



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**  
**Criminal Case 44 of 2007**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**MOHAMED NOOR KAILEY.....ACCUSED**

**J U D G M E N T**

The accused, **MOHAMED NOOR KAILEY**, was charged with the offence of Murder **contrary to section 203** as read with **section 204 of the Penal Code**. The particulars of the offence were that on 10<sup>th</sup> June 2006, at about 1900 hours, at Desheq Location in Wajir District, the accused murdered NOOR KAILEY.

**PW 1, SUUDIA HASSAN WARDERE**, was the wife to the deceased. She is the step mother of the accused.

She was living with the deceased together with the accused and their other children. Her two co-wives had been divorced before the deceased married her. But their children remained with the deceased.

On the material day, the deceased arrived back home in the afternoon. He arrived from Wajir.

**PW 1** left her baby with a neighbour, and went to the nearby dam to fetch water. After bringing the water home, **PW 1** returned to the neighbour's home, to collect the baby.

Whilst **PW 1** was still at the neighbour's house, she heard her husband making noise. She therefore rushed towards her home. However, before **PW 1** reached home, she met the accused on the way. The accused threw a panga towards **PW 1**, causing her to run-off towards town.

**PW 1** went and informed relatives about what had just happened. Later, **PW 1** returned home, accompanied by some relatives. They found the accused at home. He was holding an axe.

When the accused saw **PW 1**, he ran away.

Meanwhile, the deceased lay dead, inside the house.

It was the testimony of **PW 1** that the axe which the accused was holding had blood stains on it. The accused ran away with the said axe.

**PW 2, NOOR MOHAMED OMAR**, was a resident of Desheq town. On the material day, he heard noise coming from the direction of the deceased's home.

He then went to the home, where he found the deceased dead. However, by the time **PW 2** reached the said home, the accused was not there.

**PW 3, MOHAMED SOKAR ABDI**, was a Kenya Police Reservist. He was attending a meeting where he was briefing security officers, when they received word about the killing of Noor Kailey. One of those who were at the meeting was the OCS.

The said OCS instructed **PW 3** together with another Kenya Police Reservist named Abdi Korrow Omar, to look for the accused, who had run away.

They traced the accused at Kachacha. Although they arrested the accused, they failed to trace the axe which had allegedly been used to kill the deceased.

**PW 4, ABDULLAHI ADAM FARAH**, is a cousin to the deceased. He was a resident of Wajir, and he confirmed that on the material day, the deceased had been with him in Wajir, before leaving for his home in Desheq.

He is one of the people who identified the body of the deceased for the purposes of post-mortem examination.

**PW 5, PC FRANK OWAKA NDONG**, was together with the members of the family of the deceased when the doctor conducted the post-mortem examination on the body of the deceased.

**PW 6, PC PETER ONYANGO**, was at the Wajir Police Station when some members of the public made a report that the accused had killed his father, Noor Kailey.

**PW 6** accompanied the OSC, Inspector Oludhe and Cpl. Mugambi to the scene of crime. After taking note of the scene the police officers collected the exhibits and the body. The exhibits included the shirt, T-shirt and headscarf which the deceased had been wearing at the time of his death.

Later, the police officers re-arrested the accused.

**PW 7, CHIEF INSPECTOR JAMES OCHIENG OLUDHE**, was at the Wajir Police Station when the murder of the deceased was reported to the police.

After getting the report, **PW 7** visited the scene.

**PW 7** learnt from **PW 1** that the accused and the deceased had had an argument before the former killed the latter.

The killing is said to have taken place within the “Somali-Style house.”

After **PW 7** testified, the prosecution closed its case.

I gave due consideration to the evidence tendered, and concluded that the accused had a case to answer.

The accused gave a sworn defence. He confirmed that he used to live with the deceased and **PW 1**. He said that he and his father used to have a good relationship.

At the material time, his father had gone on safari, whilst he (the accused) had gone to herd his goats.

When he got back home, he was tired, and went to rest inside the grass-thatched house. He fell into a deep sleep, and only woke up when he was hit on the neck with a walking stick.

The accused responded by picking up something which was under him, which he used to strike out towards the source of the stick that had been used to hit him. He was surprised to learn that the person he had hit was his father.

He was shocked.

During cross-examination, the accused said that the tool which he had used to hit his father was a small axe. He also said that he did not even know what part of his father's body he hit, because he had just come from a deep sleep.

Having realized the gravity of what he had done, the accused ran away to the home of his uncle. That brother to his father lived a distance of 30 minutes walk from their home in Desheq.

When asked why he did not notify his step-mother, the accused said that **PW 1** was away at the hotel.

And when asked why he did not tell any of the neighbours the accused said that none of the neighbours was at home at the time.

As regards the axe which he had used, the accused said that he had left it at the scene. He therefore did not know what happened to the axe.

Having given due consideration to all the evidence on record, I note that the basic facts were not disputed by the accused. Indeed, he confirmed having inflicted the fatal injury on the deceased.

Contrary to the assertion that the neighbours were not at home at the material time, I find that some neighbours were at their respective homes. That is why **PW 1** was able to leave her baby with one of the said neighbours when **PW 1** went to fetch water from the dam.

In any event, the accused could not have known whether or not the neighbours were at home unless he went to check on them. And he did not do so. Therefore, his contention that the neighbours were not at home is merely conjecture.

The doctor who conducted the post-mortem examination noted that the deceased suffered a fracture of the right temporal bone and a cut wound, possibly by a sharp object. The doctor formed the considered opinion that the cause of death was the skull fracture.

In effect, the cause of death was consistent with the evidence tendered by both the prosecution and the accused.

Meanwhile, when the accused was first examined medically, he was found to have had a mental disorder, which required a further psychiatric evaluation. The said first medical examination was undertaken by Dr. Aluvaala E. Seme, at the Wajir District Hospital on 15<sup>th</sup> June 2007.

Thereafter, the accused was further evaluated by a Consultant psychiatrist, Dr. Hinga, on 9<sup>th</sup> July 2007. The psychiatrist concluded that the accused was fit to plead.

Mr. Oyalo, learned advocate for the accused submitted that although the accused did take the life of his father, he ought not to be convicted for murder. He said that the attack on the deceased was in response to the attack which he had visited on the accused, when the accused was asleep.

It was contended that the accused had been provoked by the deceased, and that his attack on the deceased was carried out before the accused had had time to cool-off the passion.

But, as the learned state counsel, Ms Mwaniki, submitted, if the accused had been attacked with a walking stick, there would definitely have been some evidence of such an attack on him.

That may be true but It is equally true that one may be attacked but without necessarily leaving tell-tale signs of such an attack. In other words, the absence of symptoms of an attack would not necessarily imply that the victim of such an attack was not attacked.

Ultimately, however, when the alleged victim of an attack has no visible signs to corroborate his assertion, it is probable that the court will hold that the allegation of an attack had not been proved. To so hold is not to impose on the accused person the burden of proof. Such a holding merely implies that the line of defence was found to be implausible.

Was the defence of provocation in this case plausible or not?

The prosecution invited me to find that the accused was telling untruths, and that therefore his allegation of provocation was also a lie.

Of course, *falsus in uno, falsus in omnibus*; meaning that when a witness willfully falsifies one matter he is deemed not to be credible on any matter. His false testimony in the one matter discredits the rest of his testimony if it is without corroboration.

Does that mean that because there was no evidence of any injury to the accused, he was never attacked by the deceased?

I am not able to state so, categorically. In other words, there is a possibility that the attack on the deceased was preceded by an attack on the accused, by the deceased.

In **R Vs NGOILALE (1951) 18 EACA 164**, the Court of Appeal for Eastern Africa expressed itself thus;

***“No doubt this element of self-defence may and, in most cases will in practice, merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts done under the stress of provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.”***

In this case, the accused was resting inside a house after returning from herding goats. He fell asleep. He was later awoken by someone who was hitting him or prodding him with a walking stick. He responded by striking out at the person who was hitting or prodding him.

The force with which he responded appears to have been in excess of what was required for self-defence. And the result was the fracture of his father’s skull.

The prosecution has led no evidence to show that the accused had any intention or reason to attack his father, before the actual incident. He had been out herding goats whilst his father was away on a safari.

It is therefore entirely probable that the accused assumed that whoever was hitting him with a stick was up to no good; and also that the said person was anybody other than his father. By so saying, I am not suggesting that the forceful striking of a person other than the father of the accused would have been alright. The point I am making is that there is nothing to indicate that the accused had any reason to want to either kill his father or to cause him grievous harm.

In the circumstances of this case, I find that the accused caused the unlawful death of his father. But I find that he lacked malice aforethought. Accordingly, I find the accused guilty of the offence of Manslaughter **contrary to section 202** as read with **section 205 of the Penal Code**. He is therefore hereby convicted for the offence of manslaughter.

Dated, Signed and Delivered at Nairobi this 30<sup>th</sup> day of July, 2012.

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**FRED A. OCHIENG**  
**JUDGE**