



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 90 OF 2013

LESIT, J.

REPUBLIC.....PROSECUTOR

VERSUS

ABDULAHI NOOR MOHAMED alias ARAB.....ACCUSED

JUDGMENT

1. The accused **ABDULAHI NOOR MOHAMED ALIAS ARAB** is charged with one count of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are:

“On the 24th day of June 2013 along Jam Street, Eastleigh Estate, Kamukunji District within Nairobi County murdered ABDIFATAH SHARIF MOHAMED”.

2. The prosecution called a total of 4 witnesses.

3. In summary the prosecution case was that on the material day the deceased was walking along Jam Street in Eastleigh in the company of PW1 and PW2, at about 6.30 p.m. when they came across a robbery. It was one youth being accosted by 3 youths.

4. The victim of the robbery called out the deceased by name to assist him. The deceased immediately crossed the road to assist the victim as the three youths struggled to take the mobile phone from him.

5. According to PW1 and 2, the deceased told the assailants to let go of their victim. The two witnesses testified that the accused reacted to the deceased asking him if he knew everyone in Eastleigh. The moment the deceased reached the group the accused who had a dagger in his hand stabbed him once on the left side of the chest. The deceased then retreated as PW1 and 2 picked stones to throw at the three youths. PW 1 chased the trio but they ran away.

6. PW2 and other members of the public helped take deceased to a nearby clinic where they were referred to a hospital. The deceased was pronounced dead same day at Aga Khan Hospital where he had been rushed for treatment.

7. The doctor who carried out a post mortem exam of the deceased, without opening up the body, formed the opinion that the cause of death was extrangulation due to a single stab wound by a sharp object. The doctor, PW4, observed that the body of the deceased was very pale an indication of excessive bleeding.

8. The accused was placed on his defence. He gave a sworn defence. He stated that he was employed in a clothes shop in Jam Street Eastleigh and lived with his younger sister in the same area. The accused

said that on the day in question he was at the shop working until 4.30 p.m. when he was relieved. He then went to play football, after which he carried his shoes to return to his place.

9. The accused stated that along the road he saw some youth fighting and he recognized one of them. He decided to go and assist the one he had recognized who is the deceased in this case. The accused stated that he had known the deceased for 3 or 4 years. The accused said that he held the deceased and pulled him out of the fight. He said that upon pulling him, he noticed that he was bleeding from his left chest but that it was not a lot of blood.

10. The accused denied stabbing the deceased and said instead that the deceased informed him that he was injured by the man he was fighting with and dismissed the wound as not serious and said he did not require to go to hospital. He also said he knew PW1 before and said he was not at the scene. He said PW2 was not there either.

11. I have considered the evidence adduced by both the prosecution and defence in this case. I also considered submissions by Ms. Onyinkwa on behalf of the defence and Ms Gichuki on behalf of the State.

12. Having considered the evidence adduced by both sides and the submissions by both counsels the issues which arise in this case are:

(i) Whether the prosecution has adduced evidence to establish who stabbed the deceased.

(ii) Whether malice aforethought was proved.

(iii) Whether failure to recover the murder weapon is fatal to the prosecution case.

(iv) Whether prosecution failed to call crucial witnesses and if so whether it is fatal to the prosecution case.

13. The prosecution has the burden of proof In this case, to prove case against the accused beyond reasonable doubt. The accused faces a charge of murder contrary to section 203 of the Penal Code. That section defines the offence of murder as follows:

“203. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

14. The prosecution must prove that the accused, by some unlawful act or omission caused injury to the deceased and that the deceased died as a result of those injuries. The prosecution must prove that at the time the accused committed the act or omission, he had formed the intention to either cause death or grievous harm. In this case the prosecution is relying on the fact that the accused stabbed the deceased with a dagger or knife. The prosecution should prove that at the time the deceased stabbed the deceased he had the malice aforethought to cause the deceased death or grievous harm.

15. Section 206 of the Penal Code sets out the circumstances that would constitute malice aforethought as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily

harm is caused or not, or by a wish that it may not be caused;

c) an intent to commit a felony;

d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

16. The prosecution called two eye witnesses of the incident in this case, PW1 and 2. Their evidence was to the effect that they were with the deceased going for supper when they came across a group of four people. Three of them identified as youths were accosting the fourth one trying to rob him of his mobile phone. That fourth one, hereinafter referred to as the victim, called out the deceased by name and in the Somali language requested him for help. It is when the deceased went to the aid of the victim that the accused, one of the three youths turned and stabbed him once in the chest asking in Somali language whether he knew everyone in Eastleigh.

17. The accused in his sworn defence has denied the charge and has said that he was not the one who stabbed the deceased, but that by the time he came to the scene, the deceased had already been injured.

18. The issue then is whether the accused was properly identified as the one who stabbed the deceased? In the case of **CLEOPHAS OTIENO WAMUNGA vs. REPUBLIC 1989 eKLR** it was held:

“What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”

19. I have considered the circumstances of the identification of the accused in this case. There are two identifying witnesses as stated earlier, PW1 and 2. PW1 said that he knew the accused before this incident having met him at the local mosque since 2009. The incident took place in 2013, a period of four years since PW1 started seeing the accused. PW1 also said he knew him not just by facial appearance but also by his nick name “Arab”. The accused in defence admitted he knew PW1 before the incident. The evidence of identification by PW1 was therefore that of recognition but more importantly, the accused himself admitted that they both knew each other before this incident.

20. PW2 on his part said that at the time of the incident there were street lights on in the street and that at a shop near the scene of incident had bright tube bulb lights on. PW2 also said that there were many shops with their lights on both sides of the road. PW2 also stated that the deceased, him and PW1 were the only other persons on the street apart from the victim, the accused and his two accomplices. He said that one could clearly see the people and the incident.

21. Regarding the accused, PW2 testified that he had seen him one week before the incident in Jam Street. PW2 testified that he was with the deceased in Jam Street at the time when they met the accused in a house. That house was also where the accused was living. He said that the moment they entered the house and the accused saw the deceased he greeted him with a lot of familiarity and he concluded that they knew each other before this incident.

22. I did consider the evidence of PW1 and 2 and also the accused statement in regard to the conditions of lighting at the scene of incident. I am satisfied that the conditions of lighting were good for a positive identification. The natural lighting was poor. However the other sources of lighting from electric bulbs in the shops nearby enabled a positive identification at the time of incident. The accused in defence admits that the lighting at the scene was sufficient to enable identification.

23. For PW2 having seen the accused person once before, an ID parade should have been organized for him to identify the accused. His evidence needed to be corroborated with other evidence implicating the accused with the offence. I find that corroboration in the evidence of PW1.

24. The accused claims that when he pulled out the deceased from the mob where he was involved in a fight, he noted slight bleeding on deceased chest. The accused claimed that the deceased was okay and even told him that he did not require to be treated. The accused in his defence admits part of the facts of the prosecution case. He admits that he was at the scene at the time of the incident. The accused also admitted the conditions of light at the scene as described by both PW1 and 2. He admitted it was about 6.30 p.m. He also admitted that even though it was beginning to be dark, it was not so dark as to prevent someone to identify another. The accused admitted that there was other sources of lights being electric lights from nearby shops which illuminated the place.

25. The accused however denies stabbing the deceased but said the contact he had with him was to pull him out of the fight. He said that the deceased was his friend of four years and that he was helping him.

26. PW2, who remained at the scene after the deceased was attacked, clearly shows that the deceased was unconscious and therefore in a critical condition. Secondly PW2 testified that the deceased was rushed to see a doctor immediately after the attack. Less than an hour later, he was pronounced dead. What the accused claims that the deceased was okay soon after the attack and that the deceased spoke to him assuring him that he did not need to go to hospital is far from the truth.

27. Having considered the evidence of PW1 and 2 I am satisfied that the accused was positively identified as the one who stabbed the deceased causing his death. The accused admitted being at the scene but denied stabbing the deceased. I find his defence was a bare denial, he was clearly seen and identified as the one who stabbed the deceased once in the chest. The accused defence that his contact with accused was both friendly and helpful to the deceased was not true.

28. I am satisfied that the prosecution has adduced sufficient evidence to prove that the accused was at the scene of the robbery against the victim and that he stabbed the deceased to prevent him from assisting the victim from being robbed.

29. The next issue is whether malice aforethought was proved. Malice aforethought is said to be proved where the evidence adduced establishes that there was an intent to commit a felony and in the execution of that intent death is caused. This is provided under **section 206(c) of Penal Code**. I find that the evidence adduced by the prosecution clearly proved that the accused and his accomplices were in the process of committing a robbery, and that in the execution of the robbery the deceased was stabbed in order to prevent resistance to the robbery. The offence falls under **section 206 (c) of the Penal Code**.

30. The murder weapon in this case was never recovered. Issue is whether that is fatal to the prosecution case? The evidence of the investigating officer CPL Owour PW3 was to the effect that he came into the case on 30th August 2013. This was two months after the incident. His evidence was that he was asked to investigate the case by the DCIO and so being a CID Flying Squad Officer he took over the file from Pangani Police Station. By then the accused was in police custody.

31. PW3 testified that he visited the accused house and did not recover any weapons. There is no evidence of who arrested the accused or when he arrested him. There is no information to indicate whether the arresting officer tried to recover the murder weapon. It is desirable that a murder weapon is recovered. In this case the prosecution failed to adduce evidence of arrest in order for the court to draw a conclusion whether effort to recover the weapon should have reasonably been made. That notwithstanding, I find that lack of a murder weapon does not affect the prosecution case, given the circumstances of the case.

32. The other issue is whether the prosecution failed to call crucial witnesses? Regarding witnesses **BUKENYA & OTHERS 1972 EA 542** LUTTA Ag. VICE PRESIDENT held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

33. Yes there were crucial witnesses not called to testify. The first is the victim of the robbery. He ought to have been called as a witness. It is clear that the victim was known by the deceased and that he is the one who invited the deceased to assist him from being robbed. PW1 and 2 did not know the victim before. It is the victim who should have shown interest to follow the police in order to give his statement. He appears to have gone underground. From that evidence, I find it difficult to draw an adverse inference against the prosecution for the failure to avail this witness.

34. The other witness was the initial investigating officer in the case. I have already stated that his evidence was missing. It was crucial evidence. He ought to have been availed to speak about the investigations he carried out and also how, where and when he arrested the accused.

35. Failure to call him does not weaken the prosecution case since the one who took over from him, PW3 testified and said his bit. This is the officer who completed the investigations and charged the accused with this offence gave evidence. Even though his predecessor was not called as a witness, it is my view that no prejudice has been suffered by the defence, and further the evidence adduced was sufficient to establish the truth in this case.

36. Before I end, I must mention that it took long for the court to deliver judgment. An application was filed by the defence seeking to be allowed to enter into plea bargaining. This was after the entire case was heard, submissions made and a judgment date set for the case. The court stayed the judgment and allowed the defence to argue the application.

37. After hearing the arguments on both sides, I wrote a ruling in which I dismissed the application. The following is an excerpt of the ruling of this court:

“It is well within the constitutional powers of the Director of Public Prosecutions to undertake criminal proceedings, and he enjoys autonomy in exercise of this function.

A crime is an injury not only against the affected individual(s) but also against the society. Offences are prosecuted by the state, which in so doing protects the social rights of all citizens. Therefore, at a minimum, the prosecution should be consulted before having the reconciliation agreements and customary laws applied in resolving criminal cases. In this case, the prosecution turned down any an offer by the accused to negotiate a plea agreement proposal. By asking this court to enforce an arrangement between the accused and the family of the accused, to the exclusion of the prosecution amounts to a disregard of the law on the exercise of prosecutorial powers. That cannot be the object envisioned under Article 159 when recognizing alternative justice systems as one of the principles to be promoted by courts when exercising judicial authority. Application of alternative dispute resolution mechanisms must be consistent with the Constitution and the written law of the land.

The Director of Public Prosecutions is the custodian of prosecutorial powers. Prosecution of offences is a public policy concern, and in preserving this power to preserve the public interest, he cannot be by passed in negotiations concerning charges against an accused person. As it was stated in the case of Gregory & Another v Republic thro’ Nottingham & 2 Others [2004] 1KLR 547:

‘The process of the criminal law is a vital aspect of the administration of justice, and is one of the key spheres of public policy and public interest, in the overall conduct of national governance. In this domain of the public interest, we believe, the dictates of public order

would require that the Attorney – General should function as the primary decision – maker, of course, subject to the legislative directions of the Parliament and the oversight of the High Court.

...the conduct of criminal prosecutions is always a matter of public interest. Therefore, the Attorney-General who is responsible for the conduct of public prosecution in the name of the Republic, is under a duty to safeguard the public interest as he manages the prosecutorial process. It is equally clear from the submissions of counsel, and from the authorities referred to, that the private individual is not in general to be regarded as the custodian of the public interest.’

Following the promulgation of the Constitution, 2010, this power lies with the Director of Public Prosecutions.

The Constitution and the written laws recognize alternative dispute resolution and traditional dispute resolution mechanisms as means of enhancing justice. The court does appreciate the good will of the accused family and that of the deceased in their quest to have the matter settled out of court. The charge against the accused is a felony and as such reconciliation as a form of settling the proceedings is prohibited. Furthermore, this request is being made too late in the day, when the case has been heard to its conclusion. For these reasons I find that the application lacks merit. The application is therefore disallowed.”

38. In conclusion, having considered the entire evidence adduced by the prosecution in this case, I am satisfied that there is no dispute that the accused was at the scene of the incident at the time of the incident. I am satisfied from the evidence adduced that the accused stabbed the deceased with the clear intention of one, preventing the deceased from resisting the robbery of a mobile phone from the victim of the robbery. Secondly, it was to aid the accused accomplices complete the robbery. I am satisfied beyond any reasonable doubt that it is the accused who stabbed the deceased.

39. I am satisfied that the prosecution has established on the required standard that at the time the accused stabbed the deceased, he had formed the intention to either cause death or grievous harm to him. I find that malice aforethought was therefore proved under **section 206(c)** of the **Penal Code**.

40. I accordingly reject the accused defence, find accused guilty of murder contrary to **section 203** of the **Penal Code** under **section 322** of the **Criminal Procedure Code**. I convict the accused of the offence charged.

DATED AT NAIROBI THIS 21st DAY OF September, 2016.

LESIIT, J.

JUDGE