



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE NO. 35 OF 2010

REPUBLICPROSECUTOR

VERSUS

MOHAMED MATA BARISAACCUSED

JUDGMENT

1. Mohamed Mata Barisa was charged with the murder of Ali Dadho Ngundo on 5th December, 2010, according to the information presented by the state. The accused denied the charge and was represented by Mr. Michira.
2. Five witnesses testified had when I took over the case from my predecessor Omondi, J. under Section 200(3) of the Criminal Procedure Code. A total of ten witnesses testified.
3. The prosecution case was as follows. The deceased Ali Dadho Nguyo lived at Masalani village with his family. His brother Gibrani Adalla Ali (PW2) married to Riziki Maneno Gibrani (PW3) also lived in the same place. The latter family farmed on a separate piece of land at a place called Bangani or Mangani. There had been a boundary dispute between the clan of the deceased and that of the accused regarding the said land.
4. On 5th December, 2010 PW3 left home for the shamba in the company of her co-wife Saida Mukahola Said (PW4) and PW3's young son Bishan Jibrani (PW9). While the trio were in the shamba, they were accosted by several men of the clan of the accused, including the accused, Jumaa, Alaskan, Amile and Wayu. They were armed with crude weapons.
5. They beat up the trio and ordered them to leave the shamba. The women fled into surrounding bushes. Meanwhile, this information filtered back into Masalani. The deceased, his brother Jibrani Abdalla Ali (PW2) and the deceased's son Babuye (PW1) armed themselves with pangas and rungas and headed for the farm. A confrontation took place between the two sides, during which Jumaa was injured. In response the accused speared the deceased who collapsed and then with his companions, dragged the body towards the Tana River. When PW1 who had managed to escape returned to the scene shortly after with help, the body could not be found. But there was a trail of blood and marks of dragging leading to the banks of the river, where there was even more blood. Jumaa died some hours later as he tried to get to hospital. Police eventually arrested and charged the accused.
6. In his sworn defence statement, the accused stated that he resided at Masalani and that on 5th December, 2010 Jumaa Wayo was injured on his shamba. He had a spear wound to his abdomen. He assisted to escort the victim to hospital. There had been fighting between his family and that of the deceased over land at Mangani. He denied killing the deceased. He said he did not

participate in the fight and only got to the scene after the fighting was over but he did not see the body of the deceased.

7. There is no dispute that there was a simmering land dispute between the family of Wayu (accused's) family and that of the deceased prior to the material date.
8. While all parties resided at Masalani the dispute was in connection with a shamba at Mangani. On the material date, there was a violent clash between the two families on the shamba. The Wayu family lost Jumaa who was speared and succumbed to his injuries.
9. It is disputed that the accused was involved in the fight. There is a dispute as to whether the deceased died in the fight from injuries inflicted by the accused.
10. This unfortunate incident occurred during the day and all the combatants were fellow villagers. It all started when PW2, PW3 and PW9 were beaten and chased off from the Mangani shamba by a group of men from the Wayu family. It would seem that the family of the deceased did not take this action lying down. Armed with pangas and rungas they proceeded to the shamba where the confrontation took place.
11. PW2, PW3 and PW9 identified the accused as one of the Wayu family men who while armed with crude weapons chased them out of the shamba. This evidence was not seriously tested during cross-examination. When PW1, his father (deceased) and PW2 arrived at the shamba, they found the Wayu clan including the accused at the shamba. According to PW2 insults were exchanged by the men on both sides. Specifically the accused allegedly insulted the deceased and his brother (PW3) who also replied.
12. PW1 said in his evidence in chief:

“.....at Bangani, Mzee Jibran (PW3) called his wife...who did not respond – we walked through the shamba searching for them (the women) and just then we saw the accused MOHAMMED MATA BARISA standing with Jumaa, Mzee Wayu and Amile. Mzee Wayu spoke to my father asking him what he had come to do there...”Do you have any land here, what have they come to do here”...Mohamed Barisa insulted my father and uncle...Gibran insulted him back...Accused hit Gibran using a rungu. The panga which Gibran had in his hand fell...Jumaa, Wayu started advancing towards my father...Accused began running after Gibran while my father picked a spear (he had been injured) and leaned against a tree. Accused aimed a spear...it injured Gibran..Accused picked the same spear and charged at my father and pierced my father with the spear in the middle of the chest and I saw my father moving backwards and fall in the same pit Jumaa had fallen into. I fled...hid under a bush..”

13. PW2 in many respects gave similar evidence regarding the fight. He specifically stated the vulgar insults exchanged between him and the accused as well as the role of the accused in the attack. By the time the area chief (PW6) and another son of the deceased (PW5) arrived at the scene, there was nobody at the scene. Similarly the second police officer to arrive there (PW10) who said he took thirty minutes from his station did not find the body. But at the same time, PW6 and PW10 received reports that Jumaa was at a place called Kubani. They went there and found him in a bad state. PW 10 witnessed his death.
14. PW6 specifically said he never saw the accused on the material date. At no point did the defence suggest to PW6 or PW10 in cross-examination that the accused was one of those assisting Jumaa at Kubani. It is the evidence of PW11 that he arrested the accused several days later at a place called Jua Kali within the jurisdiction of Hola Police Station, yet the accused was admittedly resident of Masalani. Clearly he escaped therefrom after the fight. Even then, when he spotted PW11 he attempted to escape but was nevertheless caught. This conduct is not consistent with

innocence. It goes to confirm the assertions by PW1, PW2, PW3, and PW4 that he was involved in the fight from start to finish and speared the deceased to death.

15. Other persons involved such as PW2 did not escape from Masalani. He was seen by PW8 an AP officer who was first to attend the scene. He also met with PW1. Also PW6 did meet PW2 and his wife PW3. PW2 told PW8 on arrival that the accused had speared the deceased. PW8 observed to the scene of the fight and noted the blood trail ending at the banks of River Tana.
16. The evidence on record displaces the accused's denial of involvement in the fight, spearing of the deceased and disposal of the body. The timing of the events of the transaction are such that even though the body of the deceased was never found, it is evident that by the time he was dragged from where he lay after being speared, the deceased was as good as dead. This was witnessed by PW1. The fight occurred at the shamba not the river bank.
17. Jumaa was removed to hospital by his family. It can only be that the blood trail and dragging marks leading to the river were in respect of the deceased. Secondly, the intervening period was too short for wild animals to have entirely devoured or dragged the deceased into the water as suggested during cross-examination.
18. PW10 produced some sandals found at the river bank purportedly belonging to the deceased. But none of his family was shown the sandals while they testified. The sandals therefore added no value to the prosecution case.
19. The fact that the body was not found and therefore no postmortem conducted does not detract from the evidence of PW1 as regards the final hours of his father. Notwithstanding the absence of the body or the immediate cause of death, it is evident that deceased was mortally wounded in the fight through spearing on the chest, occasioning serious bleeding.
20. The Court of Appeal had to grapple with a similar situation in **Dorcas Jebet Ketter & Ano vs R (2013) eKLR**. In that case the body of the deceased could not be traced. There was no medical evidence as to the cause of death. The court of Appeal stated:

“In **Ndungu v R (1985)KLR 487**, this Court discussed the principle that in some cases death can be established without medical evidence and also discussed other cases such as the Tanzania case of **R v Cheya (1973) EA 500** and after considering them at length stated as follows:

“Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a postmortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence, and as supporting evidence of the cause of death. In the circumstances relied on by the prosecution.”

21. The court went on to state:

“That was in respect of cases where the body is available. ...the court recognized the principle that there are cases where death can be established without a medical evidence. In this case the body itself was not recovered so that it would have been futile (to call medical expert). In our view, in such cases once the evidence, circumstantial or otherwise leaves no doubt in the mind of the court that death did occur but the body was disposed off in one way or other probably to destroy evidence and defeat justice, a court of law, properly directing its mind to the law and seeking to do justice cannot abdicate its duty to ensure justice.”

22. The Court of Appeal cited Article 768 of Section 9 Halsbury's Laws of England (3rd Edition) on

Criminal Law and Procedure, and cited a paragraph from the new Zealand Court of Appeal decision in **Republic vs Harry (152)NZLR 11(3rd Digest Supp)**. In the latter case the court stated that the

“fact of death is provable by circumstantial evidence notwithstanding that neither the body or trace of the body has been found...”

23. Applying the above principles to the present case, there is cogent and compelling evidence that the deceased suffered mortal injuries (spearing) at the hands of the accused. In the moments that followed his body was clearly drowned in the Tana River and never found. The accused's denials cannot stand and are merely an attempt to escape liability for his actions.

24. By driving his spear into the chest of the deceased, the accused clearly intended it cause him grievous harm or to kill him. Already the deceased had been slashed on his right hand to the bone. The accused's intention is demonstrated by his actions. I find his defence unbelievable and dismiss it. On the strength of the overwhelming prosecution evidence, I do find the accused guilty and convict him as charged.

Delivered and signed at Malindi this **25th** day of **October, 2013** in the presence of Mr. Okuto holding brief for Mr. Michira for accused, Accused present, Mr. Nyongesa for the State.

Court clerk – Samwel.

C. W. Meoli

JUDGE

MR. NYONGESA – I treat him as first offender.

C. W. Meoli

JUDGE

MR. OKUTO – the accused is aged 63 years old and has two wives and fourteen children, all dependent on him. He is a peasant farmer. He is a first offender. He is remorseful.

C. W. Meoli

JUDGE

NOTES ON SENTENCE

I have noted the mitigation, particularly the age of the accused and the circumstances in which offence occurred.

C. W. Meoli

JUDGE

SENTENCE

Accused sentenced to ten (ten) years imprisonment.

Right of Appeal 14 days.

C. W. Meoli

JUDGE