

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 41 OF 2003

REPUBLICPROSECUTOR

VERSUS

ABDULLAHI MUSA ALI.....ACCUSED

JUDGMENT

The accused is charged with murder contrary to Section 203 as read with Section 204 of the penal Code. The particulars of the charge are that on the 7th July 2000 at Wel - Marer sublocation in Wajir District within North Eastern Province, jointly with others not before the court murdered IBRAHIM ADAM ELMI.

The prosecution case is that on the 7th July 2000 at about 5 pm the accused and three others while armed with guns arrested the deceased and tied him with ropes and later shot him dead at around 9 pm of that evening. The body was recovered on the 14th July 2000 in a forest about 3 km away from Wel-Marer Trading Centre.

The body had 4 shot guns two on the head and two on the abdomen. The prosecution called 9 Prosecution witnesses. The most material ones are PW1 HALIMA ADAM IBRAHIM, PW2 GABEY ABDI, SALAT, and PW5 ABEY ADOW who were present when the incident occurred. The rest were formal witnesses who included the police officers who carried out the investigations and the doctor who carried out the post mortem.

PW1 HALIMA ADAM IBRAHIM in her evidence told the court that the deceased was related to her. He was a son of her sister. She does business of selling milk at Wel - Marer where she had stayed for less than 3 months before that incident. On the material date 7th July, 2000 at about 5 pm while she was at Wel - Marer she saw a crowd of people outside a hotel. She decided to go there to find out what was happening. She found the deceased had been arrested by the accused and 3 others and had tied him with ropes. Since she knew the deceased she asked them why they had arrested him but they replied that they only wanted to question him about where he came from and his clan since he was a stranger in the area. She requested them to release him but they refused and ordered her to go away. She went away. The accused was accompanied by 3 other people and they were all armed with guns. At about 8 pm she heard some screams and when she went to the scene she found the deceased had been shot on the head and was bleeding. She pleaded with the accused to release the deceased but she was threatened with death. She went back to her house. She again went back to the scene at about 9 pm but she was again kept away. She went back to her house and slept. The next day when she visited the scene again, she met the accused who informed her that the deceased had been killed at about 3 am.

The accused handed over to her the clothes of the deceased but she declined to take them. On cross examination she replied that she never reported the matter to the police nor the sub chief or the chief of the area and that she only informed Ahmed Basir PW3 to make a report to the police. PW2 ABDI and PW5 FATUMA gave similar evidence of the events of the evening of 7th July 2000. None of them reported the matter to the authorities. PW6 C.I KISWII who was then attached to Wajir Divisional CID Head quarter in his evidence told the court that the matter was reported to the CID on 10th July 2000 by the relatives of the deceased that he the deceased had gone missing. He was accompanied by 2 police officers to Wel -Marer to trace the body for the deceased but they could not trace it. They tried to find out about the incident from the people and shop keepers of Wel - Marer but they said that they did not know anything about the incident.

PW9 CPL AFTIN MHAMED in his evidence told the court that he led another group of police officers to Wel -Marer to continue the search for the body of the deceased. This was on 14th July 2000 and he managed to trace the body in a forest about 3 km from Wel - Marer Shopping Centre. He also recovered one spent cartridge near the place where the body was found. He arrested the accused as well as one Ahmed Basir as suspects but Ahmed Basir was later released. This is the same Ahmed whom PW1 Halima had told the court she had reported to about the death of the deceased and had requested to report to the police.

DW1 ABDULLAHI MUSA ALI the accused gave evidence on oath. He denied the charge and told the court that on the material date 7th July 2000, there was a D.Os Baraza at Wel - Marer Shopping Centre which was attended by the local Chief among others. The baraza ended at 5 pm. After the meeting he was assisted by two other shopkeepers namely Ali Abdi and Hassan to collect contributions from the business community to cover the expenses of the baraza. He then went to his house. At about 9 pm one Ahmed who had come from Wajir came to his house and informed him that his son at Wajir was sick. He boarded a lorry which was transporting sugar and went to Wajir. He never came back to Wel - Marer until 10th July 2000 when he arrived he was informed that police had been there looking for a shifta who had killed a man from the area. He denied knowledge of the incident since at the time it took place he was away at Wajir. He was arrested on 10th July 2000.

The police relied on the evidence of PW1, PW2, and PW5 who claimed to have witnessed the incident. But Mrs. Gusenyirwa counsel for the accused submitted that their evidence was unreliable. PW1 who was related to the deceased witnessed the incident on the evening of 7th July 2000. She was aware the deceased had been shot on the head. The following day she was informed by the accused that the deceased had died at about 3 a.m. and he had carried his clothes which he tried to handover to her but she refused to take them. This is not the conduct of a man who had committed serious offence of murder. Secondly they told the court that the deceased was shot at Wel - Marer but according to the evidence of PW9 AFTIN one spent cartridge was recovered near where the body was recovered in a forest about 3 km away. This means the shooting had taken place in that forest. The evidence of this witnesses is wanting.

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence. The accused had denied to have been at Wel - Marer at the time the incident took place. This ought to have put the police on alert to adduce evidence to negate this defence. In a criminal case the onus is upon the prosecution to prove the accused guilty, such proof being beyond reasonable doubt; and if the defence raises an issue such as provocation, alibi as in this case) self-defence or accident the prosecution must negate that defence beyond reasonable doubt and the accused assume no onus in respect of any such defence.

Although according to the evidence of PW8 DR. SHEIKH OMAR, the deceased died of bullet wounds, there is no evidence that the bullet which caused the death of the deceased was shot by the accused. The prosecution have failed to discharge their duty i.e. to prove their case against the accused beyond reasonable doubt. The evidence against the accused is far below what is required in criminal law to warrant a conviction. All the three assessors returned a unanimous verdict of not guilty. I concur with them and I so find. The case against the accused is dismissed and he is acquitted forthwith.

Dated at Nairobi this 3rd day of June, 2004.

J.L.A. OSIEMO

JUDGE