



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO 33 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ABDIKADIR DARA WAYAMO.....ACCUSED**

**JUDGEMENT**

6. The accused 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 being that on 25<sup>th</sup> July 2011 at Laza township, Hola Mission Sub-Location, Zubaki Location, Tana River District within Tana River County murdered Jineri Awadhi Akare.

2. He denied the charge and in support of their case the prosecution called eleven (11) witnesses.

3. PW1 was Wycliff Mutua Muletya a prison officer currently attached to Manyani Maximum Prison. Previously he worked with the accused person at Hola Prison and on 24<sup>th</sup> July 2011 at around 6.30 pm, he and the accused were assigned duties to guard the prison farm at Hola which was about 2 ½ Km from the Prison Camp. In that farm, there were crops that is nappier grass and mango trees and ground nuts. Each of them was issued with a pistol and ammunition.

4. While on duty, on the 25<sup>th</sup> July 2011 at around 4.30 am, they noticed two people cutting grass in the prison farm. There was moonlight and they flashed torches and the two people started to run away. They chased the two who initially ran in one direction but later separated and ran into two different directions. He chased one while the accused chased the other one. Outside the thorny fence, the person he was chasing surrendered and dropped the sack of nappier grass and he told him to sit down. Shortly thereafter he heard a voice of the person who was chased by his colleague saying “*wacha nikumalize*” or “*Let me finish you*”. He thus ran to help his colleague Wayamo. When he approached, he saw the person attack Wayamo with a machete near the fence and Wayamo shot once with a Ceska pistol. The bullet hit the attacker on the head and he fell down and he identified the machete held by the deceased in court.

5. In cross-examination, he stated that the deceased carried nappier grass but lifted the machete to cut the accused. He stated that if it was him he would also have shot the deceased in the circumstances. He stated that he wanted to assist the accused and in the process the person he had chased escaped. He maintained that the accused had reached the fence and could not retreat further into the thorns before he shot at the deceased.

6. PW2 was Ibdiraham Dokota a Prison Corporal who on that day allocated duties in the evening to officers on night shifts including two officers to the prison farm. He stated that guns and ammunition were issued by another officer. At 4.30 am, he received a report of a killing at the prison farm and he reported this to his seniors and then proceeded to the scene. On arrival, he saw the deceased lying with blood oozing from the head. He also saw nappier grass nearby. He made a report to Sergeant Bajio who reported the incident to the seniors as well as the police. He stated also that the prison farm fence had a thorny section and stated also that the deceased lay outside the fence.

7. In cross-examination he maintained that the two officers he had assigned to guard the prison farm were required to carry pistols.

8. PW3 was Akara Amara Jilo a stepbrother of the deceased. It was his evidence that on the 24<sup>th</sup> July 2011 he gave the deceased a motorcycle for use and that on 25<sup>th</sup> July 2011 at 7.30 am he was called on the phone and informed about the death. He visited the scene outside the prison farm and found blood stains outside the fence but found that the body of his stepbrother had been taken to Hola District Hospital.

9. On 26<sup>th</sup> July 2011, he attended postmortem examination at Garissa Provision General Hospital as there was no doctor at Hola Hospital. The body was thereafter released for burial. He noted an injury in the eye of the deceased. He was aware that the public in Hola almost created a commotion on the issue.

10. PW4 was senior Sergeant Bajio Ali. It was his evidence that on 25<sup>th</sup> July 2011 at 6.30 am he was called by Prison Duty Officer Corporal

Ibrahim Dokota who informed him of the incident and he informed his seniors and together they proceeded to the scene. They found the deceased about 6 metres from the thorny farm fence. There was nappier grass and ground nuts near the body, and the deceased lay on a machete. He found injuries both on the front and back of the head.

11. In cross-examination he confirmed that the body was 6 metres away from the thorny fence.

12. PW5 was Maulana Komora Awadh a mason and stepbrother of the deceased. He was called on the phone and informed that the deceased had been killed near the Water Supply in Hola. He proceeded to the scene where he found blood stains. He later saw the deceased at Hola Hospital and noted gunshot wounds on the face and back of the head. On 26<sup>th</sup> July 2011 he identified the body for postmortem at Garissa Provincial General Hospital as there was no doctor at Hola. They then took the deceased body for burial. According to him the deceased was a casual labourer.

13. In cross-examination he stated that the deceased was a family man. He agreed that the prison farm had crops and did not know what the deceased was doing with a machete at the farm. He did not see groundnuts.

14. PW6 was Awadh Omar Jilo the father of the deceased. He was called on the phone and told that his son had been killed. He went to the scene and saw blood stains outside the farm about 100 metres away. The deceased had a wound on the face and another one on the right ear. He stated that the deceased was a farmer and casual worker.

15. In cross-examination, he said that the area was surrounded by bush.

16. PW7 was Mwanahamisi Maro the wife of the deceased. It was her evidence that on 25<sup>th</sup> July 2011 at 6.30 am deceased took her on a motorcycle and near the prison farm he went for a short call and then she heard a gunshot. She thereafter proceeded to the house of her mother and did not tell anyone about the incident. At 9 am she learnt from one Maulana that her husband had been killed. She did not see the body due to religious reasons.

17. In cross-examination she said that they were married for two years and that though she ran to her mother's house after hearing gunshot she did not inform anyone. She denied that her husband owned the machete that was identified in court.

18. At this point, Judge Mutuku was transferred and I took over the case.

19. PW8 was Abdi Dara Noor a prison officer in charge of the armoury at Hola prison. It was his evidence that on 24<sup>th</sup> July 2011 at about 6.30 pm prison officers including the accused started duty and he supplied them with pistols. The next day at 8.30 am the accused returned to him the pistol with 14 bullets while he had been issued with 15 bullets.

20. PW9 was Lawrence Nthiwa a firearms examiner. He testified on a firearm report prepared by his colleague on 28<sup>th</sup> August 2011 by the name Alex Chirchir. It was a Ceska pistol with 14 rounds and one spent cartridge. Testing was done and it was found to be in good working condition. The cartridge marked as "B" was fired from the said pistol. He produced the report.

21. PW10 was Chief Inspector Johana Ekidor formerly Deputy OCS Hola police station. It was his evidence that on 25<sup>th</sup> July 2011 at 7 am he received a report that a theft suspect had been shot at the prison farm. He proceeded to the scene, found fresh cut nappier grass and a machete. According to him the deceased was 28 metres from the farm. He said that there were footprints in the sand of two thieves and two prison officers, and the deceased was hit by a single bullet. The information he received was that he was armed with a machete. He took the body to Hola hospital but because there was no doctor, they took the body to Garissa General Hospital where postmortem examination was conducted. He stated that there was an inquest at Hola Court before the matter was brought to Garissa.

22. PW11 was Dr. Wanja Hafsa who conducted the postmortem examination of the deceased. According to her, there was a bullet wound on the eye with an exit on the right ear side. She also observed a wound on the neck which gave an impression of an entry of a bullet. Cause of death was bullet wound and damage to the brain.

23. In cross-examination she said she partially opened the head and established the exit point of the bullet near the ear.

24. That was the evidence of the prosecution.

25. The accused elected to tender sworn defence and testified as DW1. He stated that he was at Hola Prison farm on duty on 24<sup>th</sup> July 2011 starting 6.30 pm. At 4.30 am he saw a movement with his colleague and they lit torches and saw two people who tried to run across the fence. They chased them. The one he chased then stopped and tried to cut him with a machete. He avoided the machete and retreated until he could not retreat any further due to the fence and he had no other choice but to shoot. He said he did not intend to kill but to scare. According to him the deceased threatened him which attracted his colleague to come and try to assist.

26. In cross-examination he denied hitting the deceased on the neck. He stated that they were trained to handle even very dangerous people. He agreed that he did not scream and said that initially the two people ran in one direction.

27. In re-examination, he stated that he did not have the opportunity to ask for assistance, but that some situations warranted shooting.

28. That was the defence evidence.

29. At the close of the prosecution and defence evidence, the defence counsel and the prosecuting counsel made final submissions. The defence was of the view that the prosecution had not proved their case against the accused person. The prosecution was of the view that the prosecution had proved their case beyond reasonable doubt.

30. This is a murder case. The prosecution is required to prove the ingredients of the offence beyond reasonable doubt. The accused is not required to prove his innocence. He can only raise doubts in the prosecution case. See the case of **Leonard Aniseth vs Republic [1963] EA 206**.

31. The prosecution was required to prove that the deceased died. Secondly, that the death was caused by the accused. Thirdly whether the death was unlawful. Fourthly, if all the above is satisfied, whether the death was caused with malice aforethought.

32. Did the deceased die? All the evidence of both the prosecution and the defence is that the deceased died. He was shot with a bullet near the prison farm at Hola and died instantly. Postmortem examination was conducted at Garissa Provincial General Hospital and cause of death was confirmed as the bullet wound which damaged the brain. I find that the prosecution proved beyond any reasonable doubt that the deceased died of a bullet wound.

33. Was the death of the deceased caused by the accused person? Again on this, the evidence both for the prosecution and the defence was that the deceased was killed by the bullet which was fired by the accused using a pistol. There is no dispute about this. The deceased died instantly that early morning of 25<sup>th</sup> July 2011 outside the Hola Prison farm. He was shot by the accused. I find that the prosecution has proved beyond any reasonable doubt that the deceased was killed by the accused. Therefore the death of the deceased was caused by the accused person.

34. Was the death unlawful? The evidence of the prosecution is that the deceased went to the farm and attempted to cut nappier grass together with another person. When they were found, they attempted to run away. After getting out of the farm, near the thorny fence the deceased was shot dead by the accused. The other person who was also chased by the other prison officer managed to escape after the prison officer came to assist his colleague the accused.

35. Only the accused and his colleague PW1 were the eye witnesses to the incident. Everybody else relied on their information in describing how the incident occurred. This is a matter where there is no alternative theory put across about how the deceased died. No expert came to explain that the death could have been caused in a different way than that described by the two prosecution witnesses; the accused and his colleague. The bullet wound through the eye and exiting through the right ear was a single shot. It indicated that infact the deceased was facing the accused person. The version of the accused and his colleague was that the deceased attempted to cut the accused with a machete and the accused retreated to the thorny fence. The retreating to the thorny fence is unlikely as the Deputy OCS Hola Police Station PW11 C. I. Ekidor found the deceased about 28 metres from the thorny fence.

36. The wife of the deceased claimed that the deceased went for a short call when he was shot that morning. That story is not believable as it was unlikely that she would go to her mother's house and keep quiet about such a serious incident knowing fully well that she was with her husband and she had left him behind after hearing the sound of a gunshot.

37. With the evidence on record, in my view, the force used or use of a gun in the circumstances at night was justifiable taking into account that the accused was on duty and was chasing somebody to arrest him and that person turned and threatened to finish him, and one might not know how the deceased intended to use the weapon that was in his hand. In my view, in the circumstances of this case, the force used was justifiable and therefore the death of the deceased was not unlawful as the accused acted in self defence.

38. Was the death caused with malice aforethought? Having found that the force used in the circumstances was justifiable and that the death was not unlawful, I also find that the prosecution did not establish that the death of the deceased was caused with malice aforethought. There was not premeditation to kill.

39. Having found that the accused killed the deceased in a situation of self-defence, I find that the prosecution did not prove the offence of murder against the accused person. I thus find the accused not guilty of murder contrary to section 203 as read with section 204 of the Penal Code and acquit him in accordance with section 215 of the Criminal Procedure Code (Cap. 75).

**Dated and Delivered at Garissa this 18<sup>th</sup> day of December, 2018.**

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**George Dulu**

**JUDGE**