



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Case 33 of 2007

REPUBLIC.....PROSECUTOR

-VERSUS -

MOHAMMED ADEN HIRBO.....ACCUSED

JUDGMENT

The accused person Mohammed Aden Hirbo is charged with the offence of **murder** contrary to **Section 203** as read with **204** of the **Penal Code** to which he pleaded not guilty.

The particulars of the charge are that on the 6th March 2007 at Kiamaiko market in Nairobi county, he murdered the deceased Mohamed Jillo Ote. Briefly, the facts are that on the material day around 7.00 a.m. the deceased who was a businessman at Kiamaiko market was at Saku slaughter house buying meat. He operated a hotel near the slaughter house. As he was buying the meat, the deceased was confronted by the accused who immediately attacked him with a panga. The deceased sustained fatal injuries as a result of the assault. The accused ran away after the attack towards Huruma Police post. He was rescued from a hostile crowd by police on patrol who took him to Huruma Police post. A short while later, relatives of the deceased took the body to the police post. The body was escorted to City mortuary where postmortem was conducted. The murder weapon was recovered by members of public and handed over to the officer in-charge of the police post. The accused was later charged with the offence.

It was the evidence of PW2 that the deceased entered the slaughter house on the material day at around 7.00 a.m. He was followed by the accused person who on entering the house started searching for a panga. When he missed it, the accused went outside the slaughter house and attempted to take the panga of one Mama Darantu in her kiosk but the lady refused to let it go. The accused went to one Alio and took a panga from him. He entered the slaughter house again and went to where deceased was buying meat. He cut the deceased on the head knocking him down. Three other panga cuts were inflicted on the deceased on the neck as he lay on the ground. The deceased died on the spot.

PW4 entered the slaughter house in the morning around 7.00 a.m. to pick keys from her husband. She saw the deceased lying on the ground and the accused slashing him with a panga. The witness screamed and the accused moved towards her brandishing the panga which caused her to retreat.

PW5 was a meat vendor in the slaughter house. He testified that the deceased was his customer. On the material day around 7.00 a.m. the deceased approached PW5 to sell him meat products popularly known as “matumbo”. The two did not agree on the price and the deceased walked to the next vendor's place which was about 2 – 3 metres away. PW5 was attracted by screams and when he looked that direction he saw the accused assaulting the deceased using a panga.

PW3 the doctor who performed the postmortem formed the opinion that the cause of death was the head injury consistent with use of a panga.

PW7 recovered a blood stained sweater which the accused was wearing at Huruma police post. He took the sweater, the panga and blood samples of both the accused and the deceased for analysis. The government analyst, PW1 found the panga and the accused's sweater were stained with the blood of the deceased group A.

The accused in his defence denied the offence of murder. He gave an unsworn statement to the effect that on the material day and time, he went to the slaughter house where he used to sell meat. The deceased came to buy meat from him. The deceased insulted the accused that he was selling dog meat. After an exchange of unkind words, the deceased roughed up the accused – prompting some two people to separate them. The deceased left through the rear door of the slaughter house. He later came back armed with a panga and attacked the accused with it inflicting injuries on his head, arm and leg. The accused picked up his panga to defend himself and it is at this juncture that he hit the deceased with it twice on the head.

There were three (3) eye witnesses in this case, PW2, PW4 and PW5. All the witnesses were known to the accused and the deceased whom they said were brothers in-law. The accused was married to the sister of the deceased. Both worked separately as meat vendors at Kiamaiko. The evidence of these witnesses was that the deceased came into the slaughter house to buy meat and that he owned a hotel close to the slaughter house. At the time, the deceased entered, he was not armed with any weapon. PW1 stood at the entrance of the slaughter house and saw the deceased come in. The accused followed the deceased and immediately started looking for a panga. The only business in a slaughter house is slaughtering and selling meat. Each person who slaughters will be having a panga or a slaughter knife at the work place for use in their day to day duties. The court takes judicial notice of this fact.

The accused took a panga from one of the meat vendors as PW2 watched. He then went to where the deceased was and attacked him. PW4 and PW5 corroborated PW2's evidence of the attack. They saw the murder weapon used and saw the parts of the body of the deceased upon which the injuries were inflicted namely the head and neck. PW1 said that the first cut was on the head and three others followed on the neck. PW2 chose to run away together with other young men. Later he joined the crowd chasing the accused. PW4 screamed when she saw the accused assaulting the deceased. She said the accused approached her brandishing the panga and she also took off. PW2 in cross-examination corroborated the evidence of PW4 and PW5 that the deceased was not armed at the time he was attacked.

The accused raised the defence of provocation that the deceased is the one who found him at his place of work, picked a quarrel and later came with a panga. He went on to say that the deceased attacked him with the panga and hit him on the head, leg and arm. This defence was dislodged by the strongly corroborated evidence of PW2, PW4 and PW5 who all said that the deceased was not armed and was attacked in cold blood. The accused was seen looking for a panga particularly from other people at the scene. He even attempted to take the panga of one Mama Darantu who refused with it. At the time the accused was searching for the murder weapon, the deceased was busy negotiating to buy meat from PW5. As soon as the deceased walked to talk to the next vendor, the accused attacked him. PW5 said he did not hear the deceased talk or quarrel with the accused although the witness was only 2-3 metres from the scene. The defence of provocation is therefore unacceptable in the circumstances.

The accused admitted that he inflicted injuries on the deceased while defending himself. He was at the scene at the material time which gave him the opportunity to commit the offence. The evidence of PW1 the government analyst on the blood stained panga and sweater to the effect that the two exhibits had blood of the deceased corroborates the evidence of PW2, PW4 and PW5 to the effect that it is the accused who inflicted the injuries on the deceased which resulted in his death. PW1 confirmed that the injuries were caused by a sharp object which he said could be a panga. The accused in his defence said he armed himself with a panga and hit the deceased twice on the head.

I find the evidence of the prosecution overwhelming proving beyond any reasonable doubt that the accused inflicted the fatal injuries on the deceased. I find that the prosecution have proved the *actus reus* against the accused person to the standards required in criminal cases.

I proceed to determine whether the accused had the requisite *mens rea* required to prove the offence of murder. The prosecution have established that the accused looked for a murder weapon and obtained one at the scene. When the deceased first entered the slaughter house, the accused was following him closely behind. It was not clear whether the deceased had seen the accused behind him. The two men were brother-in-laws. The accused was married to the sister of the deceased but at the time of the incident, the couple had separated. There is no evidence that the two men had quarrelled before the incident. The motive of the killing remains unknown.

The evidence of *mens rea*, if any, can only be drawn from both and circumstantial evidence available. According to PW4, the accused who was a meat vendor had by the time of the incident stopped the business for some time according to PW4. It is not true as he told the court in his defence that he had gone to the slaughter house to slaughter and sell meat. PW2 and PW5 did not see the accused slaughtering or selling any meat that morning. But they saw the deceased buying meat. The deceased was still running his meat business and was at the slaughter house for that purpose. The accused was seen coming into the slaughter house following the deceased from behind. He then embarked on searching for a panga which he got. He then walked and attacked the deceased with it. There was no quarrel that was witnessed between the accused and deceased by any of the witnesses. Neither was there any exchange of words between the two men. This demonstrates that the accused came to the slaughter house with a motive of killing the deceased. The accused knew him well and knew his place of work and where he bought the raw materials for his hotel and meat business. The accused also knew the time he would get the deceased at the slaughter house. I come to the conclusion that the accused was not at the slaughter house for any other business but to settle scores with the deceased the particulars of which were within his knowledge.

The accused attacked the deceased in cold blood. He cut him on the head knocking him down. The accused inflicted three deep cuts on the deceased's neck as the deceased lay on the ground. The act of the accused to inflict the severe panga cuts on major organs of the deceased's body was no doubt intended to bring the life of the deceased to an end. The doctor confirmed that it was indeed the first cut on the head which caused the death of the deceased. The persistence to inflict more and more severe injuries was meant to accomplish the plan of the accused to kill the deceased.

It is my finding that the prosecution have proved that the accused had the intention to kill the deceased. I find that *mens rea* has been established and hereby convict the accused person with the offence of murder under **Section 203** as read with **Section 204** of the **Penal Code**. I do find him guilty as charged and I hereby so declare and decree.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered in open court in the presence of the accused person, the defence counsel Mr. Ochako and the State counsel Ms. Gichuhi for Ms. Mwaniki for the State on the **14th March, 2013**.

F. N. MUCHEMI
JUDGE
14/03/13