



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO 18 OF 2012

FORMERLY NAIROBI HIGH COURT CRIMINAL CASE NO 39 OF 2012

REPUBLIC.....

PROSECUTOR

VERSUS

DEKRA ALI LEGEYE.....1ST

ACCUSED

ODHAN ABDULLAHI MOHAMED.....2ND

ACCUSED

JUDGEMENT

Dekra Ali Legeye, the 1st Accused and Odhan Abdullahi Mohamed, the 2nd Accused are jointly charged with murder contrary to section 203 read with section 204 of the Penal Code. The offence is alleged to have been committed on 28th April 2011 at Dagahaley Refugee Camp in Lagdera District, Garissa County. The victim is Abdiwelli Hussein Aden, deceased. Both accused have denied the charges. The case went to full trial and the prosecution called seven witnesses in support of its case. The two accused persons, both refugees, testified under oath with no witnesses. The case was prosecuted by Mr. Gitonga Muriuki and taken over by Mr. Allen Mulama. The defence was conducted by Mr. C.P Onono, advocate, for both accused persons.

In a murder charge, the pattern is always predictable. The prosecutor has to prove that death of the deceased in question occurred; that the death was caused by the accused person before the court and that the accused committed the murder with malice aforethought. Malice aforethought is deemed to have been established under Section 206 of the Penal Code if the prosecution proves any one or more of the following:

- i. intention to cause 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 killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused**
- iii. intention to commit a felony**
- iv. 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**

The onus to prove the above always lies on the prosecutor and never shifts and the standard of proof required is beyond reasonable doubt. To apply this test to this case, it is the duty of the prosecutor, being the State, to prove that Abdiwelli Hussein Aden died on 28th April 2011 at Dagahaley Refugee Camp; that the two accused persons or any of them caused that death and that both or any of them was possessed of the intention as defined above. The proof of the above must meet the threshold set out under the law.

The evidence as to what happened prior to the death of the deceased remains a secret. The available evidence as to the last minutes of the deceased was given, ironically, by the 1st accused person supported by the evidence of the 2nd accused.

Mohamed Hussein Aden, PW1, is related to the deceased as his older brother. On 28th April 2011 around 8.00pm, PW1 sought to know from his wife whether the deceased who used to live with PW1's family had eaten his supper. He was informed that the deceased had not eaten. According to PW1, the deceased was a school drop-out who did not have a job. PW1 went out to look for cigarettes. While going back home, he was attracted by people running towards the home where the two accused persons lived at Dagahaley Refugee Camp Block BB. It is when he learned that his younger brother, the deceased, had died. He found the deceased lying on a praying mat about 3 metres from 1st accused's house. PW1 said he saw the body of the deceased lying on his back with blood oozing from the mouth and nose. He also stated that there was a lot of blood where the body lay and the deceased's shoes were also blood stained.

At the scene, PW1 said he found his sister Rukia Mohamed Ali, PW5, and 1st accused. PW1 stated that he talked to the 1st Accused who told him that the deceased had gone to her house bleeding from the mouth and nose and asked her for water and that she had poured water on him. She told him that she did not know what had caused his death. PW1 said he had gone to 1st Accused's house before to ask her if she had seen the deceased. It is not clear whether this visit was on the same date or before.

The evidence of Mohamed Yusuf Hassan, PW2, is that he received report of the death of the deceased on 28th April 2011 at about 9.00pm and went to the place outside the 1st Accused's house. He says he found the deceased lying on his back dead with blood oozing from his mouth and nose; that he did not see any visible injuries on the deceased's body but there was a lot of blood where the deceased lay and that he went to report the matter to the police. He however met police on their way to the scene.

PC Edward Tunga, PW3, was assigned to escort the body of the deceased to Garissa Provincial General Hospital for post mortem on 29th April 2011 in company of the relatives of the deceased.

Yassin Awes Eno, PW4, got the report of the death of the deceased and went to the scene to confirm. He stated that he did not see any visible injuries on the deceased but found him lying on his back bleeding from the mouth. He went to report the matter to the police.

Rukia Mohamed Ali, PW5, is sister to the deceased. Her evidence is that on 28th April 2011 at 9.30pm she was at her house with children when the 1st Accused went there and informed her that her brother, the deceased, had died. PW5 followed the 1st Accused to the scene where she found a praying mat placed outside the 1st Accused's house and the deceased lying on his back on the mat. She testified further that the deceased was producing frothy blood mixed with other substance from his mouth.

CPL Joseph Ng'ang'a, PW6, accompanied the officers who visited the scene in Block BB at Dagahaley Refugee Camp on 28th April 2011 at 9.00pm. They were led to the scene by PW4. On arrival they found the body of the deceased lying on its back with blood oozing from the mouth and nose and no visible injuries. He testified that there was a lot of blood at the scene and blood stains could be seen a few metres, 5-6 metres, from where the body lay. He also testified that the bloodstains were covered with soil. He testified further that in a nearby house belonging to the 1st Accused, there was vomit mixed with blood which had been splashed with water; that there were bloodstains at the doorstep of 1st Accused's house; that 2 feet from the doorstep was a window with blood marks on the wall and that about one metre from

the window was a toilet where spots of blood were noticed. This evidence seems to advance a proposition that the deceased was at one time inside 1st accused's house.

Dr. Musa Mohamed, PW7, was the last witness for the prosecution. He testified on behalf of Dr. Farah Amin who had examined the body of the deceased and prepared a report. His evidence is that the examination of the body revealed blood on the ears, nose and eyes and that the neck was soft. The doctor formed the opinion that the probable cause of death was neck and head injury with basal skull fracture.

The accused persons gave their evidence under oath. The 1st Accused testified that on 28th April 2011 she was in her house with the 2nd Accused person who was visiting her; that on that day she saw the deceased around 8.00pm when he went to her house and asked her for water; that the deceased was foaming in the mouth and he vomited blood; that he was staggering and he fell down; that the deceased was alone and she did not know where he had come from; that she did not manage to give him water because he fell down and in shock she poured the water on him. On cross examination she stated that the deceased did not enter her house but fell outside her house about 10 meters from her house; that he was struggling and falling over his vomit; that she asked him whom to call for help and he told her to call Rukia (PW5) his sister which she did. She denied killing him or having any reason to do so.

The 2nd Accused testified that she had visited the 1st Accused, her friend, and spent the night at her house on 28th April 2011; that she was woken up by the 1st Accused at 7.30pm and informed her of someone who had come to her home; that the 2nd Accused went out of the house and took the torch the 1st Accused was holding and flashed it; that she saw someone lying on the ground vomiting and foaming at the mouth; that the person was moving his hands about; that the 1st Accused asked the person how she could assist and he told her to call his sister; that the 1st Accused went to look for the deceased's sister; that the 2nd Accused went back to the house, picked her baby and followed the 1st Accused.

Having analyzed the evidence, it is my singular duty to consider whether the prosecution has met the threshold of proving that the deceased is dead, that it is the accused persons or any of them who caused that death and that if the answer to the second issue is positive, whether the accused persons or any of them possessed the intention to cause death or grievous harm.

The post mortem report shows that the cause of death was probably due to head and neck injury with basal skull fracture. The external appearance of the body is indicated on the report as having clotted blood in the ears and the nose with the right eye red; the neck was soft, the feet and wrists were stained with blood; blood soaked T-shirt and shorts stained with fecal matter. There was also visible whitish discharge from the external genitalia. It may be recalled that the witnesses testified to having seen the deceased foaming in the mouth and having vomited blood. There is no mention of this in the post mortem report. Dr. Farah who performed the post mortem was not available to testify. Instead, Dr. Musa testified on his behalf. He told the court that the body was not opened up hence the use of the word 'probable cause of death'. He also testified on cross examination that there are many causes of vomiting and it could be due to an infection, tumour, or poisoning.

There was no blood, vomit or any other samples collected for analysis at the Government Chemist and therefore this court is left wondering what caused the vomiting, frothing at the mouth or the bleeding. The doctor did not indicate what may have been used to inflict the skull fracture and there is no evidence to show what could have caused the vomiting and frothing at the mouth.

From the evidence on record including the post mortem report there are no doubts in this court's mind that death of Abdiwelli Hussein indeed occurred. This settles the first issue as to whether death of the deceased occurred.

The second issue is who caused that death. Without direct evidence linking the accused persons with causing the death of the deceased, there remains circumstantial evidence. This is the evidence of surrounding circumstances which lead to a conclusion that the accused person is guilty of the charges. In **Republic v Taylor, Weaver and Donovan [1928] 21 Cr Appeal R 20** the court stated that

circumstantial evidence is capable of proving a proposition with the accuracy of mathematics. This may or may not be so but put in simple terms, for an accused to be found guilty while relying on circumstantial evidence, the circumstances surrounding the case must be such that there is no other explanation except that the accused is the person who committed the crime.

In Kipkering arap Koskei & another v. Republic [1949] 16 EACA 135 the court was of the view that:

“In order to justify, on circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of innocence is always on the prosecution and never shifts to the accused.”

The circumstances surrounding the death of the deceased are not known. There is no evidence as to where the deceased spent that day; what he did or whom he interacted with. In fact the evidence of the prosecution does not say anything about the deceased's whereabouts before he died. It is the evidence of the 1st and 2nd Accused persons which fills in the gaps in respect of the deceased's last moments before he died. The evidence of PW1, brother to the deceased on cross examination is that **“I remember telling the court that A1 told me deceased had gone to her place oozing blood on the nose and mouth. I believed her.....”** PW5 sister to the deceased also testified that **“I have no reason why Ekra was charged with this offence. She has been a good neighbour.”**

Questions that remain without answers are who inflicted the blow that caused fracture of the basal skull of the deceased? Was he hit by 1st Accused person or was it 2nd Accused person or was it both women? If so was this done inside the house or outside where deceased was found lying down? Why was the deceased foaming in the mouth? What was the cause of the vomiting? It will be recalled that 2nd Accused was visiting the 1st Accused. The house had one bed and the 2nd Accused was sleeping on the floor as per the evidence of PW6.

I wish to state that the burden to prove an accused person guilty never shifts to an accused person. It is the prosecution to lead evidence to show that the accused persons caused the death of the deceased. There is no such evidence leading this court to that conclusion. The circumstances do not lead to the two women or to any of them doing anything remotely connected with causing the death of the deceased. I find the evidence of the accused persons raising doubts as to their involvement in the death of the deceased. The only witnesses who attempted to implicate them or at least to implicate 1st Accused is PW6 who testified that **“Bloodstains were at the doorstep. 2 feet from the doorstep was a window where we found blood marks on the wall. It was still in the same house. About 1 metre from the window was a toilet with clothing door. We noticed spots of blood”** On cross examination this witness stated that he did not indicate in his statement that he saw a window with blood spots and explained that he was expanding his statement.

I find the evidence as to the cause of death inconclusive more so because the body was not opened up for examination; that no samples of internal organs or of the vomit were taken for examination to rule out other factors that could have contributed to the death of the deceased. There is no other evidence on record to corroborate that of PW6 that there were blood stains and vomit in 1st Accused's house and most importantly there is no evidence to point irresistibly to the accused persons as having caused the death of the deceased.

I must comment on the manner investigations in this case were carried out. It was not enough in a case such as this one to just record statements of witnesses and to take the body for post mortem. There was need to collect samples as I have indicated above and forward the same for analysis. There was need to trace the movements of the deceased moments before he met his death and more so to trace what he did the whole day and whom he may have interacted with. The Refugee Camp is a crowded area and someone somewhere must have seen or heard something. There is evidence that the deceased's inner clothes were stained with fecal matter and that his external genitalia was oozing whitish discharge. This

obviously is not normal and there must have been a reason for it. There is absolutely no evidence about why a grown up man would have fecal matter on his clothes or why he should have whitish discharge on his genitalia. In fact it is not stated what that discharge was; was it semen? Was it discharge due to an infection? We will never know the answer.

I find there are doubts in this case and that the prosecution has failed to prove that the accused persons or any one of them caused the death of the deceased. With this second issue not being answered in the positive, the third issue as to whether the accused persons had malice aforethought does not arise in this case and it serves no purpose to consider the same. But for the record, this court finds that there is no proof that the accused persons had malice aforethought.

After careful consideration of the evidence it is my finding that the accused persons, either jointly or individually are not guilty of this offence. There is no proof that they or any of them caused the death of the deceased. Each of them is hereby acquitted of the murder charge forthwith. Each is free to go unless for any other reason she is being lawfully held.

I wish also to state that both the accused being refugees they must be handed back to the UNHCR which is in charge of refugee affairs for custody and further action as the law provides. The Officer in Charge of Garissa Police Station shall take the responsibility of escorting the two women and handing them over to the UNHCR. I make orders accordingly.

S. N. MUTUKU

JUDGE

Dated, signed and delivered this 30th September 2013