



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

Criminal Case 3 of 2002

REPUBLIC **PROSECUTOR**

VERSUS

ABDI NOOR **ACCUSED**

JUDGMENT

Abdi Noor has been charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code.

The particulars of the charge are that on 22/8/2000, at Lodwar Township in the Turkana District within the Rift Valley he murdered **Mohamed Abdi Ali**, whom I shall hereinafter refer to as ‘the deceased’, I shall refer to **Abdi Noor** as ‘the accused’

The onus to prove the charge lies with the Republic which alleges all this, the standard of proof being beyond reasonable doubt.

“Any persons who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.” (section 203 of the Penal Code).

As will be discerned from the above definition, the main ingredients in a charge of murder are the criminal intention and a motive to cause death or bodily harm prior to killing the deceased person. The said death must have been as a result of an unlawful act or omission on the part of the accused person.

PW 1 testified how he had accompanied Abdi Ali who was a Kenya Police reservist to the Lodwar Police Station between 7.00 and 8.00 p.m. on 21/8/2000, where the latter filed a report against someone who wanted to take away his gun had threatened him. Abdi Ali did not disclose the identity of the said man to PW1. Next day at 11.00 am, as PW1 sat opposite Abdi Ali in an open kiosk where they engaged in a game of drafts, a man jumped through the window and stabbed Abdi Ali with a knife in the midribs above the stomach; after which the man, whom PW1 claims was this accused, retrieved the knife as Abdi Ali fell down. PW1 struggled with the man who however managed to run away from the scene with several people in hot pursuit. They later found him seated in the police station.

PW2 who was also one of those playing drafts in the kiosk at the material time testified how the assailant jumped into the kiosk and stabbed the deceased with a knife after which he managed to escape from the grip of PW1 and run away from the scene. He joined in the chase for only a short distance as the man entered the police station.

The Lodwar District Hospital Medical officer (PW6) who performed the autopsy confirmed the death of

Mohamed Abdi Ali. He formed the opinion that the death was caused by cardio respiratory arrest due to blood in the right cavity resulting in loss of a lot of blood due to perforation of the aorta. It was also his opinion that a sharp weapon had been used against the deceased, consistent with a single stab to the chest; that the said sharp cutting object also injured the deceased's right elbow.

PW3 testified how he had initially met the deceased that fateful morning and had accompanied him to the police station where he had gone to change his gun, after which they joined PW 1 and 2 in the kiosk; how the assailant jumped through an opening and stabbed the deceased with a knife; after which he ran and entered Lodwar Police Station having managed to escape from the grip of PW1.

PW5 who claimed to have been the investigating officer testified how on 22/8/2000, at around 12.05 a.m., while in the crime branch at that station, he had perused the Occurrence Book (O B) and found a report of death threats, which had been recorded by one PC Aden on 21/8/2000 at about 8.30 p.m.; how while at the station, the accused had come running in on 22/8/2000, and reported to him that he had been beaten a mob, over an allegation that he had stabbed one Mohamed Abdi. He booked Noor's report and while in the process of writing it out, a group of about 5 people, including PW1, 2 & 3 arrived at the Station and told him that the accused had stabbed their relative to death. He then asked the report office personnel to detain the accused while he went to visit the scene where found a temporary kiosk where he learnt, that the deceased had been stabbed. He then proceeded to the Lodwar District Hospital where he found that the victim had already died in the Hospital's male ward, and he therefore went back to the station where he booked the report and filled in the postmortem forms after which he escorted the deceased's relatives to the hospital later for the purpose of witnessing the postmortem. He also testified how he recorded the statements and opened a file, and how he recovered the murder weapon from PW1.

In his defence, the accused stated how people who were fighting hit him on the head by the road. He managed to grip a knife, which the deceased had in his possession the people at the scene separated them and restrained his assailant. He managed to run away to the Police Station where he reported that people had beaten him. He could not tell what happened to the knife. He learnt later on that somebody had died. He also stated that a total of 12 people had been arrested for the same offence of fighting but that they were released after 2 weeks. He denied having caused the death.

I have taken into account the evidence by all the prosecution witnesses, the statement by the accused person as well as the submissions by both counsel with a view to establishing whether the case has been proven beyond reasonable doubt, bearing in mind the fact that the burden should never be shifted to the accused person.

The only evidence that would tend to link the accused with the offence was the report of threats which the deceased allegedly made to the police and which was allegedly recorded the night before the incident, by one P.C. Aden, and which appears in the Occurrence Book. Unfortunately this court has very serious doubts about the credibility of that report because despite the issuance of several summons to P.C. Aden, who was the most material witness in this case, he did not avail himself to testify on that particular aspect. No valid reasons or explanation was given for his non availability. It is trite that where a material witness is not availed by the prosecution the only logical conclusion would be that had he been availed his evidence would have contradicted the case against the accused.

I find that PW5 was not being truthful when he alleged that PW2 was one of those who went into the police station that morning soon after the accused is said to have run there after stabbing the deceased, because PW2 was categorical that he gave up the chase when he saw the accused enter the police station, which meant that he was not one of those who went to the station. As if that was not all, PW 5 conceded during cross examination that having been convinced by the statements of both PW 1 and 2, he decided to charge the accused with the offence within an hour of the attack which is clear that no investigations were carried out at all, and contrary to their own evidence, he informed the court that he had confirmed that PW1, 2, 3 and 4 knew the accused, when he took their statements, yet PW 1 conceded during cross-examination that he saw the accused for the first time during the incident, and for the second time in court during this trial. He also conceded that though he had accompanied the deceased to the police station when he went to file the report pertaining to the threat, the deceased never disclosed the name of the

person who had threatened him, neither did he ever tell him or talk to him about the accused. PW2 and 3 also conceded that they had not seen the accused before the time of the incident.

Despite the fact that none of those who claimed to have witnessed the attack had not known the assailant before the incident, no identification parade was conducted to establish the real identity of the assailant.

Furthermore, the knife, which was allegedly used during the attack, was not dusted for fingerprints to prove that it was the accused that had actually inflicted the injuries. The requirement to establish who really inflicted the fatal stab would also have been necessitated by the fact that the accused had already reported that there had been a fight between a group of people, and that would perhaps explain why a group of 12 were arrested in connection with the fight, only to be released later.

Though Assessors returned a unanimous verdict of guilty. I however have serious doubts in the credibility of this case against the accused.

These lapses and omissions raise serious doubts in my mind, doubts, which should have been cleared by the prosecution, but it, did not, to its detriment.

I therefore conclude that the prosecution has not been able to prove its case beyond reasonable doubt and I do in the circumstances find that Abdi Noor is not guilty of the charge of murder and I do accordingly acquit him.

Dated and delivered at Kitale this 2nd day of February 2006

JEANNE GACHECHE

JUDGE

Delivered in the presence of: