Republic v Ali & another (Criminal Case E010 of 2021)
[2025] KEHC 9737 (KLR) (5 February 2025) (Judgment)

Neutral citation: [2025] KEHC 9737 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL CASE E010 OF 2021

JN NJAGI, J

FEBRUARY 5, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

ALI ABDI ALI ..... 1ST ACCUSED

AHMED IBRAHIM ISSACK ..... 2ND ACCUSED

JUDGMENT

1. The accused herein are facing a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the 21st June 2021 at around 1700 hours along Elwak Takaba road in Mandera Central sub-county within Mandera county they murdered one Ahmed Abdi Garad (herein referred to as the deceased).

2. The prosecution called 9 witnesses in the case at the end of which the court found the accused to have a case to answer and placed them to their defence. The accused defended themselves and called no witnesses.

Prosecution Case

3. The case for the prosecution was that Ibrahim Ali Abdow PW1 was employed as a driver by one Mohamed Noor Ahmed PW2. That on the material day at about 5.30 pm the said Ibrahim was ferrying 8 traders from the Somali side of Kenya/Somali border on the way to Elwak Kenya. They were carrying contraband sugar in the vehicle. The traders asked him to take a detour route so as to avoid a police barrier that is manned by the Kenya Police and Kenya Police Reservists. That as they took the diversion he heard gun shots. He stopped some distance ahead and saw 3 people a distance away from them. One of the persons was seated on the motor cycle while two others were standing next to the motor cycle and were directing guns at his motor vehicle. Two of his passengers had been shot dead. He asked the people why they had shot at his vehicle. They did not answer him. The people rode away on the motor

cycle. He had recognized two of the people. He took the passengers and the bodies to Mansa. On the following day he went to Elwak police station and recorded a statement.

4. PC Otieno Moses PW3 of Elwak police station testified that on the material day he reported for road block duties on Elwak-Takaba road at 7 am. He was on duty with four National Police Reservists who included the two accused persons. That at 4 pm, the 1st accused received a phone call. He talked in native language. He, the 2nd accused and Mohamed (who was acquitted under no case to answer) left the place on a motor cycle belonging to the 1st accused. They went towards Kitayu direction. The 2nd accused and Mohamed were armed. They went back to the barrier after some time. They booked off duty at 6 pm. On the following day he was asked by the DCIO to record a statement on what happened when they were on duty on the previous day. He did so.

5. PC Joshua Kipngetich PW4 testified that he was on the material day on road block duties with PC Otieno PW3 and NPR officers who included the 2 accused persons. They were on duty from 6 am and worked up to 6 pm. He narrated similar evidence to that given by PC Otieno PW3.

6. C.I. Mathew Chelimo PW7 testified that he conducted an identification parade on the 1st and 2nd accused persons in which they were identified by Ibrahim, PW1.

7. The case was investigated by PC Gedion Torit PW8 who visited the scene and took photographs. The same were processed a by Crime Scene officer, PW 6. The investigating officer forwarded the rifles issued to the accused persons together with rounds of ammunition to the ballistics laboratory, Nairobi. The same were examined by a ballistics examiner, PW5, who confirmed them to be firearms and ammunition respectively as defined in the *Firearms Act*.

8. Cpl Jackson Wachira PW9 was the officer manning the armory at Elwak police station. His evidence was that he had issued AK 47 rifles to the accused persons with each rifle containing a magazine with 90 rounds of ammunition. The accused later returned the rifles to the armory.

9. After investigations were complete, the accused were then charged with the offence that they are facing.

Defence Case

10. The 1st accused stated in his defence that he was a National Police Service Reservist at Elwak. He had been issued with a gun by the government. That on the night of 21st July 2021 he was on duty at Tabaka road block barrier and left in the morning at 6 am. He handed over his gun before leaving. It had 90 rounds of ammunition. He said that nothing happened when he was on duty. He denied having killed the deceased persons.

11. The 2nd accused stated in his defence that he was a Kenya Police Reservist at Elwak. That on the 21/6/2021 he reported for duty at Elwak road block at 6am. And worked up to 6.30 pm when he completed his shift and left for home. It was his evidence that nothing happened during the day when he was on duty. He said that he is not called by the name given by PW1 in court. He denied that he killed the deceased persons in his case.

Analysis and Determination

12. This being a criminal case, the standard of proof is that of beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 stated this degree to be as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to

deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

13. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.

14. Section 203 of the *Penal Code* defines murder in the following terms:

> " Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

15. The prosecution in order to sustain a conviction for the offence of murder must prove the ingredients of the offence which were stated in the case of Republic v Isaac Mathenge Maina [2018] eKLR to be as follows:

The ingredients of the offence of murder were discussed in the case of Republic vs Mohammed Dadi Kokane & 7 others [2014] eKLR as follows:

> " The offence of murder is defined as follows by section 203 of the penal code:
>
> "any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."
>
> This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:
>
> 1. The fact of the death of the deceased.
> 2. The cause of such death.
> 3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, and lastly
> 4. Proof that said unlawful act or omission was committed with malice aforethought."

16. It is the duty of this court to interrogate the respective ingredients of the offence of murder and determine whether the offence of murder was proved against the accused persons.

17. There was no medical evidence produced before the court to prove death of the deceased persons in this case. In the case of Chengo Nickson Katama versus Republic (2015) eKLR, the Court of Appeal upon considering several authorities on a similar case concluded that:

> " The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a postmortem examination report of the deceased."

18. That notwithstanding, the death of the deceased in this case was witnessed by Ibrahim PW1 who saw them having been shot with guns and died on the spot. The death and cause of death of the deceased persons was therefore proved.

19. Ibrahim PW1 testified that he identified the two accused persons to have been among the people who shot and killed the deceased persons. The issue for determination is whether the witness identified the accused persons as being among the gang of three people who shot at his motor vehicle and killed the deceased persons.

20. The law on evidence of identification is that such evidence should be examined carefully for the court to satisfy itself that the circumstances of identification were favourable and free from the possibility of error before it can safely be made the basis of a conviction. This fact was recognized by the Court of Appeal in the case of Cleopas O. Wamunga v Republic, Criminal Appeal No. 20 of 1989 where the court stated as follows:

> " ..... evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. Whenever the case against a defendant depends wholly or to a great extent, on correctness of one, or more identification of an accused, which he (accused) alleges to be mistaken; the court must warn itself of the special need for caution before convicting the defendant in reliance on correctness of the identification...."

21. In Kariuki Njiru & 7 others v Republic it was held that:

> The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v.Turnbull[1976]63 Cr. App. R.132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.

22. Ibrahim Ali Abdow PW1 testified that the accused persons were at a distance of about 80 - 100 meters when they shot at his motor vehicle. He said that he had known the accused persons for a period of three years at Elwak town where they work as Kenya Police Reservists. He said that at the time of the shooting, the 1st accused was seated on the motor cycle while holding onto the motor cycle`s steering handles while the 2nd accused and the other one whom he did not identify were standing next to the motor cycle while holding guns. He said that it is the 2nd accused and the one he did not identify who shot at his motor vehicle. He said that he had no grudge against the accused persons.

23. In my view the evidence of Ibrahim PW1 that he identified the accused persons at a distance of about 80 - 100 meters was not convincing. He was not able to explain how he identified the accused persons at that distance. He initially told the court that he could not remember whether the accused were wearing anything on their heads only for him to change this evidence shorty after and say that the 1st accused was not wearing anything on the head. He said that he knew the 1st accused by the names of Ali and Aliow while he knew the 2nd accused as Adow and Abdow. The names he gave to the police in his statement for both of them were Ali and Adow. He insisted that all the names referred to the accused persons. The name for the 1st accused as per the charge sheet is Ali Abdi Ali while the 2nd accused is Mohamed Ibrahim Issack. The prosecution did not prove that the names given by the witness on the accused referred to the same persons. If PW1 was referring to Ali and Aliow who were National Police Reservist officers at Elwak, there would have been no difficulty in identifying them. That it took two months for the identification parade to be conducted raises doubt as to whether Ibrahim PW1 had really identified the accused persons as the ones who had shot at his vehicle. Besides that, Ibrahim PW1

never said in his evidence that he identified the accused persons in an identification parade as testified by CI Chelimo PW7.

24. Ibrahim PW1 was the only identifying witness in the case. The law requires the trial court to carefully scrutinize evidence of a single identifying witness and only convict if satisfied that it was free from possibility of error. In Wamunga v Republic [1989] KLR 424 the Court of Appeal stated thus:

> It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

25. The of Court of Appeal appreciated, however, that evidence of a single identifying witness can still prove a fact in a criminal trial thus leading to a conviction. In Ogeto v Republic [2004] KLR 19, it was stated:

> It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.

26. In Roria v Republic [1967] EA 583, the court warned on the dangers of convicting on the evidence of a single identifying witness, stating:

> degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.

27. The main prosecution witness, Ibrahim PW1, did not tell the court the physical features of the accused persons that he saw that made him identify them as the people who had shot at his motor vehicle. Considering that PW1 is a single identifying witness, I am not satisfied that his evidence was free from the possibility of error. Consequently, I find that the prosecution did not adduce sufficient evidence to prove that the accused are the ones who shot and killed the deceased persons.

28. The third ingredient for the offence of murder is whether there was malice aforethought in the killing. The offence of murder is defined as the unlawful premeditated killing of one human being by another. The Black's Law Dictionary Tenth Edition Page 1776 states murder to be the killing of a human with malice aforethought.

29. Section 203 of the *Penal Code* states: -

> Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

30. Malice aforethought is defined in Section 206 of the *Penal Code* in the following terms:

    (a) An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.

    (b) Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is

accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused.

(c) An intent to commit a felony.

(d) An intention to facilitate the escape from custody of a person who has committed a felony.

31. In the absence of evidence that the accused are the ones who killed the deceased, the issue of malice aforethought in this case does not arise.

32. The upshot is that the prosecution has not proved the charge of murder against the accused persons beyond all reasonable doubt. I find the accused not guilty of the offence and acquit them accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT GARSEN THIS 5TH DAY OF FEBRUARY 2025

J. N. NJAGI

JUDGE

In the presence of:

Mr. Nderitu for Prosecution

Mr. Nyenyire for Accused persons

Court Assistant – Jarso

14 days R/A.