina disappeared. She did not see the accused again. She agreed that it was when they left the police station that Hyloo said that the accused killed the deceased. They had been called to the police station because they were the last people to see the deceased. She did not go back to the scene and merely saw the exhibits in court.
36. She agreed that, she said she could not remember the clothing because she was young. She also agreed that when she recorded the statement the accused was already in the police station, and she had seen him the previous night. She could not say if accused went to where the deceased went or where the clothes were found.
37. In re-examination, she said other people grazed in far places.
38. PW4 was Farah Ahmed Keynan an Assistant Chief at Balambala Sub-Location. who knew both the deceased and accused as people from his Sub-Location.
39. On 2/10/13 he received a report from Mohamed Dubat that his cousin Amina had disappeared and he reported the incident to the chief Aden Ibrahim and the police station.
40. They searched for the missing girl in the grazing area on 2nd and 3rd. On 4th October they received a report from the public that the girl was last seen with Ismael Barre Weirah. They traced the girl and on 7th October at 10 am he received information from Dirisa an area in neighbouring Tana River from Mahat Ali a goats herdsman that he had seen remnants of a human person.
41. Accompanied by the police and public, they proceeded to the scene and saw the remains of a human body, which appeared to have been burnt. They also saw the clothes of the girl and a jerican. They collected the body remains and items to the police station.
42. On 8th October, they received information that Ismael Barre was seen in an area called Ade in Balambala Sub-Location. On the 9th at about 3 am at night, with some young men, they surrounded a homestead where they found Barre in deep sleep outside the house on a mat. They took his knife and arrested him and handed him over to the police.
43. According to him, he asked Barre whether he knew why he had been brought to the police station; he said it was because of the girl who had disappeared. According to him, Barre said that the girl abused him that he had sexual intercourse with their camels and thus he killed her by stabbing her with a knife and then burnt her.
44. He identified the items which they took to the police. He identified the accused in court.
45. In cross-examination, he said accused worked for him for 3 years as a herdsman and that he knew his relatives. He said he received the first report on the girl's disappearance on 2nd October. On 4th he received information from the public that the accused was the last person to be seen with the deceased. According to him the public got the information from a girl called Rahma. On 7th he received information from Mahat that human remains had been seen and he proceeded there. Though they saw burnt grass, the clothes were aside and not burnt, and the body was burnt and naked.
46. He agreed that the accused was found sleeping at his brother's house. He said he interrogated the accused at the police station in the presence of PC Hassan Yusuf Ibrahim. He was not aware if the knife was examined for blood stains.
47. He relied on information received.
48. PW5 was Hussein Dakane Mohamud a retired cook in Balambala.
49. On 9/10/2013 six police officers visited his home and asked for the home of Maow Barre a brother of Ismael Barre the accused.
50. He directed them to that home at 2 am. He went together with the police and found Ismael sleeping on a mat outside near the fence. He had a knife under the mat.
51. He identified the person they arrested.
52. In cross-examination he said he did not have prior notice that the police were coming, nor did they tell him the reason for looking for the home of brother of the accused. He did not know if accused had disagreed with anybody. Accused was not told the reason why he was arrested, though he asked about it. He did not hear them tell him the reason of arrest at the police station.
53. PW6 was Mahat Adan Ali a herdsman at Balambala. He knew Amina Yussuf and had heard the name Ismael Barre Weirah.
54. On 7/10/13 as he herded goats in the bush, about 70 metres from the road he sensed an awful smell and observed a burnt human skull,

bones and ashes.

55. He informed on phone a Mr. Ghedi and the area chief Aden. People then came and took the remains of the girl. He only knew the accused by name.

56. In cross-examination – he said he lived in Balambala for one and a half years. He went there in 2013 at elections time but previously lived near Balambala. He had heard of the disappeared of the girl 7 days before he saw the remains. He told the chief that he had found the person they were looking for, but did not know the girl's killer.

57. PW8 was Dr. Ernest Amos Siwo of Garissa Provincial General Hospital since 2011.

58. He read a postmortem report prepared by Dr. Maingi with whom he worked. Postmortem was conducted on 8/10/2013 – body identified by Hussein Dubat Yussuf and Aden Osman through clothes in decomposed state.

59. Skull revealed trauma on right side with fracture and missing teeth. There were missing bones.

60. Death was caused by trauma on right head leading to brain injury. He produced the postmortem report as exhibit.

61. In cross-examination – he stated that there was no body, but only remains. It was not possible to do complete postmortem with facilities at Garissa. According to him, the opinion on cause of death was not conclusive.

62. In re-examination, he stated that though the doctor could not give the exact cause of death, there was trauma in the skull that might have led to death.

63. That was the prosecution evidence.

64. In his defence, the accused gave unsworn testimony. He said the police arrested and told him that he killed somebody. He did not know the family of the deceased. When he was arrested he intended to travel to Garissa to pick drugs. His occupation was taking care of family camels.

65. That was the defence evidence.

66. After the closure of the prosecution and defence evidence counsel for the defence Ms. Maina who held brief for Mr. Nyasani, and the counsel for the prosecution Mr. Okemwa made oral submissions, which I have considered.

67. This is a murder case and the prosecution is duty bound to prove all the necessary ingredients of the offence beyond any reasonable doubt. The accused person has no duty to prove his innocence – see **Leonard Aniseth vs Republic [1963] EA 206**.

68. The prosecution is required to prove firstly that the deceased died. Secondly, the prosecution is required to prove that the death is unlawful. Thirdly, the prosecution is required to prove that the accused caused the death of the deceased. Lastly, if the above are proved, then the prosecution is required to prove that the death was caused with malice aforethought.

69. Did the deceased die? From the evidence on record the deceased disappeared while herding camels and her body was not seen thereafter. Some days after her disappearance, a person saw what appeared to be decomposed parts of a human person, and some clothes in a thicket which was partly burnt.

70. The clothes were later identified as belonging to the deceased. The remnants were taken to Garissa General Hospital and postmortem examination was done, and cause of death given as injury to the skull. There was very little flesh by that time.

71. Though the entire body was not seen and nobody could facially identify the body, in my view the deceased died. To-date no one has come up to suggest that the deceased is alive. I find that the deceased died.

72. Was the death unlawful? The circumstances and evidence on the death lead to no other conclusion than that the death was unlawful. I find that the death of the deceased was unlawful.

73. Did the accused cause the death of the deceased? Nobody saw the accused kill the deceased. The case is thus one of circumstantial evidence.

74. The prosecution connects the accused to the death because they knew each other with the deceased before as the accused previously herded the camels of the aunt of the deceased, which the deceased herded on the day of her disappearance. The deceased was said to have been seen in the bush by a young girl who herded cows that day in the bush, and who said he told the deceased to go for the camels and followed her and she was not seen again thereafter. The Assistant Chief also stated that the accused on arrest informed him that he killed the girl because she insulted him by telling him that he was in the habit of having sexual intercourse with the camels of her aunt.

75. The accused on the other hand denied killing the deceased. He also denied knowing her and her family.

76. In my view, even if the accused knew the girl and her family, the evidence on record did not show that he killed her. There is no evidence

that the girl Rahma Abdi Mohamed PW3 informed the elders or the police immediately or at least the day after the incident that it was the accused who accosted and thus killed the deceased. She did not go to assist to show the direction which the accused used in following the deceased. She initially could not even remember the clothes worn by the deceased.

77. The Assistant Chief, though he said the accused admitted having killed the deceased in the presence of the police, no police officer confirmed this position.

78. The evidence also is that the accused was found sleeping at the home of a brother in the same Sub-Location.

79. In my view, the circumstantial evidence was not adequate to prove that the accused killed the deceased person, excluding any other hypothesis. I find that the prosecution did not prove beyond reasonable doubt that the accused killed the deceased.

80. Was the death caused with malice aforethought? Malice aforethought is defined under section 206 of the Penal Code. In my view, since I have found that the prosecution did not prove that the accused killed the deceased, it is not possible for me to say that malice aforethought was proved against the accused.

81. Consequently, I find that the prosecution did not prove beyond reasonable doubt the offence of murder against the accused. I thus find the accused not guilty and acquit him accordingly under section 215 of the Criminal Procedure Code (Cap. 75).

Dated and delivered at Garissa this 18th day of December, 2018.

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George Dulu

JUDGE