



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE 23 OF 2009

REPUBLIC.....PROSECUTION

=VERSUS=

ALI SALIM AWADH alias ALI HASSAN MAJID.....ACCUSED

JUDGEMENT

The accused **ALI SALIM AWADH alias ALI HASSAN MAJID** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the offence were that:

“On the 16th and 22nd day of November, 2008 at Digo Road Mombasa within Coast Province murdered KALTHUM ALI”

The accused entered a plea of **‘not guilty’** to the charge and his trial commenced before **HON. JUSTICE F. AZANGALALA** on 28th October 2009. The Honourable Judge heard a total of three (3) witnesses after which he went on transfer to Eldoret High Court. I took over the conduct of this trial on 8th December 2010 and heard the remaining eleven (11) witnesses. **MR. ONSERIO** State Counsel presented the prosecution case whilst **MR. ODHIAMBO** Advocate acted for the accused.

This case revolves around the very unfortunate and tragic death of one **‘Kalthum Ali’** (hereinafter referred to as **‘the deceased’**). Evidence from **PW4 KAFIYE SAID ISLAM** who was the deceased’s mother and **PW12 ASSA ALI**, who was a sister to the deceased was that the deceased who was separated from her husband together with her children lived with her mother and siblings in Malindi. On 14th November 2008 the deceased left Malindi on a journey to Nairobi through Mombasa. The deceased who was a businesswoman told her family that she was going to Nairobi to purchase a lathe machine. **PW8 MUFIDA SALIM ALI** a niece and close friend of the deceased told the court that the deceased would reside in their family home in Makadara whenever she visited Mombasa. **PW8** confirms that on this trip the deceased did stay with her family as usual. On 17th November 2008 the deceased left saying that she was going to visit a friend called **‘Hawa’**. The deceased was never seen alive again. A few days later the family received a phone call informing them that the body of the deceased had been recovered in an abandoned room and had been taken to Coast General Hospital mortuary. The family went and identified the body of the deceased at the mortuary. Police who had been alerted conducted investigations, after which the accused who was said to have been seen with the deceased on the night she disappeared was arrested and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. The accused gave a sworn defence in which he totally denied any and all involvement in the murder of the deceased. It is now the duty of this court to examine the evidence adduced before it with a view to determining whether this charge of murder has been proved to the standard required in law.

The offence of murder is defined in Section 203 of the Penal code as follows:

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

From this definition arises the three key ingredients that the prosecution must prove in order to prove a charge of murder:

- 1) That a death has occurred and the cause of that death
- 2) That the accused caused the death of the deceased by an unlawful act or omission – this constitutes the ‘*actus reus*’ of the offence, and lastly;
- 3) That the deceased in committing said unlawful act or omission acted with malice aforethought – this constitutes the ‘*mens rea*’ of the offence.

On the question of the fact of death there is no doubt. **PW2 ALI HUSSEIN SIMBA** who was a caretaker of Jiwaji building in Mombasa told court how in trying to establish the source of a foul stench emanating from Door No. 1 in that building, he and police gained entry into the room and found the dead, and decomposed body of a female adult. **PW11 PC ROBERT MUORU** was one of the officers who was with **PW2** when they recovered the body. He told the court that he checked the contents of a handbag lying next to the body and recovered personal documents belonging to ‘*Kalthum Ali*’. **PW4, PW8** and **PW12** all relatives of the deceased went to the mortuary where they identified the body of that of the deceased Kalthum Ali.

Similarly regarding the cause of death no controversy exists. The body was found in a terrible state, swollen, maggot-infested and decomposing all of which is evident from the photographs taken at the scene, which photographs were produced as exhibits in this case **Pexb1, PW7 DR. K.N. MANDALYA** who was the pathologist who conducted the autopsy on the body of the deceased. He noted several bruises on the torso as well as a fracture of the upper cervical spine. His opinion was that death was due to ‘*cardio-respiratory failure due to cervical fracture arising from pressure on the neck and asphyxiation*’. This is expert medical opinion evidence which has not been challenged nor controverted by the defence. It is clear therefore that the deceased met her death as the result of the unlawful act of strangulation and assault on her person.

Having proved the fact and cause of the deceased’s death the prosecution must prove that it was the accused committed this unlawful assault which led to the death of the deceased.

In this case there is no direct eyewitness evidence of how the deceased was killed. There is no witness who saw any person inflict the fatal injuries on the deceased. The accused is linked to the death of the deceased by virtue of the fact that he was said to have been seen with the deceased a few hours prior to her death. At this point before I proceed I feel it is necessary to address an anomaly in the charge sheet. The particulars of the charge indicate that the accused committed this murder on the 16th and 22nd day of November, 2008. It is quite obvious that the deceased could not have been killed on the two different dates. One can only die once. The date 16th November 2008 refers to the date when the deceased left the home of **PW8** where she had been staying and 22nd November, 2008 relates to the date when the body of the deceased was recovered inside the abandoned apartment. The charge sheet ought to have read “*between the 16th and 22nd November 2008*”. Was this failure to properly frame the particulars in the charge fatal to the prosecution case? I think not. This was a minor error which to my mind did not cause any prejudice to the accused. The evidence was clear and the witnesses clearly

referred to the dates when events were alleged to have occurred. Article 159(2)(d) of the Constitution exhorts courts to administer justice without undue regard to technicalities. The error in the dates in my view is one such minor technicality and this court will ignore the same.

PW1 RASHID ABDALLA RASHID told the court that on the evening of 16th November 2008 at about 8.30 p.m. he was enjoying a cup of coffee at Makadara Gardens with friends. He states that he saw the accused whom he knew well come by and order a cup of coffee. The accused was with a lady companion who was dressed in a buibui. **PW1** noted that a lady was wearing a pair of orange shoes and was carrying a silver/grey handbag and on his part the accused had a white cap and a black pair of jeans.

The evidence of **PW1** is corroborated by **PW3 MUSA YUSUF MUSA** who told the court that on the material date he was together with PW1 at Makadara Gardens taking coffee at 8.30 p.m. He too states that he saw the accused whom he refers to as '**Majid**' come to the same venue with a lady companion who was dressed in a buibui. He too states that the lady was carrying a silver/grey handbag and wore a pair of orange shoes. **PW3** also states that the accused was dressed in a white cap and a pair of dark blue jeans. This witness told the court that:

“Majid and the women seemed to be having a friendly conversation and I did not witness any quarrel”

It was clear that the two were on an evening outing together and both **PW1** and **PW3** testify that accused and the lady eventually left together at about 10.00 p.m.

Further evidence that the accused was seen with the deceased on 16th November 2008 shortly before she died is provided by **PW14 KIOKO MUNZULA MUTISYA**, who told the court that he runs a sweet stall next to the GPO in Mombasa. He tells the court that on that day at about 6.00 p.m. he saw the accused with a lady who was wearing a buibui. **PW14** also noted that the lady was carrying a silver/grey hand-bag. **PW14** said that he observed the couple for about 15 minutes as they stood at the stage. He too confirms that the accused had on a pair of black jeans. After they left **PW14** next saw the accused at about 2.00 A.M. the same night but this time accused was alone without the lady. All the three witnesses identify the accused before the court as '**Majid**' which they state was the name by which the accused was commonly known.

In his defence the accused categorically denies that he is known as '**Majid**' and he also categorically denies that he was in Mombasa on 16th November 2008. The accused insists that on that day he was at his rural home in Kiunga in Lamu and thus could not have been seen with any lady in Mombasa. The accused insists that he does not know **PW1**, **PW3** nor **PW14** at all. Why would three people who are totally unconnected to each other say that they saw the accused in Mombasa if he was not there? What would the witnesses have to gain by so stating? Contrary to the claim by the accused that he did not know any of the three witnesses, the three all testify that they knew the accused very well. **PW1** states in his evidence:

“I had known Majid as a friend. We had worked together at Zubra Construction. He was a messenger. I had known him for about 10 – 11 years. Majid is in court. He is the accused”

PW1 then proceeded to positively identify the accused in the dock. On his part **PW2** states:

“Majid was common in the place [Makadara]. I had seen him for one year. I did not know his full names”.

Why would these two witnesses insist that they knew the accused so well if they did not know him at all? Similarly **PW4** states as follows:

“I know the accused in this case. His name is Majid. He is here in the dock. I often see him walking at night within the GPO area. I have known the accused for about eight years”

It is not possible that three witnesses would falsely claim to have known the accused for great lengths of time if this were not true. The three witnesses could not all have been mistaken. The witnesses all state

that the area was well lit and they could see the accused very well. The court takes judicial notice of the fact that the GPO area (where **PW14** saw the accused) is on a main street in Mombasa which is well served by street lights rendering visibility good. Likewise the Makadara area is surrounded by restaurants which have electric lighting again making it easy to see and recognize others. The fact that the witnesses were all able to describe in great detail what both the accused and his lady companion were wearing is proof that they had a clear unfettered view and that visibility was good.

In his defence the accused claims that on 16th November 2008 he was nowhere near Mombasa but that he was at his home in Lamu. The accused has tendered no evidence to prove that he was in Lamu. The accused must have been in the company of family and friends in Lamu. Nothing would have been easier than to call a family member or friend to confirm that indeed he was in Lamu. I note that at no time were any of these issues raised during cross-examination of the witnesses. Defence counsel made no challenge to the witnesses either that they did not know the accused or that his nickname was Majid. It is clear that this defence is a mere denial and an attempt by the accused to place as much distance as possible between himself and the events of that night. I was able to observe the demeanour of the accused as he gave his defence. He appeared shifty and evasive. It was clear that he was not telling the truth. I therefore reject the accused's defence as an afterthought and a mere fabrication. I also reject his alibi that he was not in Mombasa that evening. Three independent witnesses have said that they saw the accused in Mombasa on the night of 16th November 2008. The three witnesses had all known the accused for several years. He was not a stranger to them. There is no reason or motive these witnesses would have had to fabricate evidence against the accused. They all gave clear and consistent evidence and all remained unshaken under rigorous cross-examination by defence counsel. This court is convinced that the witnesses were telling the truth. The accused's attempt to deny his nick-name '**Majid**' is also rejected. It is quite common for people to bear nicknames which are not their official names. All the witnesses have referred to the accused as '**Majid**'. Where would this name have come from if it was not the name he was commonly referred to by? Even **PW6 MOHAMED KHER OBBO**, who did not reside in Mombasa but told the court that he lived in Ngomeni in Malindi identified the accused to be a man he knew as '**Majid**'. Four witnesses cannot impose upon the accused a name which was not his. At no time during the trial did accused object and say that '**Majid**' was not his alias. This again did not feature in the cross-examination of the witnesses. I am satisfied that the accused was commonly known to his peers as '**Majid**'. From the weight of evidence on record I am satisfied that the accused was seen in the company of a lady wearing a buibui, carrying a silver/grey handbag and wearing an orange pair of shoes. The witnesses all gave consistent testimony on this.

The prosecution relies on circumstantial evidence to link the accused to the murder of the deceased. The Court of Appeal in the case of **JAMES MWANGI –VS- REPUBLIC [1983] KLR 522** set out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of the guilt of an accused person. In that case it was held as follows –

“In a case depending exclusively in circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference ...”

The body of the deceased was found in an abandoned flat at Jiwaji building in Mombasa. Next to the body was recovered some female clothes including a buibui, a pair of orange shoes and a silver/grey handbag. **PW2**, the caretaker who entered that flat with the police identified the handbag **Pexb1**, the shoes **Pexb2** and the buibui recovered next to the body. **PW1** also and **PW3** both of whom had seen the lady with the accused both positively identify the hand-bag and the shoes as the ones the lady had with her. In the photographs produced in court both the handbag and the orange shoes are clearly visible lying on the floor next to the dead body. **PW11** the officer who visited the scene told the court that he opened the handbag. Inside it he recovered identity card, voters card all bearing the names of the deceased **Kalthum Ali Ahmed**. Whilst it is quite common for a woman to carry a hand-bag (of any colour) these exhibits were unique in that all the witnesses say the lady they saw with accused had a silver/grey handbag and wore orange shoes which is not a common colour of footwear. The colour of the foot-wear

made it unique and easily identifiable. There could not have been many women wearing orange shoes in the Makadara area that same night. The identity card and the evidence of **PW1** (the mother) and **PW12** (the sister) of the deceased all serve to convince this court that the lady whose dead body was recovered in the abandoned flat is the **very same** lady who was seen enjoying a night out with the accused on 16th November 2008. There can be no doubt about this.

The next question this court has to consider is whether there is sufficient evidence to prove that the accused was involved in the murder of the deceased. The mere fact that the accused was in the company of the deceased the night when she disappeared will not of itself be sufficient. The accused could very well argue that although he was with the deceased at the Makadara grounds he parted company with her **before** she met her untimely death. The prosecution must avail evidence to prove a link between the accused and the murder of the deceased. All the witnesses who saw the accused on the evening of 16th November 2008 testify that he was wearing a white cap and a black pair of jeans. In the room where the body of the deceased was recovered police found a white cap. Whilst a white cap may be a common article of clothing it cannot be a mere coincidence that accused is seen in the company of the deceased wearing a white cap and in the room where the body of the deceased is recovered a white cap is also found. The only possible conclusion from this set of facts is that the accused must have been in that room with the deceased at the time when she met her death. The presence of this white cap squarely places the accused at the **'locus in quo'**. If the accused had nothing to do with the death of the deceased – if for example she had been killed by third parties then the accused would have alerted authorities of her death or would have at least tried to seek some form of assistance. Instead the accused went underground and was not traced until his arrest one year later. The fact that accused went to great lengths to deny his presence in Mombasa at the time of this incident convinces this court that he must have had a hand in the murder. The actions of the accused are not above-board at all but rather are the actions of one who has a guilty mind.

Further evidence implicating accused in this crime is provided by **PW6 MOHAMED OBBO** a friend of the accused. He told the court that on 17th November 2008 at 10.00 A.M. while in Malindi, he received a call from the accused. The accused asked the witness to help him dispose of a gold chain and two mobile phones. **PW8** had told the court that the deceased had in her possession two mobile phones and was wearing gold jewellery when she left their home. **PW6** declined to take the items – he said he became suspicious because the chain was broken. **PW6** was declared a hostile witness by the prosecution as he appeared to want to back-track on his statement to police. However **PW6** did identify the statement he made to police and had no objection to its production as an exhibit. In that statement **PW6** told police:

“The accused told me he hit a lady at Konzi street near the mosque. The lady fell and he snatched her chain In my statement I have said that accused told me that the lady resisted and he hit her with a bottle and she fell and died on the spot”

Here **PW6** having initially denied having told police that accused told him the lady he robbed had died, later concedes that in the statement he gave to police he did state that accused told him that he hit a lady with a bottle and the lady died on the spot. I am quite mindful of the provisions of Section 25A of the Penal Code as well as the law relating to the admissibility of self-incriminating statements. However here the accused having brought to **PW6** gold jewellery and mobile phones to dispose of by way of sale is merely giving to **PW6** an explanation of how he came about these items. It is clear that **PW6** in his testimony in court was attempting to water down his evidence in order to favour his friend (the accused). It cannot be a mere coincidence that on the day after the deceased was seen with the accused in Mombasa the accused seeks out **PW6** and gives him a broken chain and two mobile phones to sell on his behalf. Where did accused obtain these items from? From the evidence of **PW6** the accused robbed the items from a lady. Who was this lady if not the deceased?

Defence counsel raised the issue of the tenant of this Flat D1 who went missing immediately after the incident. **PW9 ISMAIL GULAM** the owner of the flat told the court that his tenant in Flat D1 was one **'Mohmoud Hussein'**. **PW9** also stated that the tenant's son called Mohamed paid the rent monthly and no arrears were owing. When this Mohamed was informed that a dead body had been found in his flat, he disappeared, stopped paying rent and has not been traced to date. There is every possibility that this

Mohamed knew of or may have been involved in the murder of the deceased. The fact that he absconded is proof enough. However the possible involvement of this Mohamed in this crime does not negate the involvement of the accused in the murder. The two could well have been acting in cahoots. The fact that this suspect has absconded and cannot be traced does not in any way diminish the weight of circumstantial evidence against the accused. It was the accused and no other person who was seen by no less than three witnesses in the company of the deceased shortly before she was found dead.

Based on the foregoing I am satisfied that it has been proved by way of circumstantial evidence that the accused had a hand in the death of the deceased. The facts on record support only this hypothesis and I find nothing to weaken or diminish the strength of this circumstantial evidence.

On the question of malice aforethought it is clear that the motive of the murder was robbery. The accused barely one day later goes to **PW6** attempting to hawk items which he explains he stole from a lady. S. 206(c) of the Penal code provides that malice aforethought shall be deemed to have been established where death occurs and there is shown to have been "***an intent to commit a felony***". This is precisely the situation in this particular case. I am satisfied that the prosecution have proved this charge of murder beyond a reasonable doubt and I hereby convict the accused of the murder of the deceased.

Dated and Delivered in Mombasa this 30th day of March 2012.

M. ODERO
JUDGE

In the presence of:

Ms. Odhiang holding brief for Mr. Odhiambo

Mr. Onserio for State

MR. ONSERIO: Treat as a 1st offender.

COURT: Hearing 5th April 2012 for mitigation.

M. ODERO
JUDGE
30.3.2012

5.4.2012

Before: Hon. Lady Justice M. Odero
Court Clerk – Mutisya
Mr. Gioche for State
Mr. Odhiambo for Accused

MR. ODHIAMBO: The accused does sympathise with the family of the deceased though he still maintains his innocence. We take cognizance of the fact that a life was lost. The social welfare report and psychiatric report we do submit that the accused ought not be sentenced to death. We urge court to be lenient in passing sentence.

COURT

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As pointed out by counsel a human life has been needlessly lost. This court has found the accused

responsible for that loss of life. I do take cognizance of the emerging jurisprudence that a death sentence is not mandatory upon a conviction of murder. However the offence is grave and serious thus a punitive sentence is called for. I hereby sentence the accused to serve fifty (50) years imprisonment.

Right of appeal explained.

M. ODERO

JUDGE

5.4.2012