



**Republic v Aden & another (Criminal Case 9 of 2020)  
[2024] KEHC 4047 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4047 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE 9 OF 2020  
JN ONYIEGO, J  
APRIL 15, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ABDIKADIR AHMED ADEN ..... 1<sup>ST</sup> ACCUSED**

**DAHIR HARUN BULLE ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons herein were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 03.09.2020 at Hagadera Refugee Camp in Fafi Sub County within Garissa County jointly and unlawfully murdered one Mohamed Ali Mohamed.
2. They pleaded not guilty to the charge and the case proceeded to full hearing with the prosecution calling a total of 8 witnesses.
3. PW1, Dek Aden Bishar testified that on 03.09.2020, there was a football match between Alaqsa and Sienna teams where he represented the Sienna team. That at mid-match, Sienna players started fighting after disputing a score they felt was unfairly awarded to their opponent. It was his case that at the initial time, the fight was between two individuals, Amur and Najib but eventually, the same escalated to a fight between the players of the two teams. He proceeded to state that Amur and Najib were not players of the teams herein. That he saw Mohamed (the deceased) run towards the direction of the fight but thereafter, fell down. It was his evidence that he was told that it was the accused persons who assaulted him(deceased). That he saw blood oozing from the top of the head of the deceased who was later taken to hospital but died thereafter.
4. PW2, Warsame Abdirahman Hassan stated that on 03.09.2020, he was playing for Alaqsa against Sienna team. That Sienna scored 2 goals one of which was unfairly awarded thus attracting



- dissatisfaction on the Alaqsa team. He stated that a fight ensued between Mohamed and some supporters and later escalated to supporters of both teams. That the two accused persons hit Mohamed on the mouth and head as he was trying to prevent people from entering the field. It was his testimony that the accused persons used a piece of wood fixed with nails. That upon being hit, Mohamed fell down thus prompting the players to rush him to the hospital.
5. He stated that before they left for the hospital, the deceased pronounced that Abdikarim and Alarqsa had caused his injuries. On cross examination, Mr. Onono, Counsel for the accused persons urged that the evidence of PW2 be marked as Defence exhibit and since the learned prosecutor raised no objection, the same was marked as DFMI. PW2 further stated that he saw the accused persons attack the deceased and that he was the one who carried the piece of timber to the police station.
  6. He further stated that he could not confirm who exactly hit the deceased with the said piece of timber on the head in as much as the duo participated in beating the deceased. During re-examination, he stated that he knew the two accused persons there before and that they were not playing on the material date.
  7. PW3 Abdimajib Hassan testified that on 03.09.2020, he was playing football for Sienna team against the Al Aqsa team. That Al Aqsa started playing a rough game and at the same time, shouting at the referee. That as consequence, a fight ensued between Amur and Abdul Najib. That later, people from outside the playing ground joined in the fight. It was his testimony that Mohamed alias Naja was hit on the head thus falling down.
  8. That at that point, the game stopped as they rushed to check on the deceased. He recalled that they took the deceased to the hospital but later on learnt of his death. On cross examination, he stated that there was a problem between the two teams hence the fight pitting the Sienna team against the Al Aqsa team thus attracting the fans of the respective teams to join the fight. That there was total confusion as the deceased lost his life.
  9. PW4, Abdikaliq Bashir Osman testified that on 03.09.2020, he was part of the Sienna team which was playing against the Al Aqsa team. That in the course of the match, Al Aqsa team raised a complaint against the referee of being biased. It was his evidence that the same brought about the fight between the two teams as fans joined sides in the fight which led to the injuries sustained by Mohamed. On cross examination, he stated that the accused persons belonged to the Sienna team and that the cause of the fight leading to the death of the deceased was as a result of the alleged poor refereeing. He reiterated that there was total confusion as the fans of the respective teams joined in the said fight.
  10. PW5, No. 110619 PC Wycliff Otieno testified that Mohamed Ali Mohamed made a report at Hagadera police station that he had been assaulted by people known to him and that the weapon used was a blunt object. It was his evidence that Mohamed stated that he was injured during a football match competition at Simba Station. He stated that the reportee had an injury on the head and equally, had lost four teeth. That he was later called by PW8 who directed him to accompany him to the scene where the fight broke out between the two teams. It was his case that on 09.09.2020, they went to the scene and proceeded to arrest Dahir, Abdikarim Mohamed Hassan Ali, Abdi Najib Mohamed, Abdririzak Ahmed, Mohamed Mohamed Hassan, Abdi Najib Bishar and Abdikarim Qale Bishar Osman. That they later charged the two accused persons before the court with the offence herein.
  11. PW6 PC Caleb Mokaya of Service No. 101543 testified that on 09.09.2020, OCS CIP Muktar informed him to join other officers to conduct an operation aimed at apprehending a suspect following an assault report. The operation was led by PW8 and the suspects in question were members of Sienna AFC. That they left the station and proceeded to Githunte area where they apprehended 8 suspects namely; Dahir Hassan Bule, Abdikarim Ahmed Ali, Mohamed Hassan, Abdi Najib Mohamed,



- Abdirizak Hassan, Mohamed Ali Farah, Abdi Najib Bishar Ismail and Abiqale Bishar Osman. On cross examination, he testified that he could not remember the names of the duo.
12. PW7, No.80962 Sgt. Ahmed Abdi Rage stated that on 09.09.2020, while still attached to Hagadera DCI, he was informed by the OCS of a case of murder. That there were teams known as Sienna FC and Alaqa and that on the fateful day, they were playing at Silver field within Block G-1. He stated that he was later informed that eight suspects had been arrested and were in custody. It was his evidence that he took over the case from the OCS and commenced investigations. He visited the scene of crime, secured the scene and further interviewed the suspects leading to the charges before the court.
  13. That he interviewed witnesses, interrogated the suspects and thereafter recorded their statements. After recording the statements, he concluded that the two accused persons herein were the ones who assaulted the deceased. He stated that the accused herein were not players but spectators. That when the fight started, they picked sticks with nails which they used to hit the head of the deceased. That after the post mortem examination, it was found that the cause of death was as a result of assault. He further stated that the accused persons were players from Sienna AFC. On cross examination, he stated that there were some other people who also sustained injuries in as much as he could not tell the nature of the injuries sustained.
  14. PW8 Dr. Peter Mwaniki stated that on 09.09.2020, he conducted post mortem on the body of Mohamed Ali Mohamed. It was his opinion that the cause of death was cranocerebral injuries due to blunt force trauma consistent with assault.
  15. The prosecution proceeded to close its case and, in a ruling, delivered on 07.07.2023, the accused persons were put on their defence.
  16. The 1<sup>st</sup> accused person in his unsworn testimony stated that on the material day, despite being a football player, he was not playing. That the teams differed over the match and so, a fight ensued thereby pitting one team against the other. It was his evidence that upon realizing that chaos had erupted, he left the scene and went home. He narrated that at least he saw one of the players being injured during the commotion but denied knowing whoever was responsible for the said injuries. He denied being involved in the perpetration of the offence herein.
  17. The 2<sup>nd</sup> accused person in his unsworn testimony recalled that on the material day, two teams engaged in a fight during a football match. That the supporters of the team stormed the pitch and started fighting each other. It was his case that upon witnessing the fracas, he left for home and only learnt of the deceased's death later. He denied committing the offence herein.
  18. Upon the close of the defence case, the court directed that parties file their respective submissions.
  19. By submissions dated 03.08.2023, Mr. Kihara, the learned prosecutor submitted that the prosecution had proved all the elements to support the charge of murder against the accused persons herein. Reliance to that end was placed on the case of Anthony Ndegwa Ngari v Republic [2014] eKLR where it was held that for an offence of murder to be proved, the prosecution must prove that death occurred; that the accused person was responsible for the unlawful act and further; that the accused person was possessed of malice aforethought.
  20. Counsel contended that, the accused persons attacked the deceased thereby causing his injuries which led to his death. Learned counsel relied on the case of Republic v Tubere 1945 EACA 63, where the court held that malice aforethought may be established by ascertaining the nature of the weapon used, the manner in which it was used, the part of the body injured by it, the nature of the injuries inflicted, the conduct of the accused before, during and after the incident.



21. This court was therefore urged to find that the prosecution had proved its case beyond reasonable doubt and therefore, the accused persons herein be convicted of the said offence.
22. Via submissions dated 31.07.2023, Mr. Onono, counsel for the defence submitted that the prosecution did not shift the burden of proof against the accused persons. It was stated that the incident leading to the death of the deceased was as a result of a disagreement in regards to the match pitting Al Aqsa against the Sienna team. That it was clear that the deceased was amongst the players and when the fight started, the supporters of the respective teams poured into the field. It was urged that none of the prosecution witnesses saw the accused person assault the deceased save for PW2 whose evidence was biased as like the deceased, he belonged to the Al Aqsa team.
23. That the conditions prevailing at the very time leading to the deceased's death, were not favourable to identify the accused persons as the persons responsible for the perpetration of the offence herein. Counsel contended that there was a possibility that the deceased could have suffered his injuries at the hands of any of the warring fans and/or players. It was therefore urged that the prosecution's case was not only weak but also unable to support the charges herein.

#### **Determination.**

24. I have considered the evidence tendered before this court both by the prosecution and the defence and the rival written submissions. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The offence of murder is defined under section 203 of the Penal Code in the following terms; -

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

25. From the above definition, it is clear that for the prosecution to secure a conviction on a charge of murder, it has to prove, beyond reasonable doubt, three ingredients. Those ingredients are as follows: -
  - a. the death of the deceased and the cause of death;
  - b. that the accused committed the unlawful act which caused the death of the deceased; and
  - c. that the accused had malice aforethought.

(See Anthony Ndegwa Ngari vs Republic [2014] eKLR and Johnson Njue Peter vs Republic [2015] eKLR).

26. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with, and in this case, prove that the accused persons murdered the deceased (see *Woolmington vs DPP* (1935) AC 462). The standard of proof which is required of the prosecution is that of “beyond any reasonable doubt” (See *Miller vs Ministry of Pensions*, [1947] 2All ER 372). The question therefore is whether the above ingredients were proven to the required standards.
27. As for the proof of the death of the deceased and the cause of the death, all the prosecution witnesses testified that as a result of the fracas at the field, the deceased sustained injuries which later led to his death. PW8 further testified as to having conducted post-mortem on the said body and upon which he formed the opinion that the deceased died as a result of cranocerebral injuries due to blunt force trauma consistent with assault. As such, the death of the deceased was proved.
28. It is trite that right to life is protected by our Constitution under article 26 and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless



authorized by law or excusable under the law. In *Guzambizi Wesonga vs Republic* [1948] 15 EACA 63 the court held that; -

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”

[ Also See *Sharm Pal Singh* [1962] EA 13 and *Republic v Boniface Isawa Makiod* [2016] eKLR].

29. From the evidence before the court, it follows that the cause of death of the deceased was not excusable or authorized by law and thus the same was unlawful.
30. As to whether the accused persons committed the unlawful act which caused the death of the deceased, only PW2 testified that indeed, he saw the accused persons commit the offence. The defence on the other hand urged this court that PW2 being the only identifying witness, his evidence was marred with bias and therefore, the court ought not rely on the same. The sentiments by the defence notwithstanding, it is trite law that a conviction can be based on a testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.
31. The Court of Appeal of Uganda in *Okwang Peter v Uganda Criminal Appeal No. 144 of 1999* held as follows: -

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error”

32. In the case herein, PW2 testified that on the very day, he was playing for Alaqsa against Sienna team. That Sienna had already scored 2 goals one of which was unfairly awarded thus bringing the dissatisfaction unto the Al Aqsa team. He stated that a fight ensued between Mohamed and some supporters and the said fight engulfed both teams. That the two accused persons hit Mohamed on the mouth and head as he was trying to prevent people from entering the field.
33. He went further to state that before they left for the hospital, the deceased pronounced that Abdikarim and Alarqsa had caused his injuries. On cross examination, he stated that he could not confirm who exactly hit the deceased with the said piece of timber in as much as the duo participated in beating the deceased.
34. Of importance to note is the fact that PW1, PW3, and PW4 who were also at the scene of crime did not testify in support of the alleged dying declaration as stated by PW2. The law on dying declarations in Kenya was laid down in the case of *Pius Jasunga s/o Akumu vs R* (1954) 21 EACA 331 which was cited with approval in the case of *Okale vs Republic* [1965] EA 556. The case of *Okale vs R* (supra) was in turn followed by *Aluta vs Republic* [1985] KLR 543 where it was held at page 547 paragraphs 5-10 thus:

“In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial Judge to put forward a theory not



canvassed in evidence or in counsels' speeches. A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration”.

35. As already noted, only PW2 stated that he saw the accused persons hit the deceased. The said witness further stated in his cross examination that in as much as he could not confirm who hit the deceased, the accused persons participated in beating the deceased. It therefore follows that the alleged dying declaration by the deceased was not corroborated in any way. I say so for the reason that PW2 in his statement was not outrightly clear whether indeed, it was the accused persons' beating herein which caused the said death.
36. The scenario created by the PW1, PW3 and PW4 witnesses herein, was described as one of confusion as the players together with their fans joined in the fight and as a result of the confusion, Mohamed died. None of them although present pointed at the accused persons specifically as having beaten the deceased.
37. It is trite law that the burden of proof in criminal cases lie on the prosecution and the burden never shifts. The accused persons herein had no burden to prove their innocence. In the case of Joseph Kimani Njau v Republic [2014] eKLR, the Court of Appeal stated that:

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard...”

38. In the case of Republic vs Ismail Hussein Ibrahim (2016) eKLR, the court on burden of proof in criminal cases stated that:

“To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases the Federal Court of United States in the case of United States vs Smith, 267 F.3d 1154, 1161 (D.C. Cir. 2001)(Citing In re Winship, 397 U.S. 358,370,90 S. Ct. 1068, 1076 (1970) (Harlan, J. concurring) the court stated that:

The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It's a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from lack of evidence.

Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion of speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty.

The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty



of the crime, you must give the defendant the benefit of doubt and find the defendant not guilty of the crime under consideration”.

39. The offence herein was committed during the day in the full view of everyone present. How come only pw2 saw the accused persons attack the deceased. Why is it that nobody corroborated his testimony?. Corroboration is key in any criminal proceedings unless there exists a situation or circumstances under which reasonably no other witnesses would be expected to have been present.
40. In the case of Moses Mutahi Mugo vs Republic (2022)e KLR the court underscored the importance of corroborative evidence by stating that corroborative evidence ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It would be dangerous to convict on the evidence of pw2 alone while the rest of the witnesses who were present when the incident arose states the contrary.
41. From the available evidence, and in my own evaluation, it is my finding that the prosecution has not proved beyond reasonable doubt that the accused persons herein committed the unlawful act. The offence having been committed in a state of confusion with the opposing teams fighting one another, it is difficult to pin point an individual out of the crowd fighting one another. It is even difficult to ascertain malice aforethought.
42. It would be an academic exercise to continue determining the element of mens rea in a situation where the perpetrator has not been identified positively. In my view, the evidence at hand is insufficient to sustain a charge of murder or even manslaughter
43. Having come to the above conclusion, it is my finding that the prosecution did not discharge its burden of proof to the required standard. Accordingly, I am inclined to acquit the accused persons herein unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 15<sup>TH</sup> DAY OF APRIL 2024**

**J.N.ONYIEGO**

**JUDGE**

