



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

**CRIMINAL CASE 9 OF 1999**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**OSMAN MOHAMMED Alias KIDOGO ..... ACCUSED**

**RULING ON WHETHER OR NOT ACCUSED HAS CASE TO ANSWER**

The accused, Osman Mohammed alias Kidogo is charged with one count of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the 16th day of August 1998 at Garbatulla Sub- Location Garbatualla Location within Isiolo District of the Eastern Province, he murdered ABDI ISAACK ADEN.

In his opening remarks, the learned state counsel informed the court that he would call 14 witnesses to prove the charge against the accused person. However, by the close of its case, the prosecution had called seven witnesses.

PWI was Elmi Isaack Ido whose evidence was to the effect that on 16.8.1998, at about 3.00am while he was at Garbatulla Badia, he learnt from one Mohammed Afu (who was not called as a witness) that the accused who was popularly known as Kidogo had killed the deceased. Sometime in the morning, PWI saw the deceased's body with bullet wounds from the shoulder and out through the stomach. PWI later identified the body for post mortem and also later helped in arresting the accused.

The second witness was one Boru Dida who also testified that he only learnt of the deceased's death at about 2.00am on the 17.8.1998. The rest of his testimony was very much like that given by PWI, though with the additional dimension of testifying to having recovered some two spent cartridges from the scene of the murder.

PW3 was one Jaldesa Tadicha, the then assistant chief of Garbatulla South Sublocation. He testified that on 17.8.1998, he received a report from one Hassan Alaso (PW4) concerning the murder of the deceased. Together with the said Hassan Alaso and councilor Boru Dida, (PW2) they reported the matter to the police and also assisted in taking the deceased's body to the mortuary. He also testified that he saw two spent cartridges at the scene of the crime. This witness also testified that on 22.8.1998, the accused was escorted to the witness' house by PW4 and Elmi Isaack at about 2.00am. both the accused and the AK 47 Rifle which he was carrying with him were escorted to Garbatulla Police station.

Hassan Ali Alaso was PW4. He stated that on 16.8.1998 at about 10.00pm, he heard gunshots coming from the direction of his neighbour's house, one Salatho (PW6). Later he was informed that the deceased had been killed by the accused. Later, he accompanied the area assistant chief, PW3 to report the incident to the police. He also helped in trying to trace the whereabouts of the accused following the murder. He was one of those who assisted in having the accused arrested. The next witness, PW5 was Salima Mohammed. According to her testimony, she heard gunshots in the evening of 16.8.1998 while she was asleep in her house. Later she was informed by Sala Isaack Aden of the death of the deceased. She later made her statement to the police.

PW6 was Salatho Mohammed. Her testimony was similar to the account given by PW5. She testified that she did not know the accused and that she had never seen him until the day she testified in

court. PW7 was Lawrence Nthiwa, a firearms examiner attached to the Firearms Laboratory at the CID headquarters in Nairobi. He testified that his duties included identification of firearms, ammunition and their components among other duties.

PW7 testified that on 7.9.1998, he received one rifle S/N 19543905 marked exhibit A, a magazine containing two rounds of ammunition marked exhibit B and two expended cartridges marked exhibit "C1" and "C2" respectively. After examining the exhibits, he confirmed that exhibit A was an AK 47 rifle with a calibre of 7.62mm. The same was found to be in good mechanical condition. PW7 also testified that exhibit B was found to be an AK 47 rifle magazine loaded with two rounds of ammunition of 7.62 calibre ammunition. The magazine was also found to be in good working condition. According to this witness, exhibits "C1" and "C2" were found to be 2 fired cartridges which were found to have been fired from the same AK 47 rifle magazine. PW7 produced the report prepared by his predecessor, Mr. B.G. Luvuga. The report was produced as P exhibit 1. That was the prosecution's case. Does the evidence, as outlined above establish a prima facie case against the accused person as to warrant his being put on his defence at this stage of the proceedings? Does that evidence show that properly directing my mind to the same, I could convict the accused even if the accused said nothing in his defence?

I have carefully and painfully considered the evidence so far adduced and I am of the considered view that that evidence does not establish a prima facie case against the accused person as would require the accused to be put on his defence. Of the first six witnesses, none of them saw the accused shoot the deceased, so that throughout that evidence, the prosecution has not established the nexus between the death of the deceased and the accused. It was alleged by both PW3 and PW4 that the accused admitted to having killed the deceased and that that was the reason why they arrested him. This piece of evidence lacks the corroboration of the investigating officer who was not called as a witness in his case. The absence of the evidence of the investigating officer has thus dealt a fatal blow to the prosecution's case. Further there is no evidence to show that the accused had the intention to commit the offence of murder and that he went ahead and did so. Nor was medical evidence adduced to show the deceased's cause of death.

In the result and for the reasons given hereinabove, I am compelled to dismiss the charge of murder against the accused person and to acquit him under the provisions of section 210 of the Criminal Procedure Code. Unless otherwise lawfully held, the accused is to be set free forthwith.

Orders accordingly.

Dated and delivered at Meru this 26th day of October 2005.

**RUTH N. SITATI**

**JUDGE**

**26.10.2005**