



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 8 OF 2012**

**FORMERLY HIGH COURT OF KENYA AT NAIROBI CRIMINAL CASE NO. 23 OF 2011**

REPUBLIC.....

PROSECUTOR

VERSUS

AHMED IBRAHIM FARAH.....ACCUSED

**JUDGEMENT**

**Background**

Ahmed Ibrahim Farah, the accused, is charged with murder contrary to section 203 read with section 204 of the Penal Code. It is alleged that on the 7<sup>th</sup> day of March 2011 at Baraki Village in Modogashe Division within Garissa County he murdered Abshira Moulid Hussein.

The case was filed in the High Court of Kenya at Nairobi but the trial did not commence there. The file was transferred to Garissa in February 2012. The trial commenced on 12<sup>th</sup> July 2012 and at the conclusion of the trial the prosecution had called a total of five witnesses.

**Evidence**

Abshira Moulid Hussein, the deceased, was hacked to death as she slept. On the night in question, 7<sup>th</sup> March 2011, the deceased and her two children were sharing the room with Farhiya Sugow Abdi, PW1. The deceased was accused person's wife and PW1 is step mother to the accused. According to PW1, the deceased was scared of her husband the accused whom PW1 referred to as a mad man. According to the evidence of PW1 the deceased was killed as they slept and she did not know who had killed her. This witness gave the prosecution serious challenges. She was stepped down and when she was recalled the prosecutor applied to have her declared hostile in order to enable him to cross-examine her. Even this did not help the prosecution as the witness denied recording a statement with the police pleading illiteracy.

At first PW1 told the court that while asleep she was woken up by the noise from the deceased's two children and found the deceased having been 'slaughtered'. On her being recalled she repeated that she woke up to find the deceased dead. On being cross examined by the learned State Counsel, PW1 pleaded that she was illiterate and did not know how to read or write. She denied telling police that the accused had entered the room she was sharing with the deceased. She denied telling the police that she heard the accused slashing the deceased. She denied recording any statement with the police. The learned State Counsel did not produce the PW1's statement as an exhibit and therefore this court is not able to compare her evidence with the statement.

Ibrahim Hiluale Bille, PW2, is the father of the accused and husband to PW1. He testified that he found the deceased dead and did not know who had killed her. He said he found the deceased having been removed from the house and placed outside. He said he saw a cut at the back of the deceased's neck.

He testified further that the deceased was mentally unstable and had been tied up in front of his house on the night in question; that he called his daughter to inject him with some medicine to calm him down but he did not know what happened. He said he did not know if the accused broke the rope. The name of the daughter who injected the accused was not given nor the drug used disclosed.

No. 59136 Acting Inspector of Police Charles Omusi, PW3, received the report of the death of the deceased on the morning of 7<sup>th</sup> March 2011 at 7.00am from the Chief of Gorofa Location in Modogashe. In Company of No. 74943 Police Constable Raphael Wangema, PW4, and Corporal Komora (not a witness) and other police officers PW3 visited the scene. He found the deceased lying on a bed inside a house. PW3 noticed three cut wounds at the back of the deceased's neck. He also found the accused having been arrested by members of the public and a blood stained panga (exhibit 1) allegedly used to inflict the fatal wounds on the deceased was handed over to the police. The body was collected and taken to Modogashe Hospital for post mortem and the accused was taken into custody and later charged.

Dr. Peter Mugo, PW5, testified and produced a post mortem report on behalf of Dr. Mwaura. He told the court that the deceased died from bleeding in the brain due to deep cut wounds to the back of the head/occipital region.

### **The law**

Murder is defined under section 203 of the Penal Code thus:

**Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**

The prosecution bears the onus of proving that murder has occurred. The prosecution must satisfy the court beyond reasonable doubt that:

- i. Death of the deceased in the particular trial has occurred.
- ii. The said death was caused by the accused person before the court.
- iii. The accused caused the death with malice aforethought.

Section 206 of the Penal Code defines malice aforethought as follows:

***“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance:-***

***(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.”***

### **Determination**

That Abshira Moulid Hussein, the deceased, died is a fact that has been proved beyond reasonable doubt. The medical report confirms her death. The doctor's opinion, contained in exhibit 4 (post mortem report), is that the cause of death was intracranial hemorrhage secondary to deep cut wounds to the cranium. His findings after examining the body is that there were massive deep cut wounds on the occiput extending to the lower left temporal region measuring 30cm long with skull and cranial matter exposed.

The second issue is who inflicted the fatal cut wounds on the deceased. Put differently: did the accused inflict the fatal wounds on the deceased? This question can only be answered by evidence. PW1 and PW2 are key witnesses for the prosecution. These two, especially PW1, may hold information that is key to finding who cut the deceased. She did not volunteer information to the court and an attempt to bring that information out by the prosecution did not yield any fruits. She contradicted herself and denied any knowledge of who might have cut the deceased.

PW2 held back information regarding the accused and the alleged mental illness. He testified that the accused was tied that night outside his house because he was mentally unstable. He testified that his daughter administered some injection on the accused to calm him. The daughter's name was not disclosed. The drug used to inject was not disclosed. There is no evidence as to whether the accused was undergoing treatment for a mental illness. Most importantly there is no evidence, direct or circumstantial, to connect the accused with the vicious attack on the deceased.

Police found the accused arrested by members of the public. None of those who participated in arresting him testified to shed some light on what led to the arrest of the accused. Moments immediately after the attack are very crucial and any evidence on what happened immediately after the attack is vital to prosecution case. This evidence was not available to the court.

A panga, allegedly used in the attack, was handed to the police. Who recovered the panga and where was it recovered from? There is no answer to this question.

After careful analysis of all the evidence and evaluation of the same, it is my considered view that there lacks a link between the accused and the vicious attack on the deceased. If this court were to believe that the accused was tied due to a mental illness, there is no evidence to show that he cut the rope or whatever was used to tie him and entered the house where the deceased slept and hacked her to death. To find that this is what happened is speculative and unsafe.

This is one of those cases where the prosecution is severely challenged. PW1 and PW2 are related to the accused and the deceased. It is normal in such cases where family members are charged for the witnesses who are relatives to hide the truth. The police ought therefore to have thoroughly investigated this matter and if possible seek independent witnesses if any.

With no evidence proving beyond reasonable doubt that the accused is the one who sneaked into the room where PW1 was sleeping with the deceased and two children and hacked the deceased to death the second ingredient of murder has not been proved. Without proof that the accused is the one who inflicted fatal wounds on the deceased, it would be futile to proceed to consider the ingredient of malice aforethought.

In conclusion therefore, this court finds that the charge of murder has not been proved beyond reasonable doubt against the accused. There is no evidence connecting him with the death of the deceased. This court therefore has no alternative but to set him free. The accused, Ahmed Ibrahim Farah, is hereby acquitted of the murder of Abshira Moulid Hussein for lack of evidence. He is to be set free forthwith unless for any lawful cause he is held in custody. I make orders accordingly.

**Dated, signed and delivered on 16<sup>th</sup> January 2014.**

**S.N.MUTUKU**

**JUDGE**