



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL CASE NO. 23 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NUR MAALIM MOHAMED.....1<sup>ST</sup> ACCUSED**

**SHABAN MOHAMED ISSACK.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

The two accused herein Nur Maalim Mohamed and Shaban Mohamed Issack stand charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 17<sup>th</sup> November, 2014 at 7.30 pm at Githuthe village of Hagadera Refugee Camp within Garissa County jointly with another not before court murdered Ali Abdikadil Mohamed. They have denied the charge.

In proving their case, the prosecution called a total of five (5) witnesses. PW1 is the wife of the deceased Duh Mahamud Dahale . It was her evidence that on 17<sup>th</sup> November 2014 she was at home nursing her young baby. Her husband the deceased had gone out shortly at 7.30 pm when three (3) men called from the gate and asked for him. When she said he was not in, they came into the compound flashing a torch as it was dark and displayed a rifle. They demanded ksh.3,000 from her. At that time she sat with a neighbour called Abdi PW2 who also produced ksh.500. The three men then left and shortly thereafter as the husband was now coming home, they heard gun shots and she went to the scene saw her husband lying down in a pool of blood. Neighbours then arrived, the first to arrive being Ahmed. PW 1 did not identify any of the attackers as it was dark.

PW2 was Mohamed Hussein Abdi a technician who lived at Dagahaley. It was his evidence that on the 17<sup>th</sup> November 2014 at 7.30 pm he went to the deceased house to buy miraa and when he came out, he heard gun shots and another person informed him that Abdi is the person from whom he bought miraa, was shot.

In the morning, together with other neighbours they divided themselves in two groups; one for burial of the deceased and one to pursue shoe prints. He was in the group that followed the shoe print for about nine miles where they found that some shoe prints had been erased using tree branches. They however followed shoe prints to the house of the 1<sup>st</sup> accused Nur and then to his farm where they found him chewing miraa. According to this witness, the 1<sup>st</sup> accused wore a shirt with a left sleeve which had blood stains and had blood stains on his face. The 1<sup>st</sup> accused said the blood stains were from animals he was hunting the previous night. According to this witness they interrogated the 1<sup>st</sup> accused but he refused to name his accomplices. This witness did not know the 2<sup>nd</sup> accused or how he was arrested.

PW3 was Police Constable Allan Michael Ochieno. It was his evidence that on 18<sup>th</sup> November 2014 at

9.00am while at the CID Office in Dadaab he received instructions from Corporal Nganga now deceased, to join other police officers and proceed to Weldon in Dadaab sub-county as members of the public had arrested someone. They proceeded there and the suspect the 1<sup>st</sup> accused was handed over to them. They interrogated the 1<sup>st</sup> accused and on 21<sup>st</sup> November 2014 he led the police to his home where he had said he had a firearm. He pointed at a place under a tree and they dug the ground and found an AK 47 rifle with 1 round of ammunition covered in a white polythene paper inside a black cloth. This witness stated that they did not carry out further investigations. He merely identified the recovered items.

In cross examination, he stated that the 1<sup>st</sup> accused took them to his home twice. The first time they did not recover anything.

PW4 was Inspector Halkano Idris of Ifo Police Station Dagahaley Patrol Base. It was his evidence that on 19<sup>th</sup> November, 2014 at 6.00am he was at the Dadaab Police Patrol base when they received information of somebody hiding at Dagahaley Refugee Camp block H9. They proceeded there with others and they were shown the house by an informer. They condoned the house at 4.00pm. They hit one of the two iron sheet doors which fell down and the suspect tried to run away through the other door but he fired in the air and the suspect stopped and surrendered. They then took him back to the house and saw a woman with children. The woman said that they lived together in a come we stay relationship. They searched the house for weapons but did not find any. They arrested the suspect who was Shaban the 2<sup>nd</sup> accused.

In cross examination he confirmed that 2<sup>nd</sup> accused was not found in possession of any weapon.

PW5 was Corporal Kenedy Karanja. It was his evidence that in 2014, he was attached to the Dadaab ATPU Office and that he was currently at JKIA Nairobi.

On 17<sup>th</sup> November 2014, while at Dadaab ATPU Office, they received news of a shooting incident and proceeded to the scene where they found the body of a man at the entrance of the house compound and a spent cartridge nearby which they recovered. He stated that postmortem examination was conducted on the body on the 18<sup>th</sup> November, 2014. It was his further evidence that later they received information through a phone call and proceeded to Weldon about 10km from Hagadera and arrested Nur the 1<sup>st</sup> accused. According to him, the 1<sup>st</sup> accused pointed at a place in Gidue area where he said there was a gun but nothing was recovered.

On 19<sup>th</sup> of November 2014, the 1<sup>st</sup> accused confessed the offence in a cautionary statement and implicated Shaban 2<sup>nd</sup> accused and another. Later Shaban Issack was arrested 14km from Dadaab. According to this witness also, Shaban said that Nur the 1<sup>st</sup> accused was the person who shot the deceased.

Again according to this witness, on 21<sup>st</sup> November, 2014 Nur led the police to his compound where a rifle and one round ammunition was found in the rifle magazine. He testified that he was aware that photographs of the scene were taken together with photographs of the deceased. The witness also stated that an exhibit memo form forwarded the rifle, firearm and cartridge to the Government Analyst and he received the report. He also received the postmortem form. He produced the photographs which he said were taken by a scene of crime officer. He also produced the Government Analyst report as well the postmortem report. He lastly produced the gun and spent cartridge and magazine.

When put on their defences, the accused persons gave sworn testimonies. The 1<sup>st</sup> accused Nur said that he was aged 38 years, married with 5 children and lived at Weldon which was far from Hagadela Refugee Camp. He stated that on 17<sup>th</sup> November, 2014 he was at Weldon and did not go to Hagadera. He denied committing the offence and said that the police arrested him in a hotel where he was taking a meal and denied that he was arrested by the public and handed over to the police. He denied knowledge of the gun and ammunition.

The 2<sup>nd</sup> accused Shaban also gave sworn testimony. He stated that he was 45 years of age, married two wives with four children but had divorced one wife. It was his defence that on 19<sup>th</sup> November, 2014 he was at home with his family when he heard a knock on the door and the police entered and arrested him. He denied knowledge of the 1<sup>st</sup> accused and stated that the gun did not belong to him. He stated that the case was a frame up.

That is the evidence of the prosecution under defence.

Following the closure of the defence case, defence counsel Mr. Nyaga made submissions. Counsel gave a summary of the evidence on record and stated that the prosecution had not proved its case against any of the accused persons beyond reasonable doubt.

The prosecuting counsel Mr. Okemwa, in his submissions maintained that the prosecution had proved all the required ingredients for the offence of murder against the two accused persons.

This is a case of murder. In every criminal case, the burden is always of the prosecution to prove its case against an accused person beyond any reasonable doubt. An accused person does not have a burden to prove his innocence. See the case of WOOLMINGTON -VS -DPP (1935) AC 462 and the case of LEONARD ANISETH -VS-REPUBLIC (1963) EA 206. In the case of LEONARD ANISETH, the court stated that an accused does not have a burden to prove a defence of alibi.

The prosecution was required to prove all the ingredients of the offence of murder beyond reasonable doubt. In a murder case, the prosecution is required to prove firstly the death of the deceased. Secondly, the prosecution is required to prove that the death was caused by the accused person. Thirdly, the prosecution is required to prove that the death was unlawful. Fourthly, if the death is proved to have been caused by the accused person and is unlawful the prosecution has to prove that the death was caused with malice and forethought.

In the present case, did the deceased die? I have considered the evidence on record. PW1 the wife of the deceased and all other prosecution witnesses claim that the deceased died. He was shot dead in the early hours of a night outside his compound. The postmortem report was not produced by the doctor who carried out the postmortem examination but by a Police Officer PW5.

On the totality of the evidence on record, I have no doubt that the deceased died and that he was killed though a gun shot. The prosecution has thus proved beyond reasonable doubt that indeed the deceased died on 17<sup>th</sup> November, 2014 after being shot dead.

Was the death caused by the accused persons? PW1 the wife of the deceased who saw three assailants who robbed her and Abdi PW2 before killing her husband outside the compound, said it was dark and she could not identify or recognize any of the attackers. PW2 who was in the same compound did not mention that he recognized any of the attackers. No other witness said that he recognized or identified any of the attackers.

The next day PW2 in the group of people went on tracing shoe marks for about 9km and they arrested the 1<sup>st</sup> accused while eating miraa in his farm. PW2 said that the 1<sup>st</sup> accused had a blood stained shirt and face. However there is no further evidence from any witness on the blood stains. The 1<sup>st</sup> accused was said to have admitted or confessed to the offence and implicated the 2<sup>nd</sup> accused. This is according to the police evidence. However, the alleged confession statement was not produced in court nor was it even referred to. The same 1<sup>st</sup> accused was said by the police to have taken them to his home where he showed them a gun which they recovered. The evidence on the recovery of this gun in my view is highly suspect. It is not uncommon in the pastoral area for people to possess guns sometimes for illegal purposes. The possession of gun alone does not mean that the possessor is the person who killed the deceased herein. In any event the evidence of the Government Analyst report was produced by a police officer without the Government Analyst and in rather casual manner. The 1<sup>st</sup> accused denied possession of the gun.

In my view therefore, the prosecution was not able to establish that the 1st accused was connected to the death of the deceased. His evidence that he was arrested in a hotel by the police was unshaken. Secondly, the police should have atleast called another witness in addition to Abdi to come and testify on how they tracked and arrested the 1st accused. Who knows Abdi who claims to have been outside of the deceaseds at the time of the shooting, might have been involved in that shooting?

The 2nd accused was arrested on the information of an informer. There is a contradiction in the police evidence that the 1st accused was the one who identified the 2nd accused on the one hand, and another version that an informer is the one who pointed at the house where the 2<sup>nd</sup> accused was found. In my view, in this case, it was necessary for the prosecution to have called the informer to testify as they did not find the 2<sup>nd</sup> accused with anything that could possibly connect him to the death of the deceased. The fact that he was running away to escape when one door to his house was kicked open was merely natural because he did not know the identity of the person who had kicked the door open and what his motive was. It is also said that he implicated the 1st accused as the person who shot the deceased. Again his statement was not relied upon nor was it produced in court.

Thus find that the prosecution has failed to prove that the 2nd accused caused the death of the deceased.

With regard to whether the death itself was unlawful, in my view the prosecution has proved beyond any reasonable doubt that the death of the deceased was unlawful. No justifiable reasons have been suggested as to why he was shot dead just outside his homestead. I thus find that the prosecution has proved that whoever caused the death of the deceased did so unlawfully.

With regard to malice and forethought, having found that the two accused persons did not cause the death of the deceased, I will also find that no malice and forethought was proved against any of them.

In the result, I find that the prosecution failed to prove the charge of murder against any of the 2 accused persons. I find them not guilty of the offence and acquit under Section 215 of the Criminal Procedure Code.

**Dated and delivered at Garissa on 27<sup>th</sup> July, 2017.**

**GEORGE DULU**

**JUDGE**