



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO.15 OF 2009

REPUBLIC.....ROSECUTOR

VERSUS

ISMAEL KALAMSO KABIRU..... ACCUSED

JUDGMENT

The accused, **ISMAEL KALAMSO KABIRU**, 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, as cited in the information, are that on 14th September, 2007, at Bangale Trading Centre in Tana River District, within the Coast Province, the accused, jointly with others not before court, murdered **ABIKAR SIYAT**.

The prosecution called 8 witnesses. Thereafter, the accused gave a sworn defence.

PW1, HABIBA ABDI HASSAN, testified that the deceased, **ABIKAR SIYAT**, was her neighbour within Bangale “town” which is in Garissa.

On the material day, **PW1** was going into Bangale town, in the company of 2 other ladies. When the ladies were near Bangale Market, **PW1** saw 3 men chasing after the deceased. The said 3 men then assaulted the deceased with arrows.

According to **PW1**, the deceased passed away on the spot where he had been attacked.

During cross-examination, **PW1** said that whilst she was a Warde, the accused was from the Orma tribe. However, she denied the suggestion that on the material day there had been tribal clashes between the two tribes.

PW1 also testified that she was able to identify the accused together with the other 2 persons who assaulted the deceased, because none of the 3 assailants had covered their faces.

PW2, KHADIJA BASHIR SUGOW, also testified that she hailed from Bangale. She was with **PW1** and **PW3** on 14th September, 2007, when the 3 ladies had gone to buy food at Bangale town.

PW2 also saw the deceased as he was being chased by 3 men. The said 3 men included the accused herein. **PW2** knew the accused well because he had lived within the same area of Bangale town, as the witness.

Initially, the deceased was walking ahead of the 3 ladies. The accused and 2 other men then emerged

from the front, and attacked the deceased.

During cross-examination, **PW2** said that as at September 2007, the campaigns for the General Elections for 2007 had not yet started. She also said that there had been no tribal clashes at the time material to the case herein.

PW2 saw the deceased shot in his back, with an arrow fired by the accused.

PW3, QURESHI BALE, said that she was with **PW1** and **PW2**, when she saw the accused shooting the deceased with an arrow.

PW3 testified that both the deceased and the accused had been her neighbours prior to the incident.

According to **PW1**, there were neither political campaigns nor tribal clashes, at the material time.

PW3 also said that the deceased was shot with an arrow near Bangale Market. She denied the suggestion that the deceased was shot with an arrow whilst there was an ongoing Baraza, held at Bangale, on the material day.

PW4, DR.BONIFACE NZIOKI MUSILA, conducted a post-mortem examination on the body of the deceased. He did so at the Garissa General Hospital.

The post-mortem was conducted less than 4 hours after the deceased passed away.

PW4 noted a deep penetrating wound on the back of the deceased, with rib fracture. The wound was bubbling with air upon compression, suggesting that it was penetrating wound.

As a consequence, **PW4** testified that a cardiac injury could not be excluded. But **PW4** lacked facilities to open-up the chest of the deceased, to enable him verify whether or not the heart was injured.

It was the doctor's explanation that he could not exclude the possibility that the heart was injured because the heart is located in the area where the deep penetrating wound was.

PW4 recovered the head of an arrow from the back of the deceased's body.

The doctor's conclusion was that the cause of death was the penetrating chest injury, with severe haemorrhage.

However, **PW4** testified that a poisoned arrow could not be excluded.

When answering questions in cross-examination, **PW4** said that he did not take any samples from the body, for purposes of establishing whether or not there was poisoning.

PW4 also said that the deep penetrating wound could not have been caused by a bullet. He explained that a bullet wound was characterized by an entry point, which was small, and sometimes by an exit point (which was usually larger than the point of entry).

It was his evidence that the exit point was usually more destructive.

Furthermore, the high velocity of the bullet would normally cause burns around the wound at the point of entry.

However, in this case, the wound was rugged, and the projectile was firmly embedded in the body of the deceased. Indeed, it is the doctor who removed the head of the arrow, after applying some degree of force to extract it.

Furthermore, the fracture was clean-cut, as opposed to shattering, which would have resulted from a bullet.

PW4 advised that the arrow-head be analyzed for poison.

When the doctor was taken to task about the cause of death, he said that the wound caused by the arrow was sufficient to cause death.

The reason why he felt a need to have the arrow-head analyzed for poison was that he had carried out some other post-mortem examinations during the material time, in which the wounds caused by the arrows were not, of themselves, sufficient to cause death. As death did result in those other cases, **PW4** felt that there was a need to ascertain if the arrow-heads had been poisoned.

But in the case of **ABIKAR SIYAT**, the doctor stated categorically, that the cause of death was the deep penetrating chest wound. It was his testimony that it was highly unlikely that there could have been any other cause of death. He concluded by saying that there was no possibility of any other cause of death.

PW5, SIYAT FARAH GODANA, was a first cousin to the deceased.

He identified the body at the Garissa Hospital, for purposes of post mortem.

He saw one arrow head, which the doctor removed from the body of the deceased.

However, he saw 2 injuries, which were on the back and on the hip of the deceased. Both wounds were deep.

During cross-examination, **PW5** said that on the material day, there was fighting between the Orma and the Warde tribes.

PW6, PC JEREMIAH OGINGA, was manning the Report Office at the Bangale Police Post on 14th September, 2007.

It was his evidence that on that day, at about 10.00 a.m. there was tension between the Orma and the Warde Communities. The said tensions had started on the previous day.

On 14th September, 2007, a lady arrived at the Police Post at about 10.00 a.m., and said that Siyat had been shot with an arrow.

Before **PW6** could take down the particulars of the said lady, he heard gunshots outside the Police Post. He therefore rushed out to go and quell it.

Later, when **PW6** returned to the Report Office, the lady who had reported about Siyat was not there.

PW6 was not involved in the arrest of the accused, nor had he seen the accused at the Police Post.

During cross-examination, **PW6** said that the Orma and the Warde did fight. They used arrows as well as guns in their said fight. And **PW6** described the fight as having been fierce.

PW7, CPL MICHAEL MBUGUA, was attached to the Bangale Police Post, at the material time. He was present at the Garissa General Hospital when **PW4** conducted the post mortem examination on the body of the deceased.

PW7 testified that there was a sharp arrow-head on the left part of the chest.

When the doctor had retrieved the arrow-head, he gave it to **PW7**. Thereafter, **PW7** handed over the arrow-head to the Investigating Officer, PC Hassan.

During cross-examination, **PW7** admitted that he did not mention any arrow-head when he recorded his statement. He also did not state, in the said statement, that Dr. Musila (**PW4**) gave him any arrow-head. However, he insisted that his testimony before the court was accurate, as it reflected exactly what happened.

Finally, **PW7** said that he did not take the arrow-head for analysis.

PW8, CPL HASSAN ADAN, worked with the Criminal Investigation Department (CID), Garissa, as at 14th September, 2007.

On that day, at about 8.00 a.m., he was inside his office, when the Deputy DCIO, Inspector Ouma, instructed him to accompany him to Bangale Centre. Inspector Ouma informed **PW8**, together with the 3 other officers who were to accompany him, that there had been a shooting incident at Bangale Centre.

When the team of police officers reached the centre, they found that there was very high tension following a fight between the Warde and the Orma Clans.

Outside Bangale Police Post, the officers saw some people who were armed. Meanwhile, outside the town, there were gunshots.

After calming down the situation, **PW8** and the team of officers visited the scene where **ABDI NASSIR DIBO** had been killed on 13th September 2007. Later, when the team returned to the police station, they found a report that 2 people had been shot with arrows.

One of the said 2 people was **ABIKAR SIYAT**, who died when being escorted to the Bangale Dispensary.

PW8 went to that Dispensary, where he found the body of the deceased. He did not uncover the body; he left it still covered with a piece of cloth.

On 16th September, 2007, **PW8** took over the investigations. He recorded witness statements from eye-witnesses.

On 28th October 2007, the accused was arrested by police officers who were on an “operation’ at Bangale.

PW8 testified that the accused was arrested because he was a suspect in another case of murder. But as the police continued to investigate that other case, they also realized that the accused was a suspect in this case.

During cross-examination, **PW8** admitted that the Ormo and the Warde did fight on 14th September, 2007. During that fight guns were used. **PW8** witnessed the fighting first-hand.

However, he did not see the deceased herein being shot with an arrow.

PW8 also admitted that in his covering report, he had said that some of the persons who assaulted the deceased had covered their faces.

Although the accused was arrested on 28th October 2007, the Investigating Officer did not conduct any parades for identification. His reason for not conducting an identification parade was that the identifying witnesses had known the accused person even before the incident. They knew him both by name as well as physically.

It is the said witnesses who told **PW8** that the accused had already been arrested for another offence. By that time, the accused was already in custody.

After the accused was put to his defence, he testified on oath. He denied the charge. He said that on 14th September, 2007, he was at his house, in Bangale.

He said that between 14th and 16th September, 2007, there was serious fighting between the Warde and the Ormo. But he denied taking part in the fighting.

He believes that the prosecution witnesses who allegedly saw him shoot the deceased, told lies about him. He attributed their lies to the grudge between the Ormo and the Warde.

Apparently, all the civilian witnesses, who testified for the prosecution, were wardes, whilst the accused was an Ormo.

Having analyzed the evidence on record, I find that the deceased was shot dead, using an arrow. The injury to his chest was deep. It caused severe bleeding, leading to the death of **ABIKAR SIYAT**.

PW1, PW2 and PW3 allegedly saw the accused shooting the deceased. But they also saw 2 other persons who assaulted the deceased.

As a matter of fact, PW1 testified that the 3 assailants all shot the deceased with arrows. However, the doctor who conducted the post-mortem examination, only found one wound, which was caused by an arrow-head. That gives rise to some question-marks about the reliability of the alleged eye-witnesses, considering that their evidence was not corroborated by the doctor.

Secondly, when the ladies first reported the incident, they indicated that some of the assailants had covered their faces. That is what the Investigating Officer (**PW8**) stated in his covering report.

Would that explain why **PW1, PW2 and PW3** were not able to identify the other persons who were with the accused person, when the deceased was attacked?

And if the said 3 eye-witnesses were unable to identify the other assailants, how confident can we be about their alleged identification of the accused?

That question is significant because the accused was a neighbour to the eye-witnesses. He was also a village-elder.

If the 3 ladies had identified him positively, there is no reason why it then took the police more than one month to arrest him.

And even when they arrested him, it was not in relation to the murder of **ABIKAR SIYAT**. He was arrested for some other offence. I cannot help but ask why that was the position, yet 3 eye-witnesses knew him both by name and by his appearance.

There is no assertion that he went into hiding. If anything, he says that he was actively involved in meetings that were arranged to reconcile the Warde and the Orma. Those meetings were arranged by a Government Representative from Garissa, after the incident giving rise to this case.

In the result, I find that the prosecution case has failed to meet the standard of proof set in criminal cases. I therefore find the accused **“NOT GUILTY”**. He is accordingly acquitted, and the criminal charge against him is dismissed.

I order that he be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi this 6th day of October, 2011

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FRED A. OCHIENG

JUDGE