



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL CASE NO.5 OF 2011**  
**FORMERLY HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO 69 OF 2010**

REPUBLIC.....PROSECUTOR

VERSUS

ADEN IDDI ABDI.....ACCUSED

**JUDGEMENT**

**Background**

Aden Iddi Abdi, hereinafter the accused, was arraigned before High Court at Nairobi to face a charge of murder contrary to section 203 read with section 204 of the Penal Code. It was alleged that on the night of 29<sup>th</sup> August 2010 at Elwak Township in Mandera Central District within North Eastern Province, murdered Hassanoor Mohamed Mohamoud.

The plea was taken on 21<sup>st</sup> September 2010 before High Court in Nairobi. Hearing of this case did not commence in Nairobi. It was transferred to Garissa on 7<sup>th</sup> November 2011 after one year during which time nothing was done in Nairobi despite the file going through several judicial officers. In Garissa, this court faced its own challenges after the defence counsel failed to turn up. This court ordered that another counsel be engaged to defend the accused after which hearing of this case started on 11<sup>th</sup> July 2012.

**Facts of the case**

The evidence does not clearly bring out what really happened in this matter. The prosecution in this case called six witnesses to support its case. Out of the six witnesses only two are civilians: Abdillahi Mohamed Sheikh, PW2, and Abdi Mohamed Mohamoud, PW3 and deceased's brother. The other witnesses are three police officers and the government analyst. The only witness whose evidence gives an idea what may have happened is PW2.

The evidence of PW2 is that he was going to his shop at 7.30pm on 29<sup>th</sup> August 2010 when he found the accused and the deceased quarrelling. He saw the accused holding a knife ready to stab. PW2 shouted at him not to stab the deceased but the accused chased him away. PW2 ran towards the nearby mosque to call for help but went back to the quarrelling duo and found the deceased bleeding having been stabbed at the left ribs. The accused was standing near the deceased still holding the knife.

The incident attracted members of the public who gathered. The deceased was carried to hospital and

PW2 joined the crowd taking deceased to hospital.

Someone, it is not clear who, reported the matter to the police and No. 232474 Chief Inspector of Police John Khamala Luganda, PW1, No. 231509 Chief Inspector of Police Elijah Macharia, PW4, No. 73225 Corporal Kipkorir, PW5 and other officers went to the scene. On the way they met the crowd carrying the deceased who was alive at the time. In the crowd was the accused who was identified to the police. He was arrested and also taken to hospital. According to the evidence, the accused too had a cut on the left ear.

The accused was treated and discharged while the deceased was transferred to Wajir District Hospital where he died.

Back at the scene, the police (Police Constable Maina) recovered a knife from a shrub near the roadside. It had blood stains and was identified and marked MFI-1. The bloodstained T-shirts of both victim and accused were also collected by the police for forensic examination. The T-shirt worn by the accused was marked MFI-2; that of the victim was marked MFI-3. The accused was found wearing a belt that had a knife sheath. It was recovered by the police and marked MFI-4. These items marked for identification, MFI-1 to MFI-4 all inclusive, were not produced as exhibits. This is because the prosecution wanted to have the exhibits produced by the investigating officer who never testified as the case was closed before the investigating officer was summoned to testify.

The accused was put on his defence and his defence is simply **“I know I have never killed anybody”**.

### **Issues**

Murder is defined under section 203 as follows:

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

To prove murder therefore, the prosecution has to establish that:

- i. Death of the victim has occurred
- ii. The death was caused by the accused person before the court by an unlawful act or by omission
- iii. There was malice aforethought.

Malice aforethought is the intention to cause the death of another person. It is defined under section 206 of the Penal Code. Malice aforethought is established if any one or more of the following is proved:

- i. Intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not;
- ii. 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;
- iii. An intent to commit a felony;
- iv. 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.

### **Did death occur?**

The doctor who performed the post mortem did not testify. The circumstances of this case are such that after numerous adjournments on the instance of the prosecution, the court declined to allow further adjournment as the court record will show. Among the witnesses who did not testify is the doctor. The prosecution therefore did not produce a post mortem report showing that the deceased died and what

caused that death.

This leaves the evidence of the police officers. PW1 told the court that when he saw the deceased, he noticed that he had been stabbed on the left ribs. He was conscious but not able to speak. All the evidence of the police officers, PW1, PW4 and PW5, show that they learned of the death of the victim at Wajir District Hospital.

PW2 who witnessed the quarrel between the accused and the deceased told the court that he escorted the deceased to both Elwak and Wajir District Hospitals and that he was present when the deceased died at Wajir District Hospital.

PW3 who is brother to the deceased told the court that after he got information of the stabbing he went to the scene but found the deceased had been taken to Elwak District Hospital. He went to hospital and saw injuries on the deceased's left ribs; that the deceased did not respond to treatment at Elwak District Hospital and was transferred to Wajir District Hospital where he died. PW3 was present when the post mortem was performed on the body of the deceased after which they buried the body.

After considering this evidence, I take the view that death of the deceased occurred. I cannot ignore the evidence of the PW2 and PW3 that they saw deceased dead. PW3 is related to the deceased as his brother and he told the court that they buried him.

### **Did the accused cause the death of the deceased?**

This is where some difficulties arise. PW2 testified to finding the two men, deceased and accused quarrelling. No one knows the reason for that quarrel. PW2 said he saw the accused holding a knife as though ready to stab the deceased and tried to stop him from doing so. PW2 rushed towards the mosque to get help but decided to turn back to the quarrelling duo. He found the deceased had been stabbed and accused standing over him. This can only mean that the deceased was on the ground. Indeed at first PW2 said when he turned back to the scene he found deceased dead. This is what he thought perhaps after seeing deceased lying on the ground. The accused was still holding the knife. The accused was among the people who took deceased to hospital and according to PW2, PW4 and PW5 the accused had a cut on the left ear. Again the court did not benefit from the doctor who treated the accused to know the nature of that injury but I take note that it was described as a cut wound.

In my considered view, for whatever reasons the deceased and the accused were quarrelling, a fight must have ensued. There is no evidence to show how the accused got the injury on the left ear. However, the circumstances are such that it would be in order for this court to make an inference that the injury was inflicted in the cause of the scuffle between the deceased and the accused. Circumstances too would point to the accused having inflicted the stab wound on the deceased's left ribs.

PW6 received four exhibits to examine: Accused person's T-shirt moderately stained with blood which he found contained human blood of type 'A'; deceased's T-shirt heavily stained with blood which he found to be human blood of type 'B'; a knife that he found stained with human blood of type 'B' and accused blood sample which he found to be of type 'A'.

This evidence is conclusive that the knife came into contact with the deceased because the blood type 'B' found on it matched the deceased's blood type. It is the same blood type found on the deceased's heavily stained T-shirt. The blood type 'A' found on the accused's T-shirt is explained by the injury he had sustained on his left ear and is conclusively his own blood.

All this evidence proves that the deceased and the accused came into contact and the accused's knife was used to inflict injuries, stab wound on left ribs, on the deceased.

What this court lacks is medical evidence connecting the death of the deceased and the injury inflicted on him by the accused. In my view, the law does not give us all the answers we require in a trial. It would have been so easy to find that the accused killed the deceased but this court finds itself unable to do this.

There is a missing link. This court lacks evidence that the stab wound inflicted on the deceased by the accused caused the death of the deceased. The doctor who performed the post mortem did not testify. He would have told the court what caused the death and whether the stab wound caused that death. This has led to a stage where a judge feels “impotent”!

The law requires of this court to give justice to both the accused and the victim. Ultimate justice is never attained in my view especially in our adversarial system of judging. If there is no conclusive evidence that an accused person has committed the offence for which he/she is being tried, a court of law cannot impose evidence in favour of the victim even though the natural feeling is sympathy for the victim.

The matter before me presents some difficulties as I have explained. These difficulties really leave the prosecution case in limbo. Even though there is evidence to show that the deceased and the accused quarreled and probably fought; even though this court does not doubt that the appellant inflicted the stab wound on the deceased, this court finds that there is no proof beyond reasonable doubt that the death of the deceased resulted from that stab wound. It would therefore not be safe to convict the accused.

This court will and does hereby acquit the accused for lack of conclusive evidence that the deceased died as a result of the stab wound inflicted by the accused. I make orders accordingly.

**Dated, signed and delivered this 15<sup>th</sup> January 2014.**

**S.N.MUTUKU**

**JUDGE**