



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 65 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

GUR ARERO.....ACCUSED

JUDGEMENT

1. The accused is charged with five counts of murder jointly with others contrary to section 203 as read with section 204 of the Penal Code CAP 63 Laws of Kenya. The particulars of offences are that on the 4th day of December 2011 at Oga Manyatta, Sololo District within Marsabit County jointly with others not before court murdered Abdinoor Adan Jirmo. In the second count the accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code CAP 63 Laws of Kenya the particulars are that on 4th December 2011 at Oga Manyatta, Sololo District within Marsabit County jointly with others not before court murdered Abdinoor Adan Jirmo. In the third count the accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code CAP 63 laws of Kenya the particulars of the offence are that on 4th December 2011 at Oga Manyatta, Sololo District within Marsabit County jointly in others not before court murdered Ali Wario Adano.

In the fourth count the accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code CAP 63 laws of Kenya the particulars of the offence are that on 4th December 2011 at Oga Manyatta, Sololo District within Marsabit County jointly with others not before court murdered Ibrahim Hussein. In the fifth count the accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code CAP 63 laws of Kenya the particulars of the offence are that on 4th December 2011 at Oga Manyatta, Sololo District within Marsabit County jointly with others not before court murdered Abdi Bule Galgallo.

2. The prosecution called 4 witnesses. The facts of the prosecution case were that on the night of 3rd -4th December, 2011 midnight, PW1 was sleeping under the open skies with seven other people at a place called Oga Manyatta Sololo District within Marsabit County. At around midnight PW1 was woken up by 8 or so people and asked what was his tribe and he answered he was a Garbra. The person who woke him up was the accused person and was armed with an AK 47 rifle and that the seven or so other people who were with him were also heavily armed. When he answered that he was a Gabra he realized that the people who were in his company had been woken up earlier before him. He said that some of the younger men in the group tried to escape. He then saw the accused person shoot his father on the head. PW1 testified that on seeing that he escaped from the place and entered the bush where he slept. The following morning he walked to Adadi

- Village. He said that on his way to that village he saw the accused person with five other elders who were armed with pangas, rungu and spears as a result of which he hid in the bush till they passed them. He later identified the accused person to the police inside the police vehicle at 5 pm the next day. He said that on returning to the scene he learnt that five people had been murdered who included his father Adan Jirmo the first deceased in the charge and his brother Abdi Nuro Jirmo the deceased in count 2. He said their Borana herdsman Abdi Bule Galgalo the deceased in count five was the only Boran shot dead in that group.
3. PW2 was Dr. Isaac Karbo Mwangi of Moyale District Hospital. He conducted post mortem examination on five bodies taken to the hospital by police officers. He said that he examined the bodies externally without opening them and filled post mortem forms which he produced in court as exhibits. All the deceased were found to have died of severe injuries caused by penetrating bullets due to shooting.
 4. PW3 and 4 were Police Officers who visited the scene of crime after directions by the OCPD Moyale who also accompanied them. According to PW3 they went to the scene to a village at IdadiOga in a village where they found five dead bodies. He said that they collected spent cartridges from the scene. They also re-arrested one OgurJattani identified as the accused in this case and two other boys PW3 testified that they also took photographs of the scene.
 5. PW4 the OCS of Sololo Police under which the scene of crime fell testified that they walked 30 kilometers on foot in order to assess the village where the incident had occurred due to heavy rains. After searching the scene they saw five dead bodies with bullet wounds. Because of the heavy rains the bodies were merely photographed and then released to the elders who buried before the police officers left the scene. They arrested 3 people including one Ogur Arero who he identified in this case.
 6. After the close of the prosecution case Mr. Ndubi for the Accused raised several issues in his submissions. I will deal with those issues as I consider the evidence adduced before the court. Mr. Moses Mungai for the State also made a rejoinder in submissions which I will consider as I analyze and evaluate the evidence.
 7. I have carefully considered the evidence before the court and the first thing which is very striking is the contradictions in the evidence of the prosecution. First of all there is the contradiction of whether or not the bodies of the deceased in this case were examined by a doctor, and in this case PW2 Dr. Mwangi. PW4 was very clear that there was no way the bodies of the deceased could have been carried from the scene of this offence because of the heavy rains which made the village where the deceased were murdered totally inaccessible. According to PW4 those bodies were just photographed after which they were buried. PW4 Chief Inspector Suguti corroborates Inspector Lebaso evidence (PW4) that the bodies were photographed and then buried. The evidence of PW2 that he carried out post mortem examination on the bodies of the deceased on the 4th December, 2011 may not have taken place. PW2's evidence appears to be misleading.
 8. The other glaring variation is the true identity of the accused person. PW1 the eye witness of the incident refers to the accused person as Mzee Gur PW3 referred to him as OgurJattani, and said that he arrested him from the elders of the village where the murder was committed. PW4 on his part identified the accused person as GurOraro and he was categorical in his evidence that they did not arrest anyone by name OgurJattani. The evidence of the three witnesses PW1,3 and 4 leaves a lot of questions unanswered regarding the identity of the person charged with the information before the court and that is material because the evidence of the eye witness who claims to identify him PW1 is not corroborated by PW3 and 4 in regard to the accused person. This is more so when considering the fact that PW1 claims to have been the one who with other young men apprehended the accused on the same day of the incident. The other glaring fact is PW1's evidence that he identified the accused to the police at the scene and that at the time the accused person was seated inside the police vehicle. That evidence contradicts PW4's evidence that no vehicle made it to the scene of the crime.
 9. The most important issue however is that of identification. There is only one identifying witness who is PW1. The incident took place at around midnight in a remote village 30 kilometers from Sololo District at a place where PW1 and seven others were sleeping under the open skies. Identification is a very important issue. I have taken into consideration all factors which affect identification made especially at night. In the case of **Maitanyi vs Republic(1985) 2 KAR 75** it was held:-

1. **Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.**
2. **When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.**
3. **The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.**
4. **Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”**

10. The identification was at around midnight PW1 was very clear that there was no form of lighting except the natural moonlight so he claims the moonlight was bright and he was able to see clearly. I considered the fact that PW1 had known the accused person only one week prior to this incident. I also considered the evidence by PW1 that the accused woke him up from sleep and spoke to him for 2 minutes before he heard shooting. It is clear that PW1 had been asleep and according to him in his group he was the last person to be woken up. According to him the exchange he had with the accused was the accused asking him what tribe he was, and him answering that he was a Gabra. He then heard shooting after which he escaped from the scene.

11. I do find that PW1 had known the accused for a very short time so the accused was still almost a stranger because according to him he just saw him for that one week. There is no evidence to show that he had heard the accused talking and therefore was conversant with his voice. PW1 also did not claim that it was the voice of the accused person he identified. He claims that he identified him which means facial appearance. I find that the circumstances under which PW1 saw the one who woke him up from sleep were not conducive for a proper identification. First of all PW1 was sleeping and may not have been fully awake even when he heard the question and when he gave the answer. What might have triggered his mind to be fully alert must be when he heard the shooting and that was also the reason that caused him to run away from the scene in order to save his life. He was in such a hurry to leave that he left his clothing behind. I am therefore not satisfied that the circumstances under which PW1 saw and claims to identify the accused were conducive for a proper and correct identification without the possibility of error or mistake. There was a need for corroboration of his evidence by other independent and cogent evidence. Since he was the only eye witness of the incident called as a witness his evidence did not receive any corroboration.

12. There were other things the prosecution did not adduce. There are several exhibits that should have been placed before the court. These are the photographs of the bodies taken at the scene of the incident perhaps the other exhibits left out spent cartridges collected at the scene of the incident.

13. Having carefully considered the evidence of the prosecution I find that the only identifying witness in this case had a fleeting glance at the assailant in difficult circumstances and therefore the evidence of identification by the sole identifying witness is unsafe and cannot found a conviction. Since there was no other evidence to implicate the accused person with this offence I find no basis upon which to require the accused person to answer the charge. I therefore give the accused the benefit of doubt at this stage and acquit him for the offences charged under section 306 of the Criminal Procedure Code.

DATED SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF JUNE, 2014.

J. LESIIT

JUDGE