



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CRIMINAL CASE NO. 82 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

ABDI ARAB GERSEY.....ACCUSED

R U L I N G

The accused **ABDI ARAB GERSEY**, 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 specified in the Information dated 25th September 2008, are that;

“On the 21st day of September 2008, at Elwak Township in Mandera Central District withi NorthEasternProvince, jointly with others not before the court (the accused) murdered ADOW ABDULLAHI ALI.”

By the close of the prosecution case, a total of five (5) witnesses had testified.

The accused has submitted that the prosecution failed to establish a prima facie case against him, that would warrant his being placed on his defence.

He described the evidence on record as being so scanty that it can only lead to his being set free.

I have given due consideration to the evidence on record.

First, it is clear that the body of the deceased was identified at the Wajir District Hospital Mortuary. The persons who identified the body were **PW 3, ALI ADAN ALI SHINALE**, and **PW 4, NOOR MOHAMED ABDI**.

After the body had been identified, **DR. MORRIS MWEMA (PW 5)** conducted a post mortem examination on it. He ascertained that the victim had passed away about six (6) hours prior to the time when he was examining the body.

As the post-mortem examination was conducted on 13th September 2008, that would imply that the death occurred on either the morning of that date or alternatively late on the night of 12th September 2008.

PW 2 went to the scene of crime immediately after the report was made to the Elwak Police Station, by the Assistant Chief of Bula Afey Location.

PW 2 was accompanied to the scene by the Officer Commanding Station (OSC) and PC Vincent Rono. And it is the Assistant Chief who directed them to the scene, which was about 5 metres away from a construction site.

When the police officers arrived at the scene, they saw many people. However, the said people ran-off upon seeing the police. Consequently, **PW 2** never got anybody who had been an eye-witness to what had happened to the deceased.

Meanwhile, by the time the police officers reached the scene, the deceased was unconscious. He was thus unable to talk. However, he was still alive.

The police officers escorted the victim to the nearest hospital, which was only about 800 metres away from the scene. At the hospital, the victim was accorded some medical treatment. Thereafter, the medical

personnel at the said hospital transferred the victim to the Wajir District Hospital, presumably, because the victim would get better and more indepth medical attention.

However the victim is reported to have passed away shortly after he had been admitted at the Wajir District Hospital.

The only other prosecution witness was **ISAAK MAALIM ABDULLAHI (PW 1)** who is a businessman. He testified that on 12th September 2008, the deceased had visited the business which **PW 1** runs, and had withdrawn KShs.6,000/-.

Early on the morning of 13th September 2008, at about 8.00a.m., police officers visited **PW 1** at his place of business. They wanted to know if the deceased had been there on the previous day.

When **PW 1** confirmed that the deceased had withdrawn KShs.6,000/- from him, on the previous day, the police placed **PW 1** in custody. **PW 1** remained in custody until the next day.

During his testimony in court, **PW 1** made it clear that he did not know what caused the death of the deceased.

After giving due consideration to the evidence tendered so far, I am unable to find any nexus between the accused and the death of the deceased. None of the prosecution witnesses had mentioned the accused, even remotely.

The Assistant Chief of Bula Afey, who made the report to the Elwak Police Station did not testify. Perhaps, if he had done so, he might have shed some light on the matter.

The Investigating Officer also did not testify. No explanation was given to this court for the said failure.

Furthermore, although the doctor who conducted the post-mortem examination did so on 13th September 2008, the persons who are said to have identified the body of the deceased testified that they did so a month later. I know that there is a possibility of a legitimate error on the issue of the dates, however, as matters stand currently, the prosecution has failed to offer any clarification in that respect. Therefore, and to that extent, there is inconsistency in the evidence tendered by the prosecution.

In conclusion, although the prosecution has proved that the deceased, Adow Abdullahi Ali is dead, and also that the cause of his death is loss of blood secondary to a blunt force applied to his head; nobody has linked the accused to the incident which led to the death.

Accordingly, as the evidence on record is not sufficient to found a conviction even before the accused says anything about the same, I find that the prosecution has failed to establish a prima facie case against the accused.

I therefore dismiss the case against the accused.

Consequent upon the said dismissal, I now order that the accused be acquitted pursuant to **Section 210 of the Criminal Procedure Code.**

Finally, I order that the accused be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 21st day of October, 2010

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FRED A. OCHIENG
JUDGE