



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 67 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

HALKANO DIDA DADACHAACCUSED

JUDGEMENT

The accused was charged with the offence of murder contrary to section 203 of the Penal Code as read with Section 204 of the Penal Code (Cap 63, Laws of Kenya).

The particulars were that the accused on the night of 22nd – 23rd day of October 2008 at Baldesa Sub – Location Jaldesa Location in Marsabit District within Eastern Province murdered Garbole Tunale (the deceased).

Section 203 of the Penal Code provides that “ any persons who with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”.

Malice aforethought is deemed to be established by evidence by proving any one or more of the circumstance set out in Section 206 of the Penal Code.

These circumstances are –

(a) an intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to another person, whether that person is the person killed or not; although such knowledge is accompanied

by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused;

(c) an intent commit a felony,

(d) an 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 accused pleaded not guilty to the charge, and the prosecution subsequently called nine witnesses whose evidence is summarized in the following paragraphs of this judgment.

PW1 Guyo Adi testified that while going to school, his and neighbours children found a body by the road side. The body was that of Garbole Tunale, the deceased. Found besides the body was a “ fimbo”, a walking stick and a wrist watch. The deceased had sustained injuries on the neck, ears and leg near the knee. He made a report to the Bardasa AP Camp, and later to Marsabit Police Station.

PW1 testified that he knew the accused, Halkamo Dida Dadacha. He used to do casual work in his village but did not know the origin of the accused. The accused had no Kenyan Identity Card. He had seen the accused at the home of the deceased, and had heard from, the deceased that the accused and the deceased had disagreed over a lady, and that the deceased had subsequent to the disagreement made a complaint to the AP Camp.

PW1 further testified that the accused had been arrested on the way to Moyale at a place called KBC, and that by the time he was arrested, the accused had walked between 4-5 hours from the scene of the murder.

This witnesses also identified the” fimbo” as belonging to the deceased as it had “grooved” marks. He was positive about both the stick, and its ownership by the deceased.

PW2 was daughter to the deceased. She corroborated the evidence of PW1 that the accused used to do casual work in the village and at the time of the murder, used to work in the home of Jaso Abduba. She had known the accused for about 3 months, and again corroborated the evidence of PW1 that the accused had disagreed with her father over a woman. PW2 testified that she had seen the accused on 22nd October, 2008 and must have killed her father on 3rd October, 2008.

PW3 was APC Ali Boru. He testified that had seen the deceased on 21st October 2008 when he made a report about interference by the accused with his (the deceased’s), domestic affairs. The accused had denied any such doing when PW3 interrogated him. PW3 also testified that he had visited the scene of the murder, and found the deceased’s body. It had multiple injuries, on the neck and head. He had found a linking stick, and a plastic wrist watch.

He corroborated the evidence of both PW1 and PW2 that the accused had complained over interference with his concubine. PW3 also testified that the deceased had sired three children with the concubine.

PW4 was PC Francis Krimi Muriithi. He was on duty manning on 23rd October 2008 the KBC Barrier on the Marasabit – Moyale road when he received information from Corporal James Muriungi, the OCS Marsabit Police Station, that there was a murder suspect at Baldesa Sub- Location and directed them to be on the look out as the suspect could use that road to escape. The suspect had been described to them, as not too short, and had cropped hair.

PW4 testified that at about 3.45 p.m, a person who answered that description reached the Barrier. He was stopped and upon being searched, he was found with dirty clothes in his bag, a black trouser, he detained him, and he called Marasabit Police Station who sent officer, and they handed the awarded to PC Muthengi, P.C Karuku, PC. Kikwai who with local Councilor Mumo who identified the suspect and was

arrested.

PW4 also testified that it had rained the previous night.

PW5 was Dr. Andrew Mugui Muturi. He carried out the post – mortem on the deceased's body. Externally, the deceased had deep cuts on the head, lower temporal region, going down to the neck severing vital vessels, deep cuts on the frontal aspects, with compound fracture of the skull, and three other cuts on the vertex of the skull, deep cuts on the left shoulder and several shallow cuts on the lower limbs, but that the rest of the body was normal.

PW5 concluded that the cause of death was assault with multiple wounds caused by a sharp object such as a machete.

PW5 also testified that he examined the accused, who claimed that he had been assaulted – the accused had clean not blood stained clothes, but cuts in the fore- fingers and the forehead, and found him in good general condition, not intoxicated in any way. He had wounds on the left side of the head dirty with pus, but the thorax and abdomen were normal, but the upper limbs had shallow wounds on the 2nd, 3rd and 4th fingers. The lower limbs were normal but he had been treated before the examination. The wounds were about 4 days old.

PW5 also corroborated the evidence of PW4 that the accused was intercepted and arrested at the KBC station barrier on the Marsabit – Moyale road upon being alerted by him of suspects using that route to escape arrest to Ethiopia.

PW6 further testified that upon interrogation, the accused informed him that he had been cut by the accused, but that he had managed to overpower the deceased and battered him, and was fleeing the country.

PW6 also testified that he took the accused to Baldesa the area in which he used to live, and found a panga in his house, which was produced as an exhibit (PExn, 2). PW6 also found a stained trouser, (PExh.3), which also corroborated the evidence of PW4. PW6 subsequently charged the accused with the offence of murder.

Upon cross- examination, PW6 reiterated his evidence in chief, that the trouser was both soil – and blood – stained. The “panga” was hidden and was discovered upon a search in the deceased's wooden wall and iron sheet roof, and the accused himself informed PW6 that it was the deceased who cut his fingers, and that PW6 also charged the accused with being in Kenya unlawfully.

PW7, was deceased's concubine, and the source of friction between the deceased and the accused which she denied (but was clearly so from the evidence of PW1, and indeed PW7's own evidence). Her testimony was that the deceased visited her Manyatta on the material day 22.10.2008 from about 9.00a.m and did not leave until about or shortly after mid- night. She was briefly arrested on the 23rd October, 2008 after the discovery of the deceased's body.

Her testimony was also that she knew the deceased. He was father to 3 of her children. She had 6 children by a previous marriage but had separated with her previous husband.

PW7 testified that although she knew the accused – who used to do odd casual jobs in the shamba at Baldesa, she denied being his secrete lover of any other relationship with him.

PW7 was positive that the deceased and the accused were not friends. The cause of disagreement was grazing cattle. The deceased's cattle had strayed into the shamba of the accused, and the accused abused or installed the deceased. Unhappy with the insult, the deceased had reported the incident to the chief.

PW7 related her evidence in –chief in cross – examination. According to her testimony the walking stick recovered at the murder scene was longer than the one produced in court. And again she reiterated that the accused was not her secret lover, “seriously no”, and that the dispute was over grazing into the accused's

shamba, and not quarrelling over her.

PW7 also testified in cross- examination that the accused was walking with a panga threatening to cut the deceased. PW7 also identified the watch recovered at the scene as belonging to the deceased. Custom forbade her as a woman from approaching the deceased's body at the scene of the murder.

PW8, a sister of PW7 corroborated her evidence (of PW7). The deceased had visited their manyatta at about 9.00a.m. He left at about 1.00p.m to buy miraa and returned at about 4.00 – 5.00p.m, and stayed until about or after mid-night. They chewed miraa, and had tea at about 9.00p.m. PW8 testified that it rained that night and that the deceased left just before the rain started falling. PW8 also corroborated PW7's evidence that custom forbade them as women from approaching the deceased's body. She also corroborated her sister's evidence that her sister had no relationship with the accused, and was not a secret lover to the accused. The quarrel between the accused and the deceased was over grazing when the deceased's goats strayed into the maize shamba of the accused.

PW8 also identified the walking stick as that she used to see the deceased use walking as he had a limp on one leg. This witness also corroborated the evidence of PW4 and PW6 that the accused was arrested at a place called or known to locals as " Mboche" – way far from the scene of the murder.

PW9 identified the body of the deceased who was his uncle.

When put on his defence, the accused gave evidence on oath. He told the court that he understood the charge facing him. He testified that he left Marsabit on 23.10.2008 on his way to Moyale, that he never met the deceased, and that he first heard the deceased's name in court, that he was arrested at a bus stage in Marsabit by the Police who spoke to him in Kiswahili which he did not understand. That he was beaten at Marsabit Police Station, that no parade was held to identify him as killer of the deceased, and that the Police called the complainants who said that he was the person who had killed the deceased.

He denied any knowledge of the witnesses, he first saw them in court, that the injuries he had on his head and hand were as a result of beatings by the Police until he vomited blood. The accused denied killing the deceased, as he never knew him.

When cross- examined by State Counsel, the accused testified that the scar his head was a result of a hit by the Police using a club with a nut/ bolt.

While denying knowledge of any catechist in Marsabit, the accused admitted in the same breadth that a catechist helped him but he did not know his name.

The accused testified that he left Isiolo on the morning of 23.10.2008 and arrived at Marsabit at about 2.00p.m, because the vehicle he was travelling in had broken down, and that he being a herder, he had delayed in taking out his ID Card and that he was Kenyan but he was arrested for lack of an ID Card, and not murder, and denied killing any one. He denied any knowledge of PW7, or the deceased, or any of the witness. Accused stated that the whole charge was a frame –up, because of his lack of an ID card. The accused insisted that he was Kenyan, and that there are many others like him who have no ID cards. The accused also denied taking PW6 to his house or knowing any one by the name Benjamin Mboya.

That was the evidence of both the prosecution, and the defence (the accused).

SUBMISSIONS BY COUNSEL

Mr. Mwirigi learned counsel for the accused submitted that the prosecution had not established a case against the accused to the required standard. None of the prosecution had not established a case against the accused to the required standards. None of the prosecution witnesses witnessed the accused kill the deceased. Counsel submitted the one major question is how did the investigating Officer arrest the accused as no identification parade was carried out. The second question was what was the dispute between the accused and the deceased if there was no relationship between PW7, (the deceased's concubine) and the accused. Counsel submitted that the accused was a merely being suspected in the murder of the deceased.

The defence, Counsel submitted is that the accused never committed the offence. He denies it. The source of injury to the accused was explained as Police beating, and in any event the alleged weapon with which injuries were inflicted upon the deceased was disowned by the deceased. In any event further counsel submitted, the panga was not found with any stains, and that the prosecution had failed to link the weapon with the offence. Counsel therefore called the court to acquit the accused.

On his part, Mr. Kimathi learned State Counsel submitted that the prosecution had provide its case beyond reasonable doubt. State Counsel's submissions are considered in the following analysis of the evidence and conclusion.

ANALYSIS OF THE EVIDENCE

The thread of evidence is this. The deceased and the accused lived in a village called Baldesa. The deceased was a herdsman and kept livestock goats. The accused did odd jobs in the village, and tilled some land in which he planted some maize. Some time before the incidents described in the evidence the deceased's goats strayed into the accused's maize plantation and must have bitten off a few plants. The accused was unhappy and insulted the deceased. The deceased being an older person felt very hurt with the abuse, and he reported the matter to the Chief, and to the local AP Camp at Baldesa. That was the combined evidence of PW1.

It was also the evidence of PW1 and PW2 that the accused and the deceased had disagreement over a woman. That woman was PW7. PW7 however denied that he had any secrete love relationship with the accused. On the contrary, she was concubine to the deceased with whom she admitted to have had 3 children. It was her evidence that the deceased was in her house from about 9.00a.m on 22nd October, 2008, left at about 1.00p.m to buy Miraa, and returned at about 4-5.00p.m and stayed over until mid night chewing miraa and having lots of tea. He left at about that time, and his body was discovered by school – children by the road, or path side. The children raised the alarm, and PW1 and PW3 arranged to have the body of the deceased removed to Marsabit District Hospital Mortuary.

A postmortem was done on the body of the deceased by PW5, having been duly identified by the relatives.

FINDINGS

Of course there was no witnesses to the murder of the deceased. It was all circumstantial evidenced. That evidence is that the accused and the deceased had disagreed over two major issues. One was that the accused had insulted the deceased for permitting his herd of goats to stray into the accused's maize plantation. The deceased was so insulted that he reported the matter to the Chief and the local A.P Camp. The second reason for the difference between the accused and the deceased was over a woman, the deceased's concubine. PW3 APC Ali Boru when asked by the court testified that the deceased had been in love with the concubine for a very long time and had sired children with her. APC Ali Boru added that "the concubine, through a rural woman was attractive". This was therefore one major motive and incentive to put the deceased aside. The question is whether the accused did put away or murder the deceased on the night of 22nd October, 2008 and morning of 23rd October 2008. I certainly think so. These are the reasons for that conclusions.

Firstly the accused and the deceased had differed over a woman; that was the evidence of PW1 and PW2, even though PW7 (the concubine of the deceased), denied any relationship with the accused. In any event the deceased himself according to the evidence of PW3, reported to the AP's, that the accused was interfering with his domestic affairs which by inference included crossing his path with the concubine. Certainly PW7 knew of the differences between the accused and the deceased over pasture, another powerful motive for disagreement. These were disputes over a woman or pasture.

Secondly the claim that there no identification was carried out is entirely misconceived. Who would identify the accused when the duel was entirely between the accused and the deceased, without the presence of any other person, who one could say saw the vent at distance, and needed a parade to confirm that the persons seen at a distance was the accused. There is absolutely no need for an identification when

a suspect is known. The evidence was clear that the accused was a common labourer in the area. He was known and in those circumstances an identification parade is meaningless.

Thirdly the accused was arrested in circumstances which showed that he was fugitive running away from justice. The accused vanished from the Baldesa village after the murder of the deceased. He was arrested as he was trying to flee from the long arm of the law. He gave no explanation for his sudden departure from the village.

Fourthly the evidence of the accused though given on oath clearly shows the accused to be a consummate liar. The accused makes absolute no reference to his residence in Baldesa in Marsabit. The accused weaves an incredible story that he had travelled from Isiolo on 23rd October 2008 and that he was arrested in Isiolo Town on the grounds of not having a Kenyan Identification Card.

The evidence showing that this defence is a farce is clear. PW4 was briefed by his superiors the OCS, Marsabit Police Station to be on the look out for a fugitive who met the description of the accused who might use that route to escape towards Moyale. The accused met that description and was arrested by PW4 at the KBC Barrier and handed over to Marsabit Police Station Officers.

Fifthly the accused testified that he had no grudge against the deceased. If so, why leave the village suddenly? The accused testified that he had no grudge the Police, why would they arrest and have him prosecuted?

Sixthly, the incident occurred in a village where people meet regularly and are able to associate common items like a walking stick "a fimbo" or, a particular type of watch with a particular individual. The stick and watch found at the scene of the murder were those of the deceased.

Seventh the accused when arrested voluntarily took the police to his house. How could he at the same time have travelled from Isiolo and be keeping a house in Marsabit?

Eighth the accused had blood-stained clothes. He cannot say he was injured by the police.

Ninth what can be reasonably inferred from all the evidence is that the accused waylaid the deceased and in defending himself the deceased inflicted some minor injuries on the accused. That is a more plausible explanation for the injuries sustained by the accused rather than the claim that the injuries were inflicted upon him by the police. If he was accosted by the deceased, the defence by the accused would have been that he snatched the panga from the deceased, and cut the deceased in self defense. Instead he fabricates a story alleging injuries by the police!

Tenth and in conclusion the circumstantial evidence is clear. The accused would not have fled from the Baldesa if he had nothing to do with the murder of the deceased. He would not have fabricated a story about his travelling from Isiolo when he was in Baldesa on the evening and morning of the murder.

It is circumstantial evidence which is incompatible with any explanation of innocence on the part of the accused. I therefore find the accused guilty of the murder of Garblole Tenale and I convict him accordingly.

In the light of Section 204 of the penal Code which provides for one form of punishment, death, there is no basis for any mitigation at this stage, as the accused did not plead guilty in the first place. As there is only one punishment prescribed, I sentence the accused to death as by Law provide.

Dated and signed at Nakuru this 18th day of February, 2011

M. J. ANYARA EMUKULE

JUDGE

Delivered at Meru this 23rd day of February, 2011

J. LESIIT

JUDGE