



**Republic v Muhumed (Criminal Case E003 of 2022)
[2024] KEHC 7018 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E003 OF 2022**

**JN ONYIEGO, J
JUNE 14, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

AHMED MOHAMED MUHUMED ACCUSED

JUDGMENT

1. The accused herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the said offence being that on 01.11.2021 at Athinasyar village in Bullagolol location in Bura East Sub County within Garissa County murdered Ismail Dubow Hassan.
2. Upon arraignment before court, he pleaded not guilty and the case proceeded to full trial in which case the prosecution called a total of seven (7) witnesses to prove its case.
3. PW1, Mohamed Mohamud Mohamed testified that on the material day, together with Abdi Salat, Dubow Hassan and Abdullahi, they went to rescue a cow that had collapsed due to the effects of drought. While there, Ismail (deceased) told him to prepare him tea. That while at a distance of about 50m, he saw the accused person shoot the deceased thus prompting him to run and hide in the bush. He stated that he ran back home and upon returning, he found the body of the deceased already carried away. On cross examination, he stated that Ahmed is his cousin and that he saw him shoot the deceased.
4. PW2, Abdullahi Mohamed Haji testified that on the material day at around 2.00 p.m., he was at Athinasyar watering his livestock. That he was together with Ismail Dubow, Mohamed, Abdi Salat and Mohamed Dubow who had brought them water. It was his evidence that he later heard a gunshot thus prompting him to hide in the bush. That after a short time, he came out to see what had ensued. To his surprise, he found many people as the deceased lay down dead. He testified that he was later informed by PW1 that Ahmed had killed the deceased.



5. On cross examination, he stated that the accused is his brother while Ismail was his cousin. That in as much as he did not see the accused person shoot the deceased, he found the accused person at the scene of crime.
6. PW3, Sugow Matan Onli told the court that on the material day, he was with his brother Mohamed Aden Dubow at Athinasyar as they had carried fuel for the water boozier. That villagers were also herding their livestock near where the water boozier was. That they met several people among them the deceased, PW1, PW2 and Juma herding their livestock. It was his evidence that as PW2 left to go see his livestock in the bush, together with Mohamed Aden Dubow, they also left to see their livestock but later on went back to the water boozier.
7. It was his testimony that upon returning to the water boozier, Ahmed Mohamed approached them for some water to drink a request that Mohamed Aden Dubow acceded to by giving him a half litre bottle of water. That after five minutes, they heard a gunshot.
8. Upon leaving to go find out on what was happening, they found Ismail, Juma and Mohamed Mohamud (PW1) lying down on the order of the accused person. That the accused person who was holding a gun further ordered them to lie down while promising to kill many people. When people started to show up, the accused person walked away and soon disappeared. Together with Mohamed Dubow, they called the area chief who responded together with other people. He reiterated that the accused person was responsible for the death of the deceased.
9. PW4, Mohamed Aden Dubow testified that on the unfortunate day, he was in company of PW3 as they carried fuel for the water boozier. On reaching the scene, they found many people some of whom he knew such as PW1 and PW2. That together with Sugow, they sat in their car listening to music when Ahmed (accused) approached them for some water. He proceeded to state that he gave him a 500ml bottle of mineral water after which he left. That after 4-5 minutes, they heard a gunshot prompting them to get out of the car. While outside, Ahmed ordered them to lie down. He stated that the deceased was shot dead by the accused. They later organized for the burial of the deceased as he died instantly. He further stated that he knew the accused as he was his uncle.
10. PW5, No. 235225 CIP Kennedy Chomba a barristic expert testified on behalf of his colleague SSP Florence Kanini. It was his evidence that they received a fired cartridge marked Ex A, the same having been forwarded by 240459 PC Mwangi. That it was requested that it be ascertained whether exhibit marked A was an ammunition under the Firearm Act, the caliber of the said exhibit and the type of firearm that fired the exhibit. He stated that upon examination, it was found that the exhibit was an ammunition in caliber of 7.62. x 3.9 mm. That the same was fired in a firearm designed to chamber rounds of ammunition caliber chamber 7.62 x 3.9 mm such as AK47 rifle. On re-examination, he stated that the expert could not ascertain the actual firearm that fired the exhibit A.
11. PW6 No. 241221 IP Cosmas Mbai testified that he was the investigating officer in the case herein before his transfer. That he investigated the matter and further interviewed the witnesses who saw the accused person shoot the deceased. It was his evidence that PW1 and PW2 narrated to him how the accused person approached them while in the field asking for water and thereafter shot the deceased thus causing his death. That due to religious reasons, the deceased was buried and therefore, he had to seek for orders for exhumation of the body for post mortem purposes. It was his case that from the autopsy done, the right side of the chest of the deceased showed that the first rib was fractured. He further stated that he obtained one spent cartridge which was forwarded for ballistic examination. Upon concluding his investigations, he charged the accused person with the charge herein.



12. PW7, Dr. Richard Njoroge testified that he conducted the post mortem on the body of the deceased herein and formed the opinion that the cause of death was chest injury consistent with gunshot wound. He produced the post-mortem report as Pex 1.
13. The prosecution having established a prima facie case, accused was placed on his defence.
14. The accused person in his sworn evidence stated that he was a herdsman aged eighty years old. He denied committing the offence by stating that on the material day, he was at Hamey around Liboi area herding his livestock. That his daughter who lives in Garissa was raped by an unknown person who is a close relative of the deceased. It was his evidence that the deceased person's family sought for negotiation and in return, he was compensated for the ills committed against his daughter hence concluding the matter.
15. The defence having closed its case, the court gave directions on filing of submissions. Counsel for the prosecution filed his submissions dated 11-04-24 contending that the prosecution had discharged its onerous duty in proving the key ingredients of the offence of murder inter alia; death had occurred, the accused person committed the unlawful act that caused the death of the deceased and that he had malice aforethought. To that position, learned counsel placed reliance in the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR.
16. That the evidence of PW1, PW2, PW3, PW4 and PW7 proved that indeed the deceased passed on and as such, death was established. On the second element, it was submitted that PW1, PW3 and PW4 testified that they witnessed the accused person herein shoot the deceased. That the accused person is a person well known to them as they are related hence proof of positive identification of the perpetrator.
17. In reference to malice aforethought, the prosecution placed reliance on the case of Republic vs Tubere 1945 EACA 63 where it was held that malice aforethought may be established by ascertaining the nature of the weapon used, the manner in which it is used and the part of the body injured. That in the case herein, given that the accused person shot the deceased person and thereby killing him, that was enough to prove intention of his actions. That the nature of injury that led to the death of the deceased person was consistent to the cause of death as recorded by the doctor.
18. Vide submissions dated 22nd March 2024, counsel for the accused submitted that, the prosecution failed to prove the elements of the offence of murder and further, that the prosecution did not prove that the spent cartridge was recovered from the scene and neither was there evidence linking the accused to the spent cartridge. Reliance was placed on the case of Republic vs Joseph Mwangi [2019] eKLR where it was held that suspicion alone is not enough to prove a charge of murder. Counsel further submitted that no evidence was led to establish motive on the part of the accused person in killing the deceased person. To that end, support was drawn from the case of Republic vs Stanley Muthike Tiire [2018] eKLR.
19. Counsel decried the fact that the evidence of the prosecution was marred with inconsistencies and further, that the witnesses were not credible. It was urged that the evidence of PW1, PW2, PW3 and PW4 were at variance and therefore supporting the fact that they could not be relied upon. In conclusion, this court was urged to acquit the accused person herein of the charge of murder.
20. I have considered the evidence presented before this court by the prosecution and further the defense evidence together with submissions. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the offence. (See section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya. The degree/standard of proof is always that of "beyond any reasonable doubts" [See *Miller vs Minister of Pensions* [1947] 2 ALL ER 372 – 373].



21. In the instant case, the accused is facing a charge of murder contrary to Section 203 of the Penal Code. Murder is defined as follows;

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

22. Therefore, the elements of murder which the prosecution ought to prove are;

- a. the death of the deceased
- b. the death was caused by unlawful acts;
- c. that the accused committed the unlawful act which caused the death of the deceased; and
- d. that the accused had malice aforethought.

[See *Roba Galma Wario vs Republic* [2015] eKLR].

23. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements. As for the death of the deceased, it is not in doubt that the deceased herein died. PW1, PW2, PW3 and PW4 all testified that they saw the body of the deceased. PW7 testified that he conducted the post mortem on the body of the deceased and formed the opinion that the cause of death was chest injury consistent with a gunshot wound. In view of the foregoing, I hold that the fact of death was proved.

24. As to whether the death herein was caused by the unlawful act/s, article 26 of *the Constitution* of Kenya 2010 would be a good reference point. That provision underscores the sanctity of life by providing that, the right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. (See *Sharm Pal Singh V R* [1962] EA 13). PW7 testified that the cause of death was chest injury consistent with gunshot wound. The death of the deceased herein was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful.

25. As to whether the accused committed the unlawful act which caused the death of the deceased, the prosecution submitted that the accused person was responsible for the death of the deceased. It was urged PW1, PW3 and PW4 all witnessed the accused person shoot the deceased. That the accused person is a person well known to them as they are related. The accused on his part urged that the prosecution failed to prove the elements of the offence of murder and further, it was not proved that the spent cartridge was recovered from the scene and neither was there evidence linking him to the spent cartridge.

26. The court agrees with the defence that indeed, PW5, a ballistic expert stated that he could not ascertain the actual firearm that fired exhibit A. The foregoing notwithstanding, the court appreciates the fact that PW1 saw the accused person his cousin shoot the deceased from a distance of 50 metres. Accused being a cousin to pw1 could not have been mistaken for somebody else. The offence was committed during the day hence favourable lighting conditions for positive recognition. From my assessment of pw1's general demeanour, he appeared honest and trust worthy from his testimony. There was no grudge alleged between him and the accused to infer a frame up.

27. Pw3 and pw4 stated that in as much as they did not see the accused person shoot the deceased, when they heard a gunshot, they came out of their car to find out what could be happening. That they found Ismail, Juma and Mohamed Mohamud (PW1) lying down on the order of the accused person. That



the accused person who was holding a gun further ordered them to lie down failure to which he was ready to shoot those who did not obey his orders.

28. PW3 and PW4 testified that it was the accused person herein who shot the deceased and thereafter threatened to shoot them together with Juma and Mohamed(pw1). That the accused person is a person well known to them as they are related. The accused person did deny knowing the deceased person or his family. In fact, the accused stated that after his daughter had been raped by someone related to the family of the deceased, he was compensated for the same. Even from the conduct and behaviour of the accused at the scene of the incident as confirmed by PW3 and PW4, it leaves no doubt that it was the accused who shot the deceased thus causing his death.
29. It therefore follows that the circumstances herein call to play consideration of direct evidence. It is not lost to this court that direct evidence is a piece of evidence often in the form of the testimony of witnesses or eyewitness' accounts. Examples of direct evidence are when a person testifies that he/she:- saw an accused commit a crime, heard another person say a certain word or words, or observed a certain act take place.[See Blackstone Dictionary, Sixth Edition].
30. Direct Evidence is evidence that establishes a particular fact without the need to make an inference in order to connect the evidence to the fact. It supports the truth of an assertion (in criminal law, an assertion of guilt or of innocence) directly, i.e., without the need for an intervening inference. It directly proves or disproves the fact. So Direct Evidence is real, tangible, or clear evidence of a fact, happening, or thing that requires no thinking or consideration to prove its existence. It does not require any type of reasoning or inference to arrive at the conclusion. [See [Bwire v Wayo & Sailoki \(Civil Appeal 032 of 2021\)](#) [2022].
31. In my view, the evidence by the prosecution witnesses is well corroborated hence no material contradiction can be associated with their testimonies. In a nutshell, there is overwhelming evidence that the accused herein committed the said offence and that he inflicted the injuries that caused the death of the deceased as was verified by PW7.
32. On whether the said unlawful act by the accused person was committed with malice, the Court of Appeal in *Bonaya Tutu Ipu & Another vs Republic* [2015] eKLR while quoting with approval the decision by the Court of Appeal of Uganda in *Chesakit vs Uganda*, CR. APP. NO. 95 OF 2004, held that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. [Also See Section 206 of the Penal Code on the definition of malice aforethought].
33. In the instant case, the evidence by PW1 and PW2 was to the effect that the accused herein shot the deceased. In the same breadth, the nature of the injury suffered by the deceased was described by PW7 as chest injury consistent with gunshot wound. The said report was not disputed or controverted. It is clear that from the nature of the injury described in the report, the accused herein had the intention to either cause death or to cause grievous bodily harm to the deceased herein. As such, malice aforethought has been proved.
34. On the accused' defence, the same is a mere denial which does not shake the prosecution evidence. For the accused to deny that he did not know the deceased is a lie as his brother (pw2) stated that they were cousins to the deceased. From his general demeanour, he appeared and indeed struck me as dishonest person.



35. Taking into account all the above, it is my considered view that the prosecution tendered sufficient evidence to prove the charge of murder against the accused person. Accordingly, I do convict him for the offence as charged.

Dated, signed and delivered this this 14th day of June 2024

J.N. ONYIEGO

JUDGE

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