



REPUBLIC OF KENYA

IN THE HIGH COURT

AT GARISSA

CRIMINAL CASE NO. 4 OF 2011

FORMERLY NRB HCR NO. 21 OF 2009

REPUBLIC..... PROSECUTOR

V E R S U S

HUSSEIN HASSAN ABDULLAH.....ACCUSED

JUDGMENT

The accused Hussein Hassan Abdullah 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 11th February 2009 at Seretho Trading Centre in Lagdera District within North Eastern Province murdered Aden Sangweine Bare. He has denied the charge.

In support of their case, the prosecution called 7 witnesses, though the numbering in the trial proceedings indicate that they were 8 witnesses.

The accused was initially charged in Nairobi in 2009 before the case was transferred to Garissa in 2011, after a High Court station was opened in Garissa.

PW1 was Paul Cheryoit Nikwot a nurse at Seretho Health Centre. It was his evidence that on 11th February 2009 at about 2.00 am, he was woken up by people who asked him to go to the Health Centre to attend to a patient. He proceeded there and found a person who was bleeding from the head, nose and the ears. He provided first aid and recommended that the patient be transferred to Dadaab Sub District hospital for further treatment. He escorted the patient to Dadaab hospital and left him there in critical condition.

He later learnt that the patient had been transferred to Garissa Provincial General hospital for treatment, but died on the way. He stated that he knew the accused before incident and had information that the accused was not mentally normal, as he used to chew miraa and smoke bhang. According to him, the accused was a camel herder.

In cross examination, he stated that he was woken up at night by Warsame who told him that the injured person had been beaten by Abdullahi. He stated that he had known the deceased for 4 months and that he was aware that the accused walked aimlessly both during the day and night, and did not sleep. He stated that he was one of the people who found the accused in his house with a metal bar.

PW2 was Abdi Hussen Buko a livestock broker at Garissa market. He stated that the deceased was his

nephew and that on 11th February 2009, he received information that the deceased had been killed. He received the body at Garissa Provincial General Hospital.

In cross examination, he stated that he identified the body of the deceased to the doctor.

PW3 was Warsame a pump attendant at Seretho location borehole. It was his evidence that on 11th February 2009 at 1.00 am, he was on duty giving water to camels at the borehole when Hussein Ibrahim put off the power. Shortly thereafter, he heard the sound as if something was hitting something else and saw people and camels escape. When he approached the scene, he noticed that one person had been injured and was bleeding while lying down on the sand.

Together with others, they followed footsteps and then came back and took the injured person to Hussein before continuing following the footprints.

After a distance, they flashed a torch and saw someone carrying a metal bar. That person then entered a homestead, but they shouted and arrested him and informed the chief about the incident. Together with the chief they took the injured person to hospital at Seretho, but he did not go to Dadaab.

He knew the accused as a camel herder. He was however not able to identify the accused in court because his eye sight was bad. He was even taken round the court to identify the accused, but could not identify anybody.

In cross examination, he stated that the hitting noise appeared to be like the hitting of plastic containers. He however he did not hear anyone shout during the hitting. He maintained that he saw someone fall and another ran away, though he did not witness the assault on the deceased. At the scene, he observed that the person who was on the ground had a loose neck. He confirmed that it was a dark night but said that they followed footprints to the house of Ismael who entered that house. He stated that he knew both the accused and the injured person before. According to him, the injured person was also a cattle herder.

In re-examination, he stated that he saw the person who entered Ismael's house two days earlier, and maintained that there was no moonlight that night.

PW4 was Police Constable Zakayo Ajachi. It was his evidence that on 11th February 2009 at 5.30 am, while at Dadaab Police Station, he received information that there had occurred a serious assault and that the area chief Mr. Barre and a Clinical Officer had escorted the injured person to hospital. According to him, the information was that the injured person had injuries on the head with heavy bleeding.

He proceeded to the scene and found many people, including the suspect whom the public had arrested. At 9.30 am, he proceeded to Dadaab Health Centre to check the condition of the injured person and found that he had been recommended to be transferred to Garissa Provincial General Hospital. At midday, the chief called him on the telephone to say that the injured person had died on the way to Garissa.

He interviewed many people who led him to the accused's house and recovered an iron bar. According to him, the accused's house was about 100 metres away from the scene. He recorded witness statements.

In cross examination, he stated that the scene was not disturbed and that nobody witnessed the incident. He noted no blood stains on the metal rod but insisted that the injuries suffered by the deceased were consistent with the use of the metal rod as the weapon. He said that he was showed the accused's house by the accused's father. He said that the clothes of the deceased were blood stained.

In re-examination, he stated that he worked hand in hand with the investigating officer and that the Clinical Officer referred the deceased to Dadaab hospital.

PW5 was PC Ezaekiel Kamau. He was sworn but was immediately stepped down because he was expected to testify regarding mental assessment of the accused person.

PW6 was Hussein Ibrahim Ahmed. It was his evidence that he was at Seretho at 2.30 am with Warsame Usher, when they heard noise from the camel drinking place where a man had died. They rushed to the scene of the noise and found Aden Shangwein lying down with injuries and bleeding. According to this witness, there was moonlight that night. They called the area chief and informed him of the incident.

He stated that the people who shouted that someone had been killed disappeared and that he did not witness the assault. He later met people who had arrested the accused.

He accompanied the deceased to hospital. He knew the accused before as a neighbour. It was his evidence that he visited the home of the deceased later for Maslaha (Somali customary mediation) discussion to resolve the issue customary. He confirmed that he saw the police carrying a metal bar.

In cross examination, he stated that he worked at Seretho watering point. He stated also that he found the deceased lying on the ground alone. Though he saw an iron bar, he did not know those who arrested the accused and recovered the iron bar. He also did not know the person who attacked the deceased.

PW7 was Dr. Julius Rogena Angwata of Garissa Provincial General Hospital. It was his evidence that on 11th February 2009, he examined the body of the deceased. He found two deep cut wounds on the scalp. The scalp was fractured. The upper spine of the head 2nd and 3rd column was fractured or twisted. He came to the opinion that the injuries were caused by a sharp and heavy object. He stated that severing the spinal code could cause instant death. He produced post mortem form as an exhibit.

In cross examination, he stated that the cause of death was due to a scalp fracture with a severed spinal code.

That was the end of the prosecution case.

When put on his defence, the appellant gave unsworn testimony. He stated that he was Hussein Hassan and that he was arrested at Seretho while unconscious. He was later told that he had killed somebody. He stated that he did not know if he had killed somebody and denied killing anybody.

He did not call any witness.

At the end of the testimony of both witnesses for the Republic and the accused, counsel on both sides made oral submissions. The submissions were on proof of the offence as well as the issue of the mental status of the accused person.

This is a case of murder contrary to section 203 as read with section 204 of the Penal Code. The prosecution alleged that the accused killed the deceased or murdered him. The accused denied committing the offence.

In criminal cases, the burden is always on the prosecution to prove an accused person guilty of the offence charged beyond any reasonable doubt. The accused does not have a burden to prove his innocence. He can only raise or creates doubts in the prosecution case. See the case of **Woolmington - vs- DPP (1932)AC 462**.

In a murder case the prosecution is required to prove three main ingredients. Firstly, whether the deceased died. Secondly, whether the death was caused by the accused person. Thirdly, whether if the death was caused by the accused person, it was unlawful and caused with malice aforethought.

Did the deceased die? The evidence from the prosecution witnesses is that on that night of 11th February 2009, the deceased was found lying unconscious at Seretho Location livestock watering point, with serious injuries on the head and the neck. He was bleeding profusely through the mouth, nose and ears. His neck was loose. He was taken to Seretho health clinic given first aid and, later transferred to Dadaab Sub District Hospital where it was recommended that he be transferred to Garissa Provincial General Hospital. On the way to Garissa General Hospital, he died. PW7 Dr. Rogena conducted postmortem

examination shortly after the death on 11/2/2009. He produced the post mortem form as prosecution exhibit 2. He found the cause of death to be a depressed skull fracture with severed cervical spinal code. In my view, the prosecution has proved beyond any reasonable doubt, that the deceased died of severe injuries in the head and neck (spinal code).

Was the death of the deceased caused by the accused? No one testified to having witnessed the hitting of the deceased by the accused. The people who were said to be where the deceased was hit disappeared and none of them came to testify in court.

PW6 Hussein Ibrahim Ahmed was clear on this when he stated that the people who shouted that someone had been killed disappeared. Though he was near the scene together with PW3 Warsame Usher, none of them witnessed the incident.

The prosecution has maintained that a metal bar was used by the accused to hit the deceased. The evidence on the recovery of the metal bar is not particularly clear. PW3 Warsame Usher stated, that it was a dark night and that after following footsteps using a torch, they saw someone carrying a metal bar who entered a homestead and was arrested. Though this witness said that he knew the accused, he was not able to identify the accused in court when he was taken round. The prosecution did not show when he became blind. No mention of the bar.

The police PW4 P C Zakango Ajanja said that they recovered the metal bar was recovered from the house. That metal bar was not taken to the Government Chemist to find whether there were any traces of blood or human matter on it. It is my opinion that, if indeed that metal bar was used to hit the deceased some human blood or traces of human flesh would have been found on the metal bar. This was not ascertained by sending the metal bar to the Government Chemist for examination.

The prosecution is relying on circumstantial evidence, as there is no eye witness to the incidence.

When the prosecution relies on circumstantial evidence to support their case, the legal requirement is that they tender evidence from which the court will be persuaded that there is no other hypothesis than that it is the accused who caused the death of the deceased. There should be no room for another inference. Once they leave loopholes, creating a possibility of another hypothesis than the guilt of the accused, then the benefit of that doubt has to be given to the accused.

I am aware that in this part of country, attempts are usually made to settle traditionally even cases of murder. However the prosecution through the police has not come up with any evidence that such an arrangement militated against their obtaining or calling evidence to prove their case. The only person who visually connects the accused to the offence was PW3 Warsame. He said that he saw the accused in the light of a torch as they followed footsteps shortly after the incident carrying a metal bar.

A conviction in a criminal, case, can be safely founded on the evidence of a single witness In the case of **ABDALLA BIN WENDO AND ANOTHER –vs- R (1953), 20 EACA 166** the defiant East African Court of Appeal held as follows:-

“subject to well known exceptions, it is trite law that a fact maybe proved by the testimony of single witness but this rule does not lessen the need for treating with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring correct identification were difficult”.

In the later case of **NZARO –vs- R (1991) KLR 70** the Court of Appeal stated as follows:-

“whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the Judge should warn the jury (himself) of the special need for caution before convicting the accused person in reliance on the correctness of the identification or identifications”.

The accused herein has denied that he committed the offence. In effect he denied the identification by the single witness.

In my view, the circumstances of the identification were difficult, that being a dark night. In addition, the only witness who claimed to have seen the accused while tracing footsteps that night was totally not able to identify the accused in court. Assuming he was blind, the prosecution did not try to show when he became blind. It cannot thus be said with certainty that he saw and identified the accused that night carrying a metal bar. Secondly, the metal bar which was produced by the prosecution in court was not taken to the Government Analyst to confirm whether it had any traces of blood stains or human flesh that could connect it to the killing of the deceased.

Having warned myself that this is a case based on circumstantial evidence, and that the evidence of the only witness who said he saw the accused shortly after the incident carrying a metal bar is shaky, I am of the view that the accused might just have been arrested from his nearby house because he had a history of being mentally unstable.

The fact that the accused has been behaving in an usual ways in the locality, in the past after having abused miraa and bhang for a long time, as stated before commencement of the trial by Dr. Mucheru who was not a witness in the case, is not sufficient to connect him with the death of the deceased. The fact that a metal bar was found in his homestead, even if it was true does not, prove that the accused hit the deceased or that that metal bar was used in the assault.

In my view, the prosecution evidence on record falls for short of proving that indeed the accused person caused the death of the deceased.

Submissions have been made on the mental status of the accused. The defence did not pursue a line of defence of insanity or lunacy under section 166 of the Criminal Procedure Code (Cap. 75). Though the accused might have some low moments in his mental perception of things, due to his use of miraa and bhang, in my view this court cannot and should not make any order against him on the basis of his alleged mental status. In my view he understood the proceedings and is better treated as a patient in hospital to cure his drug dependency condition. His relatives can take him to hospital. No order will thus come from this court on his mental status.

As for malice aforethought, since I have found that the accused did not cause the death of the deceased, as the prosecution did not provide sufficient evidence to support that contention, I find also that malice aforethought was not proved by the prosecution.

In conclusion, I find that the prosecution has not discharged its burden of proving their case of murder against the accused beyond reasonable doubt. The accused is thus entitled to an acquittal, and I acquit him accordingly of the offence of murder under section 215 of the Criminal Procedure Code (cap.75).

Dated and delivered at Garissa this 31st day of May 2016.

GEORGE DULU

JUDGE