



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 88 of 2002

REPUBLIC RESPONDENT

VERSUS

ABDULLAHI ODOWA AHEMED & 2 OTHERS APPELLANTS

RULING

The accused Abdullahi Odowa Ahemed, Hassan Gabay Ahemed, Hassan Ahamed Apsiye are charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code.

The particulars are that on the 13th day of February, 2002 at around 11.00 p.m. at Ndeto market in Garissa District of the North Eastern Province jointly murdered ABDI ABDULAHI.

The prosecution calledwitnesses in support of its case.

P.W. 2, No. 2301117, Chief Inspector George Nyagah, took over investigations from Inspector Githinji, and constable Machio. He filled the post-mortem form relating to the deceased and took it to the M.O.H. Garissa who equally filled the post-mortem to the CID in charge Garissa Police Station.

P.W.1, Abdirizall Abdallahi Abdullah was at Ndetu resting at his shop. He heard a shot behind the shop in the direction of the Chiefs Camp. He went towards the direction of the shot but did not reach. He was in the company of Dubat Ali. In the morning, he heard people say his brother was killed. He made a report to the O.C.S. Dadaab Division. He visited the scene and found that his brother had bled to death. He was hit by a bullet around the waist. The bullet appeared to have gone from left to right. The body was buried on 13th February, 2002.

P.W.3, Ahmed Mohammed Sheikh, sheet, a Kenya Police Reservist recalled that on 13th February, 2002 at 11.00 p.m. he was at a camp for Kenya Police Reserve. Five of them were patrolling around Nderu. They split into two groups. A group was of two consisting of Hassan Gobe Ahmed and Abdullahi Othway Ahmed confronted somebody. P.W.3(Ahmed) heard this group asking that person to identify himself for.....

The person abused them. The next thing that P.W.3, heard was gun-shots. Then an exchange of fire ensued.

P.W.3 and Hassan Ahmed Abdi went to the scene and enquired from the two the circumstances of the shouting.

In the morning P.W.3 and Hassan Ahmed, Abdulkari Odawa Ahmed and Hassan Ahmed Absye discovered the body of the deceased at the scene of the shooting. The deceased had one bullet wound. He arranged for the body to be taken to the Police Reservist Camp. He identified the three accused in Court as the assailants.

In cross-examination, P.W.3 absolved the 3rd accused from blame.

At the close of the prosecution's case Mr. Mutua for the accused submitted that the prosecution had not established a *prima facie* case warranting the accused being put on their defences.

That the body of the person shot was buried without being identified. That no exhibits were produced. Ballistic expert never gave evidence. That in the circumstances it would be an error in law to put the accused on their defences.

Mr. Bwofoli for the prosecution relied on the evidence on record and rested his submissions.

Section 306 (1) of the Criminal Procedure Code provides:

(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty..”

Section 306(1) supra is the equivalent of Section 210 in trials before the subordinate courts.

Section 210 of the Criminal Procedure Code provides:

“If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.”

What amounts to a *prima facie* case under the equivalent of the Tanzanian provisions was considered by the Court of Appeal in RAMANLAL T. BHATT –V- R [1957] E.A. 332

“.....It may not be easy to describe what is meant by a *prima facie*”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

Applying those principles to the current cases, there is no available evidence what caused the death of the deceased. The post-mortem was not done or if deceased was produced. Hence the cause of death was not established by evidence. The prosecution thus rests on suspicion that the deceased died of gun shot wounds. It is quite possible that death was caused by intervening circumstances unconnected with the injury which has not been excluded. In the result it has not been proved that death was caused by the act of the accused. See GICHUNGE –V REPUBLIC [1977] E.A. 546.

Accordingly I am inclined to record a finding on NOT GUILTY in line with Section 306(1) of the Criminal Procedure Code. All the accused acquitted and are set free unless lawfully held for some other lawful reasons.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF AUGUST, 2006.

N.R.O.OMBIJA

JUDGE