



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 71 of 2009

REPUBLIC.....PROSECUTOR

VERSUS

MOHAMED SALAH MAHMOUD.....ACCUSED

RULING

The accused person, **MOHAMED SALAH MAHMOUD** is charged with **Murder** contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 19th day of July, 2009 at Iftin Village in Garissa District within North Eastern Province jointly with others not before Court murdered **DAUDI FARAH MOHAMED**.

The prosecution called 7 witnesses. After the close of the prosecution case, **MRS. TUTA** for the State and **MR. ONONO** for the accused opted to make no submissions.

I have considered the evidence adduced by the prosecution. Two of these witnesses were eye witnesses of the incident. These were **HASSAN MOHAMED ALI PW1**, and **SAHARA MUDUW NOOR PW2**. Both witnesses alleged that on the material day that is, 19th July, 2009 at 4 o'clock in the afternoon, they witnessed the accused person, **MOHAMED SALAH MAHMOUD** and one **MAHAT SHAFFI HASSAN** (not before the Court) emerge from a plot of land along the Garissa Road. The two of them allegedly attacked the deceased in this case, using machete and a Somali sword.

Considering the evidence of these two eye-witnesses, **HASSAN PW1** was going towards Jara/Garissa Road walking towards Garissa Town when he witnessed the incident. **SAHARA** was on the other hand, walking towards the opposite direction. According to both **HASSAN** and **SAHARA**, the deceased person **DAUDI FARAH** was walking away from Garissa Town, while the accused person and the other emerged from a plot which was near the road.

HASSAN said that he heard the accused person asked the deceased what tribe he was. He also heard the deceased answer that he was Abdallah. **HASSAN** said that the moment the deceased said that he was an Abdallah, **MAHAT SHAFFI** (not before the Court), hit the

deceased on the middle of the head with a machete and that the accused person using a Somali sword he drew from his right side of his body, stabbed the deceased on the right side of the neck. **HASSAN** stated that immediately the two attacked the deceased person, they ran away and that when he saw that, he also ran away from the scene.

SAHARA PW2 said that she was walking home from Garissa Town carrying a heavy load of milk at her back. **SAHARA's** testimony was that as she walked in the outskirts of the town, she met the deceased person walking towards the same direction and that they walked together with the accused. As they were walking with the deceased leading her, two men emerged from the side of the road and she gave their names as **MAHAT SHAFFI** and **MOHAMED SALAH MAHMOUD**, the accused in this case. According to her testimony, **MAHAT** produced a machete and hit the deceased on the head. That **MOHAMED** stabbed the deceased twice below the neck with the Somali sword.

SAHARA said that she was a distance of about 20 metres from the deceased at the time of that attack. She stated that she knew the attackers because they were her neighbours of nine years. She said that she did not know the deceased before the incident. **SAHARA** said that after witnessing the attack, she ran into the home of the local councillor one **AHMED EBO**, to whom she reported that someone had been murdered. She said that the councillor went to check on that issue but she said she did not go back to the scene because she was in shock. The councillor was not a witness in this case and neither is it indicated in the testimony of **INSPECTOR MWANGI** that he was ever interviewed as a possible witness.

The evidence of the other witnesses, **PW3, PW4** and **PW5**, is to the effect that the deceased was related to them and that they came to know about the incident after the fact. These were **PW3 KHALIF DAUDI**, son of the deceased, **PW4 ABDI SAHAL HERSI** and **SALAH MOHAMED ALI PW5** a first cousin to the deceased. **PW5** identified the body of the deceased to the Police officers at the scene not long after the incident. The evidence of these three witnesses is not material as far as identity of the persons who attacked and fatally wounded the deceased were concerned.

The investigating officer **PW6** was **INSPECTOR MWANGI**. His evidence is very crucial because it gives a summary of investigations that he carried out and some of the conclusions that he made from those investigations. According to **INSPECTOR MWANGI**, there seemed to be a misunderstanding between two sub-clans of the Somali tribe, that is Abdul Waq sub-clan and Abdallah sub-clan. **INSPECTOR MWANGI** narrated that as a result of his investigations he came to the conclusion that the attack on the deceased person was in retaliation to an earlier attack on the same day. **INSPECTOR MWANGI** testified that on the morning of the day in question, a member of the Abdul Waq clan was attacked and killed and two other members of the same sub-clan seriously injured at a place called Bura Mzuri, in the outskirts of Garissa Town.

Following that attack, in the afternoon of that same day, the deceased, who is a member of the Abdallah sub-clan which is the clan suspected to have been involved in the attack of Abdul Waq sub-clan on the morning of the same day, was attacked and killed. This latter attack took place at Bura Iftin, which is also in the outskirts of Garissa Town. **INSPECTOR MWANGI** testified that the accused person

was arrested one day after the incident and was held in custody for 14 days. **INSPECTOR MWANGI** was however mistaken, if the accused was arrested on the 20th July, 2009 and released on the 30th of July, 2009, then the accused was in Police custody for 10 not 14 days.

Regarding the arrest of the accused person, **INSPECTOR MWANGI** testified that the accused person was arrested after some people at the scene implicated him with the offence. When asked who these people were, **INSPECTOR MWANGI** testified that they were people who he found at the scene immediately following the attack and that these people whose names he did not know, had informed him that they got that information from other people. All these people are unknown and **INSPECTOR MWANGI** did not take any names of possible witnesses at the scene and on the day of the attack. That means that the accused person was implicated by persons other than **HASSAN** and **SAHARA**. This also means that there was no nexus between **HASSAN** and **SAHARA** on one hand and the initial arrest of the accused person on the other hand.

INSPECTOR MWANGI explained that the accused was released after 14 days due to lack of any evidence implicating him with the incident. **INSPECTOR MWANGI** said that following his release, members of the Abdul Waq sub-clan raised serious complaints and even threatened to lynch the accused. **INSPECTOR MWANGI** testified that the Police gave the clan members a condition that the accused person could only be re-arrested if those clan members could bring witnesses who could give evidence implicating the accused with the offence. **INSPECTOR MWANGI** stated that one day after his release, the accused person was re-arrested because two witnesses implicating him showed up. These were: **PW1 HASSAN ALI** and **PW2 SAHARA MUDUW NOOR**. It is very clear from this evidence that **HASSAN** and **SAHARA** were hitherto unknown to **INSPECTOR MWANGI** as possible witnesses to this case. That state of affairs raises serious questions as to the integrity and reliability of **HASSAN** and **SAHARA**.

In regard to the identification of the accused person by **PW1 HASSAN** and **SAHARA PW2**; **HASSAN** testified that he had known the accused person for 3 years prior to the incident. **SAHARA** on the other hand, stated that she knew the accused person very well because they were very good neighbours for nine years before this attack. The issue is why did it take these two witnesses persuasion to give their statements to the Police? I am puzzled by this fact first of all, because **HASSAN** and **SAHARA** claimed that they knew the accused person for a very long time and therefore the possibility of mistaking him for another person did not exist. In any event, the incident took place in broad daylight. Despite that knowledge, it took them 13 days to go to the Police to give their statements.

No explanation was given by the two witnesses why it took those 13 days to go forward with their statements to the Police. In fact, **HASSAN** in his evidence contradicted **INSPECTOR MWANGI**'s contention by stating that he gave his statement to the Police, 4 days after the attack. **HASSAN** was not telling the truth for two reasons: the first one is the fact that had he given his statement to the Police 4 days after the attack as he claimed, the accused person could not have been released on the 30th of July, 2009 as happened in this case.

INSPECTOR MWANGI's testimony was that the accused was released on the 30th of July, 2009 for lack of any statements of witnesses implicating the accused with this offence. The second reason is the fact that the original statement and the typed copy of the statement made by **HASSAN** to the Police are both dated 31st of July 2009, which is definitely 13 days after the attack. The written

document confirms that **HASSAN** did not tell the truth regarding the date that he gave his statement to the Police.

I noted that both **HASSAN** and **SAHARA** are from Abdallah sub-clan which is the clan to which the deceased belonged. The accused person on the other hand, is from the Abdul Waq clan which is the clan suspected to have carried out the attack on the deceased. The fact that **HASSAN** and **SAHARA** came forward to give their statements to the Police only after the Police required members of their clan to produce witnesses, who could implicate the accused person so as to enable the Police re-arrest him for the offence, creates serious suspicion that their statement may have been a fabrication, so as to fix the accused person and pacify the Abdallah clansmen.

Having considered the evidence of **INSPECTOR MWANGI** and especially the experiences that he had in the course of investigating this crime, it is not unreasonable or far-fetched to conclude that the evidence of **HASSAN** and **SAHARA** may be a concoction. Considering the circumstances of the accused's arrest, his release for lack of statements implicating him, and his re-arrest following statements of witnesses implicating him with this offence, it cannot be ruled out that the Abdallah clan came up with two witnesses just in order to implicate the accused person. The possibility that the two witnesses were lying that they witnessed the incident cannot be ruled out especially following the delay in giving their statements to the Police and also the persuasion the Police had to give to their clansmen to produce witnesses who could implicate the accused. In terms of consistency of the evidence of the two witnesses; **HASSAN**'s testimony was that he heard the accused person talking to the deceased asking him from which clan or sub-clan he hailed from. **PW1** said he was approaching the accused, the deceased and another, one **MAHAT**, when he heard that conversation. **SAHARA** on the other hand, did not hear any conversation at all. She was walking towards the deceased and the accused and **MAHAT** from behind them. From her statement also, **SAHARA** did not see any other person at the scene apart from those three. There is some inconsistency between the evidence of **HASSAN** and **SAHARA** first of all the inconsistency is in regard to the conversation held between the accused and the deceased; the inconsistency being that **SAHARA** did not hear any conversation between the two of them. That conversation is significant because it gives a (clan) motive for the attack. It is also significant because from the evidence of **SAHARA** she was walking right behind the deceased at the time the attack took place and being that near, she ought to have heard a conversation between the two people if indeed there was any. The second inconsistency is **SAHARA**'s evidence that she did not see any other person at the scene of this attack except the accused, the deceased and **MAHAT**. **HASSAN**'s evidence is that there were other people he saw even though he does not name them and he saw that they also ran away when the deceased was attacked. I find that the inconsistency in the evidence of these two eye-witnesses is material and goes to the substance of the charge. It causes the evidence of these two witnesses to be irreconcilable.

In the Court of Appeal case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283**, **MADAN, MILLER and POTTER JJA** held:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

Having carefully considered the entire evidence, I find that **HASSAN** and **SAHARA** have created in my mind, an impression that they are not creditworthy and therefore unreliable which makes it unsafe for this Court to rely on their evidence. This conclusion is informed by the fact that they delayed in going to the Police to make their statements in this matter, which delay was inordinate and unexplained. These two witnesses came forward to give their statements to the Police only after the Police set conditions for the re-arrest of the accused person, and that raises doubt that their statements may have been fabricated. The circumstances of the arrest based on the conditions given by the Police to clansmen to which **HASSAN** and **SAHARA** belong raises serious suspicion regarding the trustworthiness and the integrity of the two witnesses, and the safety of accepting their evidence. I do find and hold that the evidence adduced by the prosecution is in all the circumstances of the case and the factors involved unsafe and unreliable and therefore insufficient to require the accused person to answer the charge against him.

For these and other reasons which I have given in this judgement, I am not satisfied that the prosecution has established a prima facie case against the accused person to require him to answer the charge against him as provided under section 306 of the Criminal Procedure Code. I therefore acquit the accused person at this stage.

Dated at Nairobi this 11th day of March, 2010.

LESIT, J.
JUDGE

Read, signed and delivered in the presence of:

Elisha.....Court clerk

Accused..... present

Ms. Rutto.....for the State

Mr. Onono.....for the accused

LESIT, J.
JUDGE