



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 10 OF 2012

FORMERLY HIGH COURT OF KENYA AT NAIROBI CRIMINAL CASE NO. 47 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

SHUKRI ABDI HARUN.....ACCUSED

JUDGEMENT

Background

Shukri Abdi Harun was arraigned before the High Court at Nairobi on charges of murder contrary to section 203 read with section 204 of the Penal Code. It is alleged that on 4th July 2010 at Boka Trading Centre of Kamaguru Location in Tana River District within Coast Province he murdered Bishar Bulle.

The case was commenced in High of Kenya in Nairobi and was transferred to Garissa in February 2012 but it took almost a year before the case could commence due to various challenges including engaging a new defence counsel for the accused and lack of witnesses.

The prosecution called seven witnesses in support of its case. At the close of the prosecution case, the accused was put on his defence and he gave a sworn statement. He had intended to call some witnesses but his proved difficult. He is the sole witness for the defence.

The evidence

The story that emerges is that the deceased, Bishar Bulle, died under unnecessary and uncalled for circumstances. He was related to the accused as a brother by the same mother. The accused was the younger brother to the deceased. The death of the deceased resulted from a quarrel between the two brothers over a camel that the accused claim belonged to him. Out of the seven witnesses only one is an eye witness to the circumstances that led to the death of the deceased. Mahat Bulle Hassan, PW5, who is related to the deceased as a brother according to his evidence, testified that he witnessed the deceased and the accused fight on 4th July 2010. He testified that the accused wanted to sell the camel in question but the deceased refused saying that he uses the camel whenever he shifts to new area.

The family of the accused and deceased are pastoralists. It is common knowledge that it is the practice of pastoralists to shift their livestock to new grazing fields. They chase pasture as need dictates and the family of the deceased is no different. Whenever this happens, camels are used to carry the belongings of the moving family. It is within this context that the claim by the deceased that he uses the camel to carry belongings whenever shifting becomes necessary should be understood.

PW5 told the court that the quarrel over the camel between the deceased and the accused led to a fight. PW5 tried to separate them but he was injured on the right thumb. He stepped back and left the two fighting. He said he saw the accused stab the deceased on the abdomen with a knife leaving the intestines spilling out. He said he saw the deceased fall down and the accused take hold of the disputed camel while he, PW5, tried to tie the stomach of the deceased and called for help.

Among the people who rushed to the scene was Mohamed Bocha, PW1. He was the Assistant Chief of Boka Sub-location. His evidence is that on 4th July 2010 he was at Boka Market when he saw people running towards the hospital and he followed. At the hospital he found the deceased lying down with intestines out. He asked him what had happened and the deceased informed him that the accused had stabbed him. PW1 accompanied the deceased and family members to Bangale Police Station where the matter was reported to No. 48318 Acting Inspector Simon Kamau, PW7. PW7 referred the matter to Garissa Provincial General Hospital. The deceased did not respond to treatment. He died on 7th July 2010.

The accused was arrested at Bangale Open Market on 6th July 2010 by No. 93856 Police Constable Rimba Jembe Kadodo, PW2, and No. 92528 Police Constable Arnold Mwai Kimweli, PW3. The accused was identified by his relatives including Ahmed Ali Bulle, PW4.

The deceased died as a result of cardio pulmonary arrest due to excessive bleeding. The report on the cause of death of the deceased was presented in court by Dr. Elizabeth Wanja Mutura, PW6, on behalf of Dr. Rukia who had performed the post mortem on the body of the deceased. The evidence of PW6 is that the body of the deceased had multiple cut wounds on left shoulder, on the left lateral chest, on left side of the chest, on the left hand index finger, on the first and second fingers of the right hand, on right upper abdomen near the ribs and on the right lumbar region, all of which had been stitched.

The accused testified under oath. He told the court that he had gone to the market to sell a camel he had owned since he was five years old; that the camel had been given to him by his uncle known as Osman Abdillahi; that he did not manage to sell the camel because the deceased who was his older brother refused that the camel should be sold; that he pleaded with the deceased but he would not change his mind; that a fight ensued between them after the deceased started the fight by hitting the accused on the head with a stick; that the accused started bleeding on the head and fell down; that the deceased sat on him and searched him but did not find the Somali sword the accused was carrying; that the accused removed the knife and struck at the deceased when the latter tried to get hold of the knife; that the accused stabbed the deceased on the stomach. He told the court that he did not intent to kill the deceased and was sorry about his death.

Issues for determination

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 law places the onus of proving a criminal case on the prosecution. This never shifts unless where the law specifically provides so. In this case the prosecution has to prove beyond reasonable doubt that:

- i. Bishar Bulle, the deceased, is dead.
- ii. His death was caused by the accused person before the court.
- iii. The accused caused that death unlawfully and with malice aforethought.

Malice aforethought is deemed to be established when there is evidence which proves an intention to cause death of or to cause grievous harm to any person whether that person is the one who actually dies or not.

I have no doubt in my mind that death of Bishar Bulle occurred. There is ample evidence on record

including that of the accused to show the chain of events leading to the death of the deceased. The evidence of the doctor shows multiple cut wounds on the deceased's body. After examining the body of the deceased, the doctor formed the opinion that the possible cause of death was cardio pulmonary arrest due to excessive bleeding.

The evidence clearly shows that the accused stabbed the deceased and cut him on various parts of his body. By his own admission the accused told the court that he used his knife to stab the deceased. The accused said he was defending himself against his brother who had started the fight by hitting him on the head with a stick. The deceased died as a result of excessive bleeding due to the multiple stab wounds inflicted by the accused. I have no doubt in my mind that the accused caused the death of the deceased.

Did the accused intent to kill the deceased?

Proof of murder is never complete without proof of intention on the part of the accused to cause the death or grievous harm to the victim of murder. This is the malice aforethought component of the charge of murder. Intention to cause the death of the victim is defined under section 206 of the Penal Code 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.”

For our purposes section 206 (a) and (b) are relevant. The accused told the court that he regretted the death of his brother and that he did not intent to kill him. In *Ekaita -vs- Republic (1994) KLR 225*, the Court of Appeal at page 230 held,

'For the purposes of this appeal, where the accused knows that there is a serious risk that the death or grievous bodily harm will ensue from his acts, and he proceeds to commit those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as a result of those acts constitutes malice aforethought. It does not matter in such circumstances whether the accused desires those consequences to ensue or not...'

The accused told the court that the deceased attacked him first. This evidence is not confirmed by the only eye witness, PW5. This witness told the court that the accused and the deceased started fighting after the quarrel. He did not state who attacked the other first. He did not confirm the accused's defence that the deceased attacked him first.

The deceased had multiple wounds: a cut wound on the left shoulder measuring 2cms, two cuts wounds on the left lateral chest measuring 2cm and 4cms, cut wound on left 1st finger, cut wound on right 1st and 2nd finger measuring 2cms and cut wound on right hypochondriac region (upper abdomen) measuring 2cms, cut wound on the right lumbar region (lower abdomen/spine) 15cms and cut wound on left lumbar region measuring 5cms. In total the accused inflicted a total of eight cut wounds on the deceased measuring between 2cms to 15cms in diameter! These were severe injuries and the witnesses testified that

the intestines were spilling out.

I take the view that one does not inflict eight cuts on another person without knowledge that this would expose the victim to a serious risk of death or grievous bodily harm. It is true that the two brothers argued over a camel and the accused may have been angered by this. However, after the two started fighting, PW5 intervened and tried to separate them. He stepped aside when he was injured. The attempt to intervene by PW5 ought to have sobered the accused up but it did not. He continued cutting the deceased all over the abdomen. The repeated stabbing of the deceased and the nature of the weapon used in my view constitute malice aforethought.

After evaluating the prosecution evidence and the defence, it is my finding that the accused was driven by malice and he must have known that his action would result in the death or grievous bodily harm of the deceased. I find malice aforethought proved beyond reasonable doubt. I reject the accused defence and find the charge of murder proved beyond reasonable doubt. The accused's statement that he regretted the death of his brother is a mitigating factor that can be factored in during sentence. I will and do hereby convict the accused for murder as charged. I make orders accordingly.

Dated, signed and delivered this 16th day of January 2014.

S.N.MUTUKU

JUDGE

Sentence

The accused person is hereby sentenced to serve 10 years imprisonment.

S.N.MUTUKU

JUDGE