



REPUBLIC OF KENYA



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**Republic v Sora (Criminal Case E007 of 2022)
[2025] KEHC 2390 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL CASE E007 OF 2022**

JN NJAGI, J

MARCH 6, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

KANCHORA GODANA SORA ALIAS KANA KANCHORA WARIO ACCUSED

JUDGMENT

1. The accused herein is 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 14th February 2022 at Milima Tatu, Jirime location in Marsabit Central Sub County within Marsabit County he murdered one Ahmed Mohammed Sheikh (herein referred to as the deceased).
2. The prosecution called 8 witnesses in the case at the end of which the court found the accused to have a case to answer and placed him to his defence. The accused defended himself and called no witness.

Prosecution Case

3. The case for the prosecution was that the deceased was a resident of Jirime location on the outskirts of Marsabit town. He was living with his wife PW5 and his 15 year old school going son, PW2. That on the material day at around 2 pm the deceased's wife PW3 left the deceased at home and went to attend a school meeting where PW2 was studying. That at around 4 pm, PW2 was released from school and went home. He found his father, the deceased seated under a tree outside his house. PW3 entered into their house and changed school uniform into home clothes. He came out of the house.
4. That while PW2 was outside the house, he saw a motor cycle riding into their compound with three occupants. It passed where his father was seated and went a stopped a short distance ahead. It turned and started to go back. It stopped where his father was and one of the passengers alighted from the motor cycle. He identified the person as one he had been seeing in Marsabit town. The person was wearing a long jacket. He removed a gun from the jacket, cocked it and fired several bullets at his father.



His father fell down. He, PW2, ran into the home of a neighbour. The people escaped in the motor cycle.

5. Meanwhile, the deceased's wife, PW5 heard gun shots while at the school. She rushed home and found the deceased lying dead outside his house. Members of the public went to the place. The report of the shooting was received by the police at Marsabit police station. PC Duncan Wachira PW7 then of Marsabit DCI rushed to the place with other police officers. PW7 found the deceased having been shot dead about 3 meters from his house. He collected 3 spent cartridges at the scene. The body was moved to Marsabit County Referral Hospital mortuary. A post mortem was conducted on the body by Dr. Tuume PW1 of the said hospital. She found it with three bullet wounds on the head, neck and back. She formed the opinion that the cause of death was due to severe brain injury as a result of gun shot wounds. She completed a post mortem report to that end.
6. PC Wachira PW7 investigated the case. He recorded the statement of the deceased's son, PW2, who said that he had identified one of the killers. Later on 18th August 2022, PC Moses Loliwo PW3 of Marsabit Central DCI office received information from an informer that a suspect of murder had been located at Kiwanda Ndege area. He went and arrested the person, the accused. He escorted him to Marsabit police station. PC Wachira PW7 was apprised of the arrest. He made arrangements for CI Obonyo PW6 to conduct an identification parade on the accused. The accused was identified by the deceased's son, PW2 in an identification parade of 8 persons. CI Obonyo completed the parade form to that end. PC Wahira sent the recovered spent cartridges to the Ballistic Laboratory, Nairobi for examination. They were examined by CI Kenneth Chomba PW8 who found them to be fired cartridges formerly component parts of a round of ammunition in calibre 7.62 x 39mm which were fired from one firearm. He wrote a report to that end.
7. After investigations were complete the accused was charged with the offence. He denied the charge. During the hearing of the case in court, Dr. Tuume PW1 produced the post mortem report as exhibit. CI Obonyo PW6 produced the parade form as exhibit. PC Wachira produced the spent cartridges as exhibits. CI Chomba PW8 produced the ballistics report as exhibit.

Defence Case

8. When placed to his defence, the accused stated in a sworn statement that he is a resident of Jirime ward in Marsabit County. That he was arrested on the 18/8/2022 while walking on the road. He was placed in the cells and was accused of being in possession of a rifle. He denied it. The police started to beat him. He took them to his house but they did not find anything. They returned him to the cells and continued to beat him. He stayed in the cells for 2 days. Policemen asked him to produce Ksh.100, 000/=. He told them he had no money. They said they will fabricate a case against him. An identification parade was organized. He was number 3 in the parade. A person went to the parade and touched the person who was number 1 in the parade. He was told to repeat the parade. The person came a second time and touched him. He denied that he is the one who killed the deceased.

Analysis And Determination

9. It is the duty of the prosecution in a criminal case to prove the case against an accused person beyond all reasonable doubt. Lord Denning in *Miller vs Ministry of Pensions*, [1947] 2 ALL ER 372 had this to say on that standard of proof:

“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.”

10. The accused is charged with murder under Sections 203 as read with section 204 of the [Penal Code](#) that state as follows:

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

204. Any person who is convicted of murder shall be sentenced to death.”

11. The elements of the offence of murder under sections 203 and 204 of the [Penal Code](#) were stated in the case of Republic Versus Andrew Omwenga (2009) eKLR to be as follows:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- a. The death of the deceased and the cause of the death,
- b. That the accused committed the unlawful act which caused the death of the deceased and
- c. That the accused had the malice aforethought”.

12. It is therefore my duty to interrogate the evidence tendered before the court and determine whether the offence of murder has been proved against the accused person beyond all reasonable doubt.

Death and cause of death of the deceased person

13. The fact of death of the deceased person was witnessed by his son PW2 who was present when he was shot with a rifle. His wife PW5 and PC Wachira PW7 went to the scene and found him lying dead on the ground. Dr. Tuume PW1 conducted a post mortem on the body of the deceased and found it with 3 gunshot wounds on the head, neck and back. She formed the opinion that the cause of death was due to severe brain injury as a result of gun shot wounds. I have no reason to doubt the findings of the doctor as to the death and cause of death of the deceased person. Her evidence was not challenged. The deceased therefore died as a result of a gun-shot wounds.

Whether the accused committed the unlawful act which caused the death of the deceased

14. The son to the deceased PW2 testified that he identified the accused person as the person who shot and killed his father. The issue for determination is whether the witness identified the accused person as being the person who shot and killed the deceased.
15. 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....”

16. 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.

17. The deceased's son PW2 testified that he was about 6 meters away from his father when the accused shot at his father. That he identified the accused by his face. That by that time he had known the accused for a period of about 2 weeks as his father used to send him, the accused, to bring him miraa. That he knew his name. That at the time of the incident the accused was wearing a mavin cap. That he had a scar mark below one of his eyes. That later he picked him in an identification parade at the police station. That at that time he identified him by the mark that he had seen on his face on the day of the incident.

18. Whereas the witness says that he knew the accused by name at the time of the incident, he never indicated so in his statement to the police. He instead stated in his statement that he could identify the person. If indeed the witness knew the accused by name, there is no reason why he did not give his name to the police when he recorded his statement but instead said that he could identify him. The failure to do so creates doubt whether he actually knew the accused by name.

19. The witness PW2 said that at the time of the incident he identified the accused by a scar that was below his left eye. He said that during the identification parade, he identified him by the said scar. However, the witness never stated in his statement to the police that he identified the accused by the said scar. Neither did the parade form indicate that he identified the accused by the said scar. More so when the accused appeared in court, the court observed that the accused had a faint scar below his left eye that was barely visible at a distance. How then did the witness see the scar at the distance he was from the shooter when the scar was not clearly visible from a distance and considering the circumstances of the shooting? The above leads me to the conclusion that the identification of the accused by PW2 was not credible.

20. The deceased's son PW2 was the only identifying witness in the case. It is trite that the evidence of a single identifying witness ought to be treated with a lot of caution as the witness can be mistaken on the identity of the accused person. 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.



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

A conviction resting entirely on identity invariably causes a 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.

22. In view of the discrepancies stated above on the evidence of PW2, I am not satisfied that it is safe to act on his evidence on the issue of identification of the accused person. The accused is entitled to the benefit of doubt as far as the evidence of PW2 is concerned. There was thus no sufficient evidence that the accused is the one who killed the deceased.

Malice aforethought

23. The third ingredient for the offence of murder is that the killing must have been committed with malice with malice aforethought. 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.

24. In the absence of evidence that the accused is the one who killed the deceased, the issue of malice aforethought does not arise.

25. The upshot is that the prosecution has not proved beyond all reasonable doubt that the accused murdered the deceased. The accused is found not guilty of the offence of murder and is acquitted accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MALINDI THIS 6TH MARCH 2025

J. N. NJAGI

JUDGE

In the presence of:

Mr. Omar for Republic

Mr. Halake for Accused

Accused – present

Court Assistant - Jarso

