



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE 68 OF 01

- 1. ABDALLA HASSAN ALI**
- 2. P.C. MOHAMMED MOHAMMED RAGE**
- 3. P.C. GEORGE MUTISO MUTUTHIU**
- 4. AHMED ADEN ALI**
- 5. FATUMA RUNOUR RABAI..... ACCUSED**

VERSUS

REPUBLIC..... RESPONDENT

RULING

The accused persons in this case are charged with two counts of murder contrary to section 203 as read with S.204 of the Penal Code. In count one the 1st accused persons namely Abdallah Hassan Ali, PC Mohammed Mohammed Rage, No.75749, PC George Mutiso Mutuhui, Ahmed Aden Ali and Fatuma Runour Rabai are charged with jointly murdering Faliema Hadan on the 22nd November 2000 at Bulo Iftin village within Garissa District. In Count two the same five accused persons are charged with murdering Abdi Hassan Sharo in the same circumstances and at the same place and time as in count one. Each accused denied the charge . M. Njanja appeared for the 1st and 4th accused persons, Mr. Mutinda for 2nd and 3rd accused persons while Mr. Kinyanjui appeared for the 5th accused person. Mrs. Ondieki appeared for the state.

As at the closing of the prosecutions case it is necessary to consider whether the prosecution has made out a prima facie against the accused persons jointly or singularly as to enable the Court to call upon the accused persons to make their own defence. The prosecution called fourteen witnesses in support of their case. P.W.1 is the husband to the fifth accused person in this case. He has testified that the 5th accused and his first wife were not getting on very well and had fought on two previous occasions since each was jealousy with the other each time he spent a night in the others house. In both cases the elders resolved the issues.

P.W.1 further testified that on 20th November 2000 the deceased reported to him that one Mohammed Rage, Hassan Ali and another third man called Mutisya wanted to kill her so that she could be eliminated so as to leave the first wife (5th accused) living with him (P.W.1) alone. According to P.W.1 the deceased told him that the 5th accused had agreed to pay the killers thirty thousand shillings and one thousand shillings had been paid towards the execution of the plan. This evidence of P.W.1 that he advised her to

report the matter to the area chief next day.

P.W. 1 also testified that he met his brother in-law at the deceased's house and on the material evening at 7 p.m. He asked him if he had received the deceased's report about the plan to kill her and what he had done. He told his brother in-law Hassan Shagow that he would find out from the deceased what the chief had done about the report. P.W.1 then left for the 5th accused's house and as he was trying to find out why his son had not attended school he heard two blasts in quick succession towards the deceased's house. On reaching at the deceased's house he found her injured and bleeding profusely. He also found his brother in-law (P.W.2) injured too.

P.W.1 identified the 1st accused as the Hassan Ali allegedly given money to eliminate his wife. He also identified Mohammed Rage as the 2nd Accused while Mutisya is the 3rd accused in this case. Under cross examination P.W.1 admitted that he did not report to the police his information from the deceased that the 1st, 2nd, and 3rd accused has been given money to eliminate his wife. He was unable to explain in detail as to where this money was given and in what form and when it was given over by the 5th accused person. On further cross-examination P.W.1 admits that he did not see the 1st or the 2nd accused near the scene of the crime that evening. P.W.1 admits that part of the reasons why he never reported the threat on the deceased life to the police was because he did not believe that the 5th accused could have plotted to kill her co-wife. P.W.2's evidence is to the effect that the deceased had named those who wanted to kill her as the 1st, 2nd and 3rd accused persons. Unlike P.W.1, P.W.2 did not disclose the amount of money which the accused persons would be paid to eliminate his deceased sister. Although P.W.2 was in the deceased's house prior to the blast which killed the deceased it is P.W.2's evidence that he did not see either 1st, 2nd and 3rd persons during the incident. P.W.2's evidence as it concerns the 1st accused had come to his sisters compound (deceased) on the evening of the death and asked for the whereabouts of P.W.1. He was told that P.W.1 had gone away and after the 1st accused had gone away he came back again and returned in the company of the 2nd accused person. The two were in the company of a third person whom P.W.2 thought was the 3rd accused in this case. The three left after the second visit after leaving that P.W.2 was present. P.W.2's evidence is that it was after the departure of the three that a bang took place. P.W.2 estimated the lapse of time between the departure of the three men and the blast to be two or so minutes. Under cross-examination P.W.2 admits that although planning to kill another person was a serious crime he did not report this information to the police.

P.W.3's evidence is to the effect that the 1st accused person came and asked for P.W.1 from the Boma. On 22/11/2000 at around 7 p.m. the 1st accused was all alone and he left after leaving that P.W.1 was away. P.W.3's evidence is to the effect that five minutes thereafter there was an explosion where she and the two deceased were injured. Under cross-examination P.W.3 reiterates that she met the 1st accused alone on the material evening prior to the blast and not with two other people. The witness admitted that her statement to Court contradicts her written statement wherein she stated that she met two people prior to the incident. P.W.4 the Assistant Chief testified that he received a report from the deceased at about 7.10 p.m. on 22/11/2002 that the 2nd accused and one Mutisya had threatened to kill her. P.W.4 went to the police station immediately but did not trace the police at the police station which was dark. He did not trace the police at the police station which was dark. He did not trace the two at their houses either. According to P.W.4 he heard this explosion 3 minutes later. He did not see the 2nd accused at the scene after the blast. Under cross-examination P.W.4 was at pains to explain why he did not report the deceased's complaint to her over that threat to her life at the police station. He admits that he did not indicate the fact of his having gone to the police station to report the deceased's report to the police in his statement to the police. P.W.8's evidence is that he met Mohammed Rage 2nd accused at 8 p.m. in his shop prior to the blast. He does not know how the 2nd accused was involved in the death of the two deceased herein.

P.W.9 took a statement under inquiry from the 1st accused person (exhibit 9). The 1st accused categorically denied any involvement in the commissioning of the offence. The 1st accused further explained that he was in house when the offence took place.

P.W.10 took a statement under inquiry from the 5th accused person in this case (exhibit 10). IN the statement the 5th accused denied any involvement or any knowledge about the death of the deceased

herein. P.W.11 took a statement under inquiry from the 2nd accused person (Exhibit 11) in which the 2nd accused also denied a statement under inquiry from the 3rd accused person who also denied having committed the offence. Under cross examination the witness testified that the police investigated the extent of the statements. P.W.12 was a police officer attached to Bulla Iftin police patrol base on the day the murder took place. According to P.W.12 on the material day at 7 p.m. (I.e, 22/11/299) he was at the police base with PC Charles Mengich, Elema Bocha, Raymond Rono the 3rd accused person and the 2nd accused person. The 2nd accused left the base at 7 p.m. and within a short time the blast that killed the deceased occurred. The witness literally exonerated the 2nd accused from any involvement in the actual commission of the crime (i.e. causing the blast) that led to the deceased in that the 2nd accused was not carrying anything as he left the base. He has testified that the 2nd accused went to the direction opposite the scene where the blast took place. According to P.W.12 the 2nd accused had barely left the police base before the blast occurred. He also exonerated the 3rd accused from participation in the crime because he was in the company of the 3rd accused who was on duty at the time the blast that killed the deceased herein occurred. P.W.13 testified that he was one of the investigating officers in this case. He implicated the accused persons from a tip off which he received from an informer. He admitted that none of the five suspects whom he arrested admitted the charge through their statements under inquiry.

Given the above evidence I am unable to find that the prosecution has made out a prima facie case against any of the accused persons as to enable me to call upon any of the accused persons to make their own defence. Apart from the existence of evidence to the effect that the 5th accused person did not get on well with her co-wife the deceased in this case there is no evidence on record to prove that she actually paid money to the 1st accused, 2nd accused, 3rd accused or 4th accused person to eliminate any of the deceased persons. I agree with Mr. Njanja's submissions at the close of the prosecution's case that mere enmity and suspicion on the part of the 5th accused was not enough to ground a charge of murder against the 5th accused person. It is difficult to believe the evidence of P.W.1 that the deceased had complained to them about the threat to her life yet none of them reported the threat to any authorities.

The evidence of P.W.2 to the effect that he saw the 2nd and 3rd accused a few minutes before the death of the deceased in the 5th accused's house is also not credible in the light of evidence of P.W.12 who stated that the 1st accused was with him at the police post a few minutes prior to the blast while the 3rd accused was in his company and on duty at the time the blast occurred. The evidence of P.W.3 contradicts that of P.W.2. It is also noted that both the 2nd and 3rd accused persons gave evidence as to their movements prior to the commission of the offence in their statements under inquiry which the prosecution produced in exhibits. One therefore wonders as to believe as between P.W.2, P.W.3 and P.W.12 or even what the accused persons stated in their statements under inquiry. It is also hard to believe that P.W.2 knew of the conspiracy to kill the deceased but never gave such information to the police. I find P.W.2 an incredible witness. No attempt was made by the prosecution to try and discredit the contents of the statements under inquiry which the 1st, 2nd, 3rd and 5th accused persons made to P.W.9 and P.W.10 in this case. The statements contain the accused's explanation as to what happened to each of them prior to the blast. The statements contain a denial by the accused persons that they were nowhere near the scene of the commission of the offence.

Evidence adduced by the police officer more so the DCIO is to the effect that this was a bandit prone area. The possibility that such bandits could have caused the blast that led to the death of the two deceased persons cannot be ruled out. This clue was not followed during investigations. Evidence on record also tends to exonerate the 5th accused persons from the commission of this offence because she was in the company of P.W.1 when the blast took place. There is no other evidence available to discredit the evidence of P.W.1 nor the content of her statement under inquiry on this aspect.

Given the accused's explanation in their statements under inquiry one wonders what other evidence is expected to come out from five accused persons if they are called upon to make their own defence. This is the gist of Mr. Kinyanjui's submissions at the close of the prosecution's case.

Taking everything into account I find that the accused persons have no case to answer and acquit each of them under S.306(1) of the Criminal Procedure Code.

Order accordingly.

R.M. MUTITU

JUDGE

7/11/2002

Delivered in open Court in the presence of Mrs. Ondieki for the state,

Mr. Mutinda for 2nd and 3rd accused, Mr. Njanja for 1st accused and accused 4 and Mr. Kinyanjui for accused 5 and in the presence of Assessors Benajamin Okoth and Michael Ahenda and in the absence of Mr. Wekesa (assessor), Interpretation Ali Hassan.

R.M. MUTITU

JUDGE

7/11/2002.

Order:

Ali Hassan be paid interpretation fees today.

R.M. MUTITU

JUDGE

7/11/2002