



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Case 10 of 2004

REPUBLIC
APPLICANT

VERSUS

MOHAMMED BASHIR MOHAMMED

ABDALLA H MAGANGA
ACCUSED

J U D G M E N T

Cr Case No. 3 of 2001 Republic – vs – Mohammed Bashir Mohamed was consolidated with Criminal case No. 10 of 2004 Republic – vs – Abdalla H Maganga. Therefore fresh information was filed by the state counsel on 10.5.204 and dated 27.4.04 in which both accused were charged jointly for the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. That they jointly murdered Chengo Charo on the night of 10th and 11th October 1999. Trial commenced on 29.9.05. Prosecution called seven witnesses who testified that the accused persons were known. On 10.10.99 the deceased knocked at the door of PW1 and said “**I have been stabbed**”. Deceased was bleeding. The deceased said he was stabbed “**by Abdalla and Bashir.**” At the time PW1 gave evidence he was aged 18 years. But on the date of incident he was 13 years old. He gave consistent and clear evidence of what he saw that night. PW2 testified that that same night he was drinking mnazi beer at Abdalla’s place when the deceased came to the place. Abdalla 2nd accused was selling mnazi and was with his friend Bashir (1st accused). They were drinking the liquor. Then they developed a quarrel. Abdalla hit the deceased with a kick (teke). Both accused started asking the deceased for money (200/-). A quarrel arose on the issue of money. Later that night Bashir was seen with a long knife by PW2. Later the deceased was found bleeding and was taken to a house. PW2 with others took the deceased to the hospital where they were told he was already dead. Further evidence was that PW4 had seen deceased lying on his back nearby. A mkokoteni was to transport the deceased to hospital. This witness did not witness the incident on 10.10.99. PW5 saw deceased on 10.10.99 at her door. She testified that he said he was stabbed by Abdala and Bashir. She was among the people who escorted the deceased to hospital.

The body was collected by police who took it to Kilifi mortuary. PW1 police officer said on oath that the person charged was Abdalla Kizingo not Abdalla Hamisi Maganga but he explained that he later came to know the two names were of the same person the accused No. 2.

The state counsel was unable to produce other witnesses. On 23.3.06 when the case was scheduled for hearing. His application for adjournment was rejected by court. The prosecution did not produce evidence of pathologist to show cause of death. The prosecution did not produce the knife which is said to have been seen with the first accused.

Upon perusal of the evidence offered by prosecution it is clear there was no direct evidence as to who stabbed the deceased. The witnesses who were all neighbours believed that the accused stabbed the deceased but there is no one who saw the accused injure the deceased.

The evidence that the deceased named his attackers. Section 33(a) Evidence Act Cap 80 states “**when the statement is made by a person as to the cause of his death, or as to any of the instances of the transaction which resulted in his death, in cases in which the cause of that person ‘s death comes into question and such statements are admissible whether the person who made them was or was at the time when they were made, under expectation of death and whatever may be the nature of the proceedings in which the cause of his death coming into questions.**”

The evidence of what deceased said was given by PW1 and PW5 both relatives, PW1 called deceased uncle and PW5 said deceased was her husband’s brother. PW1 was first to see the deceased who knocked at the door of their home. He heard deceased say he was stabbed by accused Abdalla and Bashir and saw that deceased was bleeding. He woke his mother PW5 who was sleeping on same bed with him. She also testified that the deceased said he was stabbed by Abdalla and Bashir the accused. There was light. She had a kerosene lamp and she saw him bleeding from the chest. I have no doubt that what they said was the truth.

Consequently deceased was found dead later night before morning. From the record (charge sheet) the first accused was arrested on 29.11.99, the second accused was not arrested until the year 2004. In both cases, they were believed to be offenders. The accused gave unsworn statements in their defence. The first accused, Bashir was at his home at material time. There they were drinking with about 20 other persons. He was purchasing beer and he became very drunk. In the morning he traveled to Mazeras place of work until the day he was arrested on 29.11.99.

The second accused said on 10.10.99 he was in the village. In the evening he was selling liquor at his home with others about 25 persons. PW4 Sebastian was sleeping there very drunk. Later at 8 pm he was called by telephone and he abandoned selling beer and went to attend to his lorry. His wife continued selling beer. He himself traveled to Kisumu on duty. He never returned to Mombasa until on 11.1.2004 when he was arrested and charged with this offence. He admitted that at the scene he was demanding ksh. 200/- from Katana and not from deceased as stated by PW4.

Both accused denied having killed the deceased. In the circumstances, it is important to consider the statements of accused and the evidence laid before court. It is clear both accused were present at scene where customers were purchasing liquor. 10th day of October was a public holiday and getting thereby drunk in celebrations of the holiday. The incident occurred at night and the light available is not described. No one saw the accused or any of them stab the deceased. The issue of identification is difficult to resolve. There is weak evidence that accused was seen with a knife that night but the knife was not produced as exhibit. There was also allegations that the deceased was quarrelling with accused over a small amount of money. However, these two incidents are not sufficient to confirm that the accused are the people who stabbed deceased.

I agree with the authority by Defendant in Criminal Appeal No. 56 of 98 that circumstantial evidence must be clear and direct. On the issue of deceased statement that the accused stabbed him, I have already said the evidence of the two witnesses who heard him say so is reliable.

For the evidence of dying declarations to form the basis for conviction certain considerations must be made seeing that where death has occurred already, the deceased cannot be called to give evidence to be subjected to cross examination. Also if the circumstances at the scene are not satisfactory for identification.

In this case the incident was at night and there were several people and the people were drunk. The deceased could have been mistaken as to the identify of who stabbed him.

There are several authorities touching on the reliance of dying declarations see **MOHAMMED**

WARSAMA – VS R (1956) 23 EA CA 576. In the case of **PIUS JASUNGU s/o AKUMU – VS – R (1954) 21 EACA.** The deceased died before signing the statement and there was no corroboration of the story told by deceased. On the question of weight of evidence the court said

“in Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having, at the time, a settled hopeless expectation of imminent death so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of oath. It has been in this court that the weight to be attached to dying declarations in this country must consequently be less and that exercise of .. in reception of such statements. See R – VS – MUNYOVYA BIN MSUMA (1939)6 EACA 128. “

In conclusion Section 33(a) Cap 80 is to be applied when the declarant is dead. The statement must relate to the cause of death or to the circumstances of the transaction which resulted in death and where the statement concerns identification which took place at night caution should be exercised failing which some corroboration will be required. In this case, the witnesses who were given the information were not present when the incident took place.

I find that there was no evidence of corroboration of the dying declaration as to the identity of the attackers. The witnesses said that they believed, the belief is not supported with evidence.

The assessors are of the opinion that the accused are not guilty. There is no evidence linking the accused to the offence. I agree with them although I am not bound by assessors’ opinions.

In my view, I find the prosecution failed to prove their case beyond reasonable doubt.

I find the accused and each of them not guilty. I acquit them. They shall be set at liberty forthwith.

J KHAMINWA – JUDGE

Judgment read in open court in presence of accused, state counsel, Mr Munya holding brief for accused.

I thank the assessors for being in this throughout the trial. I discharge them from serving as assessors for the next 12 months from today.

They shall be paid for appearing today.

J KHAMINWA

JUDGE

13TH SEPTEMBER 2006