



**Republic v Roba (Criminal Case E006 of 2021)  
[2024] KEHC 5881 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5881 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL CASE E006 OF 2021**

**JN NJAGI, J**

**MAY 23, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GUYO GONE ROBA ..... 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 21<sup>st</sup> day of April, 2021 at Dukana in North Horr Sub-County within Marsabit County he murdered one Jalla Jillo Qilta (herein referred to as the deceased).
2. The prosecution summoned a total of 8 witnesses in support of its case while the defence called one witness, the accused.

**Prosecution Case**

3. The case for the prosecution as testified by its witnesses is that the deceased was a herder in Dukana Sub-county of Marsabit County. It was the evidence of his wife, Midina Godana PW2, that she was on the material day herding her livestock in the company of her husband when her husband left her and went to check their livestock on another area of the place they were herding the livestock. That at around 10 am, a person who was unknown to her approached her. He was carrying a gun. He started to interrogate her as to which manyatta they belonged to. She informed him that they were from Laga Gara. He then told her to gather her livestock together as some of them had gotten lost. She started to do so and while doing so, the person held her and dropped her down in an attempt to rape her. She screamed and her husband appeared while holding a stick. Her husband hit the person with the stick. The person shot her husband with the gun on the chest and he fell down. The person ran away after shooting her husband. She followed him and he fired at her but the shot did not get to her. She went



- back and started screaming. People went to her assistance. Police were called. They went to the place and carried away the body.
4. It was the evidence of the deceased's wife that she did not see the person who shot her husband again until the day she testified in court. She identified the accused in court as the person who shot her husband on the fateful day and identified the gun used to shoot him.
  5. Abdul Bonaiya, PW3, testified that he was a herder. That on 21/4/21 he was herding his livestock at a place called Saru. He was grazing in the company of Guyo Gone, the accused. That their herds had scattered and he was herding on one side while Guyo was herding on another side. At around 10 am, he heard a woman screaming. He feared and hid himself. That the accused followed while panting and holding his shoes on one hand and a gun on the other hand. The accused had been carrying the same gun when they were grazing. He asked the accused why he was panting and he told him that he had killed a person and that he wanted to escape. The accused went away. He, PW3, went to the manyatta and informed the residents of what the accused had told him. That on the way back to the scene with other people they found a body covered with Kikoi on the face. There were other people at the place. The people said that it was his friend (PW 3's) who had killed the person. He was arrested and tied on the hands with a rope. A police vehicle went there and the police ordered that he be untied. They picked the body. He was taken to the police station where he was interrogated and released.
  6. The area Chief, Godana Gollo Wata, PW4 testified that on 21/4/21 at 10:00 am, he heard from members of public that there was a person who had raped a woman and killed her husband. That he went to the Border Police Camp and reported to C.I Legol who convened some police officers and they went to the scene in a lorry. That the road was impassable and they left the lorry on the way. They were led to the scene by members of the public on foot where they found the body of the deceased herein. The body had a gun shot on the chest. That a person called Abdul Bonaiya Koto was being tied up on the hands. He was handed over to the OCS.
  7. A police officer with the Border Police Unit at Saru Camp, ASP Peter Legol, PW6 testified that on 21/4/21 at around 10 am, the chief PW4 went to the camp and reported that a person by name Guyo Roba has been shot dead by a person called Jallo Jillo Quita. He, PW6 and other policemen went to the scene where they found the body of a person with a gun shot on the chest. There were many people at the scene. He was handed over a spent cartridge by a member of the public. They took the body to Dukana police station. He handed over the spent cartridge to the OCS.
  8. The Investigating Officer. C.I. Jack Achira PW8 of North Horr DCI Office, testified that on the 21/4/2021 he was called by the OCS Dukana Police Station and informed that there was an incident of murder at a place called Dabaso in Balesalo location. That he went to Dukana and he was informed by the OCS that the body of the deceased had been collected from the scene of the incident and was lying at the local health center. He was informed that the suspect, the accused, had surrendered himself to the police station and was in custody. That the accused had surrendered an AK47 rifle, serial number 37401 loaded with 2 rounds of live ammunition. He was further informed that a cartridge had been collected at the scene. He took over the exhibits from the OCS. He picked the body and brought it to Marsabit County Referral Hospital for post mortem. The same was conducted.
  9. It was further evidence of the Investigating Officer that he sent the AK 47 rifle, the 2 live rounds of ammunition and the cartridge to the ballistics examiner. He recorded statements of witnesses and charged the accused with the offence.
  10. Dr. Tume Isacko PW7 of Marsabit County Referral Hospital testified that she conducted a post mortem on the body of the deceased herein on the 26/4/2021. She found the body with a gun shot entry wound on the anterior part of the abdomen and an exit wound on the lower back close to the



spine. She formed the opinion that the cause of death was due to bleeding secondary to gun-shot wound. The doctor filled the post mortem report and signed it. She produced it in court as exhibit, P.Exh.7.

11. The ballistics expert, Mbalani Alfred PW1, testified that he examined the AK47 assault rifle S/No. 37401 marked exh A and found it to be a Chinese made AK47 designed to fire rounds of ammunition in calibre 7.62x 39 mm. That the firearm was in good general and mechanical condition. He ascertained it to be an ammunition in terms of the [Firearms Act](#). That the two cartridges marked D1 and D2 were found to be rounds of ammunition in calibre 7.62x 39 mm and were test fired from the AK 47 rifle and ascertained to be ammunition. That the fired cartridge marked C was found to be formerly a component part of a round of ammunition in calibre 7.62x 39mm. That a microscopic examination was conducted on the same in conjunction with each of the cartridges that were fired from the AK 47 rifle that revealed sufficient matching firing pin identification markings, ejector and breech face markings which enabled him to form an opinion that the cartridge marked C was fired from AK 47 rifle marked A. The officer prepared a report to that effect and signed it. He produced it in court as exhibit, P.Exh.6.

### **Defence Case**

12. When placed to his defence, the accused stated in an affirmed statement that he hails from Saru in Dukana in North Horr sub-county. That on the 21/4/2021 he was herding his livestock at a place called Dabaso in the company of Abdul Bonaiya PW3. Later in the day they parted company as they herded their animals. He then heard gun shots. He later took his animals home. His uncle called Ali Roba told him that he was being sought by the police. His uncle suggested that they go to the police station to find out why he was being sought. They went to the police station where he was locked up and his uncle chased away.
13. The accused stated in his evidence that he did not know a woman by name of Medina Godana Dido, PW2. He denied that he attempted to rape her. He denied that he shot and killed the deceased.

### **Analysis and Determination**

14. The accused is facing a charge of murder contrary to section 203 of the [Penal Code](#) that defines murder in the following terms:

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

15. This being a criminal trial, the standard of proof is that of beyond reasonable doubt. Lord Denning in *Miller v 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.”



16. 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 v 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.”
17. The death and cause of death of the deceased was proved by Dr. Tumme PW7 who did a post mortem on the body and found it with a gun shot wound on the anterior part of the abdomen with an exit wound on the lower back. She formed the opinion that the cause of death was due to bleeding secondary to gun-shot wound. There is no reason to doubt the evidence of the doctor on her finding. I therefore find the death and cause of death of the deceased to have been proved.
18. The second ingredient of the offence is whether the accused is the one who unlawfully killed the deceased.
19. The evidence that tended to connect the accused with the offence is the evidence of the deceased’s wife PW2 that the accused attacked her in an attempt to rape her and that when her husband responded to her screams the accused shot him dead with a gun. Second link is the evidence of Abdul Bonaiya PW3 that he heard a gun-shot. That shortly after, the accused ran towards him and told him that he had killed somebody. The third link is the evidence of the ballistics expert PW1 that the cartridge recovered at the scene was fired by the A 47 rifle said to have been recovered from the accused.
20. The question is whether the deceased’s PW2 wife identified the accused as the person who shot her husband. The witness was the only one who claimed to have seen the accused shoot the deceased.
21. In *Wamunga v Republic* (1989) KLR 424 the Court of Appeal gave the following guide in dealing with evidence of identification:
- “..it is trite law that where the only evidence against a defendant is evidence of 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.”
22. It was the evidence of the deceased’s wife that she never knew the accused before the date of the purported attack on her. That the next time he saw him again is when she testified in court. Her evidence therefore amounted to dock identification.



23. In *Gabriel Njoroge v R* [1982-88] 1 KAR 1134, the Court of Appeal held that dock identification of a suspect is generally worthless unless other evidence is adduced to corroborate it. However, the same court in *Muiruri & 2 Others v. R* [2002] 1KLR 274 stated as follows:

“It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of.

But the holding in Gabriel Njoroge case (supra) appears to us to be too broadly couched. We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like *Abdulla bin Wendo v. Rep* [1953] 20 EACA 166, *Roria v Republic* [1967] EA 583 and *Charles Maitanyi v R* [1986] 2 KAR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The Court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

24. It is to be noted that the Investigating Officer in this case did not conduct an identification parade to test whether PW2 could identify the accused. In the case of *Bernard Mutuku Munyao & Another versus Republic*, Nairobi Criminal Appeal No. 222 of 2004 (2008 eKLR) the Court of Appeal held that a conviction based on dock evidence is safe and that failure to hold an identification parade is not always fatal. The Court said:-

“Evidence of identification parade is part of the whole process of subjecting the evidence on record to careful scrutiny and considering the surrounding circumstances as stated in *R v Turnbull* (1976) 63 Cr. App. R. 132. The absence or presence of it goes to the weight to be placed on the available evidence and does not make such evidence inadmissible or of no probative value. One would think of circumstances where lack of an identification parade would seriously weaken the evidence of visual identification where there is a solitary witness or it is the only evidence available and the identification was made in difficult circumstances. We have no reason to doubt that the findings of the two courts below that the two witnesses positively identified the two appellants at the scene in circumstances that were conducive to such identification.”

25. In this case, PW2 was the only witness on identification. It is trite that the evidence of such a witness has to be examined with a lot of care so as to erase the danger of mistaken identity. In my view, it was necessary in such a case to conduct an identification parade to test whether PW2 could identify the accused. The investigating officer did not give any explanation as to why he did not conduct an identification parade. Though the witness told the court that she identified the accused by his face, she did not give his description to the police when she recorded her statement. There is danger that PW2 could be mistaken that the accused is the person who shot her husband. I do not think that it is safe to rely on her evidence that the accused is the person who shot the deceased.



26. The other evidence linking the accused to the crime is the evidence of Abdul Bonaiya PW3 whose evidence was that the accused confessed to him that he had killed somebody. That the accused was at the time carrying a rifle that the witness identified in court as the AK 47 rifle, P.Exh.2. It was the evidence of the witness that he used to see the accused with the said rifle when they were grazing animals.
27. A confession is defined in section 25 of the *Evidence Act* as follows:
- A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.
28. In *Sango Mohamed Sango & another v Republic* [2015] eKLR, the Court of Appeal at Malindi held that a confession to a private citizen is admissible and may be proved in evidence against an accused person. The court in that case cited the case of *Rex v. Kituyan s/o Swandetti* (1941) 8 EACA 56 where the former Court of Eastern Africa stated that a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence.
29. The accused denies that he confessed to PW3 that he killed somebody. In *Tuwamoi v. Uganda* [1976] EA 91 the court stated that a court should act with caution on a confession which has been repudiated or retracted and that before founding a conviction on such a confession it must be fully satisfied in all the circumstances of the case that the confession is true. Whereas there is a possibility that the accused told PW3 that he had killed somebody, there is no evidence to corroborate the evidence of PW3 that the accused killed the deceased herein. There is thereby no basis to act on the evidence of PW3 that the accused confessed to him of having killed somebody.
30. The third link is the evidence of the ballistics expert that the cartridge, P.Exh. 4 (that was said to have been recovered from the scene) was fired from the AK 47 rifle, P.Exh. 2.
31. It was the evidence of C.I. Legol PW6 that he was given the said cartridge at the scene of murder by an elder. The said elder was not identified nor did he testify in the case. There was thereby no evidence where the elder got the cartridge from. There was no evidence that it was recovered from the scene.
32. Further to this, there was no evidence that the accused was arrested while in possession of the AK 47 rifle, P.Exh.2. According to the evidence of the Investigating Officer PW8, the accused was taken to Dukana police station by one Ali Roba. The report at the said station indicated that the accused was a suspect of murder and that he had been arrested with an AK 47 rifle S/No.37401 with 2 rounds of ammunition. However, the person who took the accused to the police station did not testify in the case. No police officer from the said station testified in the case. The end result is that there was no evidence that the accused was arrested while in possession of the AK 47 rifle.
33. The upshot of the evidence adduced before the court is that the prosecution failed to adduce sufficient evidence to link the accused with the rifle P.Exh.2 and the spent cartridge P.Exh.4. There was no credible evidence from the deceased's wife PW2 that the accused is the one who killed the deceased. Consequently, there was no evidence to link the accused with the death of the deceased. The prosecution has not proved beyond reasonable doubt the charge against the accused. The accused is found not guilty of the offence of murder and is acquitted accordingly.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 23<sup>RD</sup> DAY OF MAY 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:



Mr. Otieno for prosecution

No appearance for accused

Court Assistant Jarso

14 days R/A.

