



**Republic v Sora (Criminal Case 3 of 2020)
[2024] KEHC 13919 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 13919 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL CASE 3 OF 2020
JN NJAGI, J
SEPTEMBER 20, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

SORA DUBA SORA ACCUSED

JUDGMENT

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 13th May 2020 at Funa Qumbi village in Sololo sub-county within Marsabit County he murdered one Sora Jarso Roba (herein referred to as the deceased).
2. The prosecution called 12 witnesses in the case at the close of which the accused was put to his defence. The accused defended himself and called 4 witnesses.

Prosecution Case

3. The case for the prosecution was that the deceased was a herder. That at the material time he was herding his livestock at a place called Funa Qumbi. He was grazing at the said area in the company of Jillo Godana Jillo PW2 and Abdul Elema PW10. Two minors, DL PW6 and JLH PW7 were grazing their family animals near the area where the deceased was grazing.
4. It was the evidence of Jillo Godana PW2 that he was on the material day grazing his animals together with the deceased. That at 1.00pm he heard some gunshots. He then saw the deceased running towards where he, PW2, was. He saw three people running after the deceased. He also started to run. He went and hid behind a tree. He saw one of the people who were running after the deceased shooting him with a gun. The deceased fell down after he was shot. The person who shot the deceased went and stood over him and shot him several times as the deceased lay on the ground. He recognized the person who had shot the deceased as Sora Duba Sora, the accused. He knew him before. After the shooting,



- he PW2 ran towards where some other herders were grazing their animals. He found Bonaya Halake and Abdul Elema PW10. They had also heard the shooting and they were in the process of escaping.
5. It was further evidence of the witness that some boys who were herding livestock in the area heard the gun shots and went to report to the manyatta. Villagers went to the scene of the shooting at 2 pm. Policemen arrived at the scene at 6pm. They took away the body.
 6. Abdul Elema PW10 on his part told the court that he was on the material day herding his livestock with one Bonaya Halake. That the deceased and Jillo Godana were grazing their livestock near them. That at 1pm, he heard gun shots. He then saw three people running after the deceased. They were armed with guns. He and Halake hid themselves. He then saw one of the people, the accused, firing at the deceased. The three people then left after shooting the deceased. He and Halake gathered their livestock. They went to the manyatta and reported. He took policemen to the scene. They collected the body of the deceased.
 7. Two minors, DL PW6 and JL PW7, both aged 8 years testified that they were grazing their livestock near where the deceased was grazing his livestock. That three people passed near where they were. They did not know them. After some time they heard gunshots. They went home and reported to LH, PW5 who is father to JL PW7. They went with PW5 to the grazing field and gathered their livestock and took them home. In his evidence, LH PW5 confirmed the evidence of the two minors that they reported to him what they had seen and heard in the grazing fields. It was his evidence that he went with them to the grazing field with some other people. He returned his livestock home as the other people went in search of the deceased.
 8. Boru Elema Wario PW3 and Wario Jillo PW4 told the court that they were at Funan Qumbi village when they received a report of the shooting. They and other people went to the grazing field and did a search on the deceased. They found his body. Policemen went to the place and collected the body. It was their further evidence that they went with the police to the scene on the following day. The police searched the place and recovered a spent cartridge.
 9. Sgt Sammy Yaa PW8 then of Sololo police station testified that on 13/5/2020 he was at the police station when he was instructed by the OCS to accompany other police officers to a scene of murder at Funan Qumbi. They set off for the place and reached there at 8.30 pm. They found the body of the deceased. It had gun shot wounds. They picked it and took it to Sololo Mission Hospital mortuary. The case was taken over by officers from DCI, Moyale.
 10. Sgt Kennedy Kusimba PW9 then the DCI Marsabit North at Turbi testified that he visited the scene on 14/5/2020 in company of the Deputy OCS Sololo police station. They were led to the place by elders from Kunan Qumbi village. That they found blood stains and some bones at the scene. They collected a spent cartridge about 3.4 meters from where the blood stains were. The case was then taken over by DCI officers. On the following day he re-visited the scene with the DCI officers from Moyale and the OCS Sololo police station. In the evening of that day, the investigating officer gave him the name of the suspect, Sora Duba Sora Chiwa. He knew the said person. On the same evening he saw the suspect at a kiosk at Turbi town. He and other police officers arrested him. They handed him over to the DCI officers from Moyale together with the recovered cartridge.
 11. The ballistics examiner, CI Alfred Mbalani PW 11 testified that their laboratory received a spent cartridge from PC Mambo Edward. He examined it and found it to be a fired spent cartridge case which is a former component part of ammunition in calibre 7.62 x 39mm. That microscopic examination revealed identifiable markings indicating that it was discharged from an A 47 rifle. He prepared a report to that end. During the hearing he produced report in court as exhibit, P.Exh.4.



12. The body of the deceased was examined by Dr. Cyprian Mbakara, PW1, of Sololo Mission Hospital on the 14/5/2020. He found it with a gun shot entry and exit wounds. The gun shot had crossed the abdomen and injured the intestines, liver and diaphragm. That the deceased had been hit with a sharp object on the head. He formed the opinion that the cause of death was due to the injuries sustained and that either of the injuries could have caused the death. He completed a post mortem report and signed it. During the hearing he produced it in court as exhibit, P. Exh.1.
13. The investigating officer PC John Muoni PW12 of Moyale DCI office testified that he received the report of the murder on 15/5/2020. He and a colleague went to Turbi police station where they picked the OCS and the area chief who took them to the scene at Tite grazing ground within Turbi. The body had already been taken away by the OCS Sololo police station. The area elders promised to get the culprit. They went to Sololo police station where the OCS gave them a spent cartridge said to have been picked at the scene. He was handed over a post mortem report and some photographs. On the following day he was informed by Sgt Namoso that a suspect had been arrested. They went to Sololo police station and picked the person, the accused. He charged him with the offence.
14. It was further evidence of the investigating officer that he processed the photographs at a cybercafé. He took them to the scenes of crime officer, PC Abdullahi Jillo, who prepared a certificate of photographic print. Further that PC Edward Mambo prepared an exhibit memo and sent the cartridge to the ballistics examiner. During the hearing the investigating officer PW12 produced the exhibit memo, the certificate of photographic print and the photographs as exhibits, P.Exh.3, 5 – 9 respectively.

Defence Case

15. When placed to his defence the accused gave sworn evidence in which he stated that he is a herder and a resident of Turbi township. That at the material time he was grazing his livestock at a place called Haro Tita which is on the way to Marsabit from Turbi township. He was with other people from Turbi when they were grazing their animals at the said place. They were Boru Galgalo Boru DW3, Katelo Omuro DW4 and Barille Gufu DW5. That on 13/5/2020 he was still at the said place. That on 15/5/20 he left the place and went to Turbi. On getting there he went to the house of his second wife, Halima Hussein, DW2. Policemen then went to his house and arrested him. He was taken to Turbi police station. He said that he never knew the deceased herein and Abdul Elema PW10. He however knew Jillo Godana PW2. He said that the place called Funa Qumbi where the deceased is said to have been killed is about 50 km on the way to Moyale from Turbi township. He denied killing the deceased.
16. The accused called 4 witnesses. His wife Halima Hussein, DW2, testified that she lives at Turbi township. That at the material time the accused was herding livestock at a place called Tita. He had been away for two weeks. He returned home on the evening of 15/5/2020. After some time policemen went to their house and arrested him.
17. The other witnesses called by the accused – Boru Galgalo Boru DW3, Katelo Umuro DW4 and Barille Gufu DW5 – testified that they were at the material time grazing their livestock at Tita. That the accused was with them at the place. That they had stayed in the area for some time. That on the 15/5/2020, the accused left them there and went to see his family at Turbi township. On the following day they received a report that he had been arrested. Katelo Umuro DW4 added that they were sleeping at the same place and the accused never left them at any time. He and Boru Galgalo DW3 said that they had stayed in the area for about a month before the accused left them to visit his family. Barille DW5 however stated that they had stayed in the area for about 2 weeks before the accused left them on 15/5/2020.



Submissions

18. Counsel for the accused, Mr. Behailu, submitted that there were serious inconsistencies in the evidence of the eye witness accounts as a result of which the court should not make much reliance on their evidence. It was admitted that Jillo Godana PW2 told the court that when the people attacked them he was only in the company of the deceased and that the other herders were about 200-300 meters away. Further that he said that there was no obstruction between him and the attackers but stated in cross-examination that there were trees in between. More so that the witness said that it is the accused who killed the deceased but that the other attackers also shot at the deceased.
19. It was submitted that PW10, Abdul Elema told the court that the accused shot at the deceased while the deceased was running away. That he said that there were two gun shots while Jillo, PW2 stated that the accused shot at the deceased about 4-5 times while the deceased was lying on the ground.
20. Counsel submitted that though PW2 and PW10 said that the attackers did not see them, the photographs produced by PW12 indicates that the topography of the area was grassy and therefore the attackers could not have failed to see the witnesses at the distance they were said to be at.
21. It was submitted that the Abdul Elema said that he was closer to the scene of the shooting than Jillo, PW2, yet PW2 claimed to have been the one closer to the scene of the shooting as the others were about 200m away.
22. Counsel for the appellant submitted that the defence evidence was consistent that the accused was on the material day grazing his animals at Tita which evidence was corroborated by his witnesses. Counsel urged the court to acquit the accused of the charge.
23. The prosecution did not make any submissions in the case.

Analysis and Determination

24. This being a criminal case, the standard of proof is that of beyond reasonable doubt. Lord Denning in *Miller vs. 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.”
25. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
26. Section 203 of the Penal Code defines murder in the following terms:

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



27. The prosecution in order to sustain a conviction for the offence of murder must prove the ingredients of the offence which were stated by the Court of Appeal in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR to be that:

“For the offence of murder, there are three elements 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 that 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.”

28. In this case the prosecution was obligated to prove beyond reasonable doubt the following elements of murder:

- a) That there was the death of the deceased and the cause of the said death
- b) That the death was caused by unlawful acts or omission
- c) That the accused committed the unlawful act which caused the death of the deceased
- d) That the accused had malice afore thought.

Cause of death

29. The body of the deceased in this case was examined by Dr. Dr. Cyprian Mbakara, PW1, who found it with a gun-shot wound across the abdomen and an injury on the head caused by a sharp object. He formed the opinion that the cause of death was due to the injuries sustained. I have no doubt from the evidence of the doctor that the cause of death on the deceased was the gun shot wound across the abdomen that damaged his vital parts such as the liver, intestines and diaphragm together with the injury on the head caused by a sharp object. The cause of death was therefore proved.

Whether the death was caused by unlawful act of the accused

30. The question in this case is whether the accused is the person who caused the death of the deceased as claimed by the eye witnesses for the prosecution, Jillo Godana PW2 and Abdul Elema PW10. The court in determining the question has to interrogate whether the witnesses identified the accused as the person who shot at the deceased. The court takes guide in the case of Wamunga vs. Republic (1989) KLR 424 where 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.”

31. It was the evidence of Jillo Godana PW2 and Abdul Elema PW10, that they saw the accused shooting the deceased. Jillo PW2 told the court that he was grazing his animals together with the deceased when he heard a gun shot and then saw the deceased being chased by three people. He ran away and managed to hide himself behind a tree. He then saw one of the people whom he recognized as the accused shooting the deceased with a gun. He had known the accused sometimes back for a period of two years when they were grazing their animals together at Turbi and Funan Qumbi. It was his evidence that after the deceased fell down upon being shot at, the accused went and stood over him and fired at him several times. He PW2 then escaped and went to where Abdul Elema PW10 and Bonaya Halake were.



32. Abdul Elema PW10 on his part told the court that he and Bonaya Halake were herding their livestock a distance away from where the deceased and Jillo Godana were herding their livestock. That they saw three people armed with guns and they hid themselves. They then saw the people chasing the deceased. One person whom he recognized as the accused fired at the deceased. The deceased fell down. They gathered their livestock and went to their manyatta and reported. He took policemen to the scene. It was the evidence of PW10 that he had known the accused for many years as they had been herding livestock together in the area.
33. Looking at both the evidence of Jillo Godana PW2 and Abdul Elema PW10, it is apparent that there are material contradictions in their evidence. Jillo said in his evidence that at the time when the incident occurred, Abdul Elema and Bonaya were herding their livestock about 200-300 meters from where they were. He in fact said that he could not see them because they were distant away. Abdul Elema on the other stated that they were no more than 60 meters away from where the incident occurred. The question then is as to who between them is telling the truth as to what happened. If the court were to go by the evidence of Jillo Godana PW2 that Abdul Elema was about 200-300 meters away from them, then it is doubtful whether Abdul Elema could have seen exactly what happened at that distance.
34. Abdul Elema told the court that he first heard a gun-shot before he saw the three people chasing the deceased. There was a second gun shot and the deceased fell down. He insisted that there were only two-gun shots and if they were more than that he would have heard them as he was not far. Jillo PW2 on the other hand said that there were many gun shots, including about five of them which the accused sprayed on the deceased while standing over him.
35. Jillo said that he was hiding about 15-20 meters away when he witnessed the shooting. Elema on his part said that he was about 60 meters away during the shooting. Why then would they differ on the number of gun shots that were fired? Why is it that Elema did not see the accused spraying bullets on the deceased while standing over him as claimed by Jillo?
36. The doctor PW1 who performed the post mortem on the body of the deceased found only one gun shot on the deceased. This dispels the evidence of Jillo PW2 that the accused sprayed bullets on the deceased while standing over him. The doctor also found a sharp injury wound on the head of the deceased. The injury is visible at the back of the head on the photographs produced by the prosecution. Whereas the two witnesses claimed to have seen the accused shooting at the deceased, none of them said that they saw him hitting the deceased with something on the head. If the witnesses were so near as they claimed, how would they have missed to see such a thing? The fact that they did not witness the deceased being hit on the head creates doubt whether they actually witnessed the killing.
37. It is also clear that the evidence of Jillo PW2 was full of contradictions. In his statement to the police, he stated that he first saw three men approaching them while armed with AK47 rifles. In his evidence in court he insisted that he first heard gun shots and then saw the people chasing the deceased and he ran away. Which of these two is the truth?
38. The witness in his statement to the police stated that after the incident he ran to their manyatta and informed the villagers. He however insisted in court that he had remained with his livestock in the grazing field and that it is children who were in the grazing field who went and reported the incident to the villagers. He said that he arrived home with his livestock at 8pm. He did not explain the contradiction between his evidence in court and what is recorded in his statement to the police.
39. The witness initially told the court that the place of the shooting was flat land and that there was no obstruction between him and the three people when they were chasing the deceased. He later said in cross-examination that the whole place was entirely covered by trees of his height. However, the



photographs produced in court by the investigating officer showed the place to be flat grass land with distantly scattered short trees. How could the witness claim that the place was entirely covered with trees when the photographs showed otherwise? The photographic evidence exposed Jillo Godana PW2 as a witness who was not credible and one not worthy of believe.

40. The Court of appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283, held the following on credibility of witnesses:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

41. In *Richard Munene v Republic* [2018] eKLR, the same court stated that;

“It is a well settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of prosecution witness that will be fatal to the case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial that an accused person will be entitled to benefit from it.”

42. The inconsistencies and contradictions in the evidence of the two eye witnesses, Jillo Godana PW2 and Abdul Elema PW10, as set out above were substantial to the main issue in question as to whether the accused is the person who shot at the deceased. I am not satisfied that they were witnesses worthy of believe. They were not convincing that they identified the accused as the person who shot and killed the deceased.

Malice aforethought

43. The prosecution in a case of murder is required to adduce evidence showing that the killing of the deceased was done with malice aforethought. Section 206(b) of the Penal Code defines malice aforethought as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances –

- (a)
- (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.”

44. Having found no evidence that the accused caused the death of the deceased persons, the issue of malice aforethought does not arise.

45. The upshot is that the prosecution has not proved that the accused murdered the deceased. Consequently, I find the accused not guilty of the charge of murder and acquit him pursuant to the provisions of section 306(1) of the Criminal Procedure Code. I accordingly order the accused to be set at liberty forthwith unless lawfully held.



DELIVERED, SIGNED AND DATED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Magero for Republic

Mr. Halake for Accused

Accused – present

Court Assistant – Barako

