



REPUBLIC OF KENYA



**Republic v Aden aka Adesh (Criminal Case E002 of 2022)
[2025] KEHC 4657 (KLR) (10 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4657 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E002 OF 2022**

**JN ONYIEGO, J
APRIL 10, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

ABDIKADIR ADEN AKA ADESH ACCUSED

JUDGMENT

1. The accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on 24.12.2021 at Bulburis area in Garissa Township Sub County, Garissa County, jointly with others not before court they murdered Ismael Abdi Mohamed.
2. The accused person having pleaded not guilty to the charge, the prosecution summoned a total of seven witnesses in support of its case.
3. PW1, Feisal Daudi testified that on 23.12.2021 at 11.00 p.m., Abdullaman Yussuf requested him to drop him at Bura Gesto using his motor cycle. On the way, they came across somebody who was seriously flagging them down using his torch light. Upon stopping, he noted that the person stopping them was his former classmate one Eban. That Eban wanted bodaboda services to Garissa Ndogo and so, he told him to wait so that he could drop Abdullaman before he could serve him. However, Eban insisted to join the ride and together they rode up to the point where Abdullaman Yussuf a lighted.
4. It was his case that he dropped Eban at Garissa Ndogo where he found Adesh who was standing outside a shop. That he picked Adesh and together with Ismail he dropped them at the White House. Thereafter, he left to go pick Mohamed Aden who was waiting for him.
5. That Ismail and Aden walked towards Bula Bulburis while he dropped Mohamed to his home. He went back to the White House to go pack his boda boda. He stated that he tried to return Ismail's missed call but in vain as he failed to pick his call. That when he later called Ismail again at 1.00 a.m.



- he told him that he was walking home. He later learnt of the death of Ismail. On cross examination, he said that he left Adesh with Ismail together chewing miraa at White House in as much as he was not aware how the deceased met his death.
6. PW2, Dr. Fred Abdon Naibei standing in on behalf of his colleague Dr. Rage testified that post mortem was done on the body of the deceased on 24.12.2021. From the general examination, rigor mortis had set in as the body was stiff. That several injuries were noted. The deceased had bled from both ears and nose and the body had a cut wound on the occipital area, there were lacerations on the abdomen and bruises on the right elbow. As a result of the forgoing, the witness formed the opinion that the cause of death was over bleeding due to head injury.
 7. On cross examination, he stated that noting that the deceased bled from the nose, the same pointed to bleeding that originated from the brain and it was imperative that the cause of the bleeding be determined. That an internal examination was not done for the hospital lacked a mortician. However, the cause of death was bleeding due to head injury.
 8. PW3, No. 83536 Cpl. Ronald Emase testified that he is a data analyst attached to Safaricom Enforcement Office. That on the strength of a letter written by the DCI Garissa dated 28.12.2021 requesting for the call data records (CR) of some numbers found that, No. 0723XXXXXX, from the records was registered under the name of Abdikadir Adan Kuno holder of ID No. XXXXXXXX. The second number being 0759XXXXXX, was registered in the name of Collins Muriti, holder of ID No. XXXXXXXX.
 9. It was stated that the DCIO had called for data records to ascertain whether the two numbers had any contact within a specified time. That it was established that there was communication between 0759XXXXXX and 07292XXXXX as captured on 24.12.2021 at 0033 hours (midnight). The witness averred that at this time the two numbers were being served by the same Base trans receiver station (Booster). The same numbers were in contact on the same day at 0015 hours (mid night) as they were serviced by a booster known Bura Gerto.
 10. He stated that throughout his analysis, it was established that whenever the two numbers made calls, they were served with the same booster. He explained further that on 23.12.2021 at 2318hrs, the two numbers were being served by booster known as Garissa Bura Junction. On the same day at 2300 hours they were served by Garissa Burra.
 11. On cross examination, he said that he was called to analyze data call for numbers; 0723XXXXXX which was registered in the name of the accused and number 0759XXXXXX which was originally registered in the name of Ismail Mohamed. He explained that when a number is inactive for over 90 days, it is repossessed and re-allocated. That this number was in communication for over 15 times. No. 07292XXXXX was registered in the name of Abdikadir Aden Kunow while number 0723XXXXXX belonged to Daudi Abdi and not Abdikadir Adan Kunow as stated in his evidence in chief.
 12. It was his evidence that the number 07292XXXXX was registered in the name of Abdikadir Kunow and the last communication between No. 07292XXXXX and 0759XXXXXX was 14.12.2021 at 0033 hours and the same were served by Garissa Gulet booster. That it was phone number 0759XXXXXX which called the number 07292XXXXX and at this time the two numbers were not served by the same booster.
 13. PW4, Abushira Abdi Mohamed testified that on 23.12.2021 at 9.30 p.m., she was in town when her brother called her and informed her that he needed Kes. 200/- for transport and so she sent the same via mpesa. That the deceased had plans to meet a friend by the name of Abdikadir Adan Kunow. She



said that the said Abdikadir Adan Kunow was someone known to her and so, she sent the money via phone number 07282XXXXX for his boda boda services.

14. After that, she went to sleep but after short while, she heard some noise from a boda boda. That she enquired from the deceased whether he was safe upon which he told her that given that he was a police officer, no one could harm him. She proceeded to caution him to be careful and thereafter, the deceased left but before leaving, the deceased told her that should anything happen to him, then they should look for Abdikadir.
15. The following day, the deceased was nowhere to be seen as his phone was off. That she called her brother Roble Abdi who also confirmed having not seen the deceased. She stated that it was Fatuma Dele who informed them that her brother's body had been seen at Bula Bulburis. She stated that upon going to Bula Bulburis, they found that indeed their brother was dead and his hands and legs remained tied. Further, that a rope was also tied around his neck as he bled from the eyes and nose. She stated that the accused person was well known to her as they used to be neighbours while they were still staying at Garissa Ndogo before moving to Bula Bulburis.
16. PW5, Fatuma Dele testified that on 24.12.2021, she was at Bula Bulburis looking for her goats. That at 8.00 p.m., she saw people gathered at a scene where there was a body of a young person which she identified as belonging to the deceased herein. The body was lying under a tree with both legs and hands tied and further, the said body had stab wounds on the head and eyes. She recalled reporting the same to the deceased's brother and mother and thereafter, reported the same to the police.
17. PW6, No. 97XXXX PC Noah Kosgei testified that on 24.12.2021, his boss CIP Jeremiah Ongaga directed him to visit a scene of crime at Bura Bulburis. That together with his colleagues, they visited the said scene where they found a dead body. They documented the scene and further took the body to Garissa hospital and thereafter, embarked on recording statements. The deceased was identified as police officer by the name of Ismail Abdi Mohamed who previously worked at Kola police station, Muranga County.
18. On the same day post mortem was done by Dr. Rage who formed the opinion that the cause of death was strangulation. That while conducting investigation, he learnt that the deceased's sister Abshira had sent Kes. 200/- to the accused on behalf of the deceased to buy miraa. The mobile number for Abshira being 07285XXXXX which sent the said amount to 07282XXXXX belonging to Abdikadir. Additionally, that he found out that the deceased had left home at 9.00 a.m. via bodaboda to Garissa Ndogo where he was to meet the accused person. The two met and then proceeded to Bura Bulbulis but along the way, the rider ran out of fuel thereby leaving the duo to walk home.
19. It was his case that in as much as the accused person claimed that they were attacked by four people prompting them to run in different directions, investigations proved otherwise as the accused person was placed at the scene of murder. That this was so since the phone data analysis showed that the accused was with the deceased all through.
20. Additionally, the accused person was not available until when the police officers visited their home and further, he failed to report the alleged attack to any police station and neither did he attend the deceased's burial. On cross examination, he said that he identified two suspects namely; accused Aden Kunow and Feisal Baji. That PW1, the motor cycle rider was treated as a prosecution witness.
21. PW7, Said Aden Bulle, Chief Medina location stated that on 24.12.2021, he received a phone call from Nyumba Kumi head that there was a dead person at Bula Bulburis in Medina. That he proceeded to the scene where he confirmed the same but he could not identify the deceased. He called the OCS Garissa



- who organized a team which visited the scene and thereafter picked the body. On cross examination, he stated that the body appeared to have been dragged and dumped there.
22. DW1, upon being placed on his defence recalled that on 23.12.2021, he received a phone call from the deceased requesting him to buy him cigarettes and miraa. That he sent him Kes. 200/- which he used to buy the said miraa and cigarettes and then remained with Kes. 50/- as change. He stated that the deceased told him to go to Mwangaza to find Dekow, his brother who had a motor vehicle to drop him at Bula Bulburis.
 23. That Dekow asked for Kes. 200/= and noting that he did not have the said money, Ismail offered to go to Garissa Ndogo. After 1 hour, Ismail arrived with Feisal Bej at Garissa Ndogo and so, they agreed to go to Bula Bulburis, Ismail's home. Together with Feisal Bej and Ismail, they boarded Feisal Bej's boda boda and on reaching ADC, Feisal Bej said he had run out of fuel.
 24. He said that, as they were walking, they saw a boda boda rider with three pillion passengers. That the said people stopped and attacked them using rungas thus prompting them to run away to seek for help. He stated that he ran to a nearby mosque where he stayed till morning when he left for home. He however stated that he did not note the registration number of the attackers' motor cycle and that he learnt of Ismail's death when he was called upon to record his statement.
 25. Despite directions being given that parties file their written submissions, both parties failed to comply with the said directions.
 26. I have considered the evidence as adduced by the prosecution witnesses and the defense proffered by the accused person. In my view, the main issue for determination is whether the prosecution has proved its case against the accused person beyond reasonable doubt to sustain a conviction for the offence of murder as charged.
 27. Section 203 of the *Penal Code* provides that:
"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."
 28. In the instant case, this Court is to establish whether the prosecution's evidence as a whole proved beyond reasonable doubt the following elements of murder: that there was the death of the deceased and the cause of the said death, the death was caused by unlawful act or omission, that the accused committed the unlawful act which caused the death of the deceased and that the accused had malice afore thought.
 29. On whether there is proof of death and the cause of the said death, Dr. Rage who conducted post mortem on the body of the deceased formed the opinion that the cause of death was as a result of strangulation. As such, the first element on death was thus proved by the prosecution.
 30. On whether the death of the deceased was caused by an unlawful act and whose unlawful act it was. Article 26 (1) of *the Constitution* of Kenya 2010 guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by *the Constitution* or other written law. The evidence before this Court irresistibly points to an unlawful act that led to the death of the deceased as it was established that the cause of death was as a result of exsanguination.
 31. On whether the prosecution proved beyond reasonable doubt that it was the accused person and not any other person who committed the unlawful act which caused the death of the deceased, it is clear that no one saw the accused person kill the deceased. It therefore implies that the prosecution purely is relying on circumstantial evidence to prove its case.



32. In the case of Ahmad Abolfathi Mohammed & another vs Republic [2018] eKLR, the Court of Appeal had this to say on circumstantial evidence:
- “However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence.”
33. It was not denied by both parties that the accused person was the last person with whom the deceased was seen before he was found dead. It follows that courts are replete of decisions touching the last seen doctrine. A case in point is the Court of Appeal in the case of Moingo & Another vs Republic [2022] KECA 6 (KLR) where the court reiterated that:
- “The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased).”
34. As already mentioned, it was not controverted that the deceased was last seen with the accused person herein. The investigating officer stated that in as much as the accused person claimed that while with the deceased, they were attacked thus prompting them to run in different directions, investigations proved otherwise as the accused person was placed at the scene of murder. This was confirmed by the fact that the phone data analysis showed that the 1st accused was with the deceased all through and further, that even after the alleged attack, he did not report to the police of the said incident.
35. In the same breadth, the accused person was not available until when the police visited their home and not to mention that he did not make it to the burial of his alleged friend, the deceased herein. The accused person on the other hand did not deny being with the deceased only that, he contended that while on their way home, they were attacked by four men thus prompting them to run in different directions. My interpretation of the accused person’s defence is that the most probable killer(s) of the deceased were the alleged attackers hence not him.
36. But even for a moment, taking the accused person’s version as being correct, the problem that I find in believing him is his unexplained failure to report to the authorities the alleged incident where his friend lost his life. The foregoing notwithstanding, the accused person and the deceased were not only friends but also neighbours in the previous estate where they used to live. The same was compounded by the fact that, PW4, sister to the deceased had previously sent him money via mpesa. It remains not only unknown but also insincere as to why the accused person failed to feel obligated to inform the family members of the deceased on the incident of the attack or report to the police.
37. From the record, no attempt was shown by the accused person in trying to find out whether his friend was alright noting that when they were attacked, they fled to different directions. To the contrary, the accused person found peace upon seeking refuge at the mosque where he allegedly spent the night and in the morning, proceeded with his life like nothing happened. Surely, the accused person’s silence and behaviour were too loud to go unnoticed.



38. It is my humble consideration that it was incumbent upon the accused person as provided for under section 11 of the Evidence Act to explain how the deceased met his death. But having miserably failed to do so, when the totality of the evidence is considered, it becomes apparent that an adverse inference must be drawn that he and no one else was the person who caused the death of the deceased.
39. It remains unknown why the accused person wanted the deceased dead but the same notwithstanding, motive is not a consideration to determine the offence of murder. I am therefore convinced that the person who committed the unlawful act that led to the death of the deceased person is the accused person herein.
40. Finally, on the question whether there was malice aforethought on the part of the accused person, the prosecution had a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code which states that:
- Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually 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 not be caused;
 - (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
41. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of Republic vs Tubere S/O Ochen [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
42. In this case, the medical doctor testified and described the nature of the injuries suffered by the deceased. He stated that the deceased died as a result of strangulation and not to mention the lacerations and stab wounds on the body. From the foregoing, my mind is clear that the accused person clearly wanted the deceased dead hence proof of malice a forethought.
43. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond reasonable doubt.
44. Accordingly, I find the accused person guilty of the offence of murder as charged contrary to section 203 of the Penal Code and I proceed to convict him accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF APRIL 2025

J. N. ONYIEGO

JUDGE

