



**Republic v Mohamed (Criminal Case 1 of 2015)
[2023] KEHC 24969 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 24969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 1 OF 2015
DO CHEPKWONY, J
APRIL 18, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

BAKARI SWALEH MOHAMED ACCUSED

JUDGMENT

1. The accused person, Bakari Swaleh Mohamed is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).

The particulars of the charge being that:-

“On the 7th day of June, 2014 at Miritini area in changamwe within Mombasa County, the accused person murdered Saidi Kibwana”.

2. The accused person was first arraigned in court on 5th January, 2015 whereby he was informed of the charge against him but was not required to respond until such time that he will have been examined by a Psychiatrist to establish his suitability to plead and assigned counsel to represent him. The accused was examined and found fit to plead. He was then assigned Mr. Egunza as his counsel.
3. The charge was then read out to him and particulars thereof explained to him in Kiswahili language which he understands and he pleaded not guilty to the offence of Murder.
4. The trial commenced on 8th July, 2015 whereby the prosecution called four (4) witnesses, while the accused on being placed on defence, opted to give a sworn statement and called no witness.
5. The prosecution’s evidence is that on 7th June, 2015, the deceased, Saidi Kibwana was at his house with his wife, (hereinafter referred to as PW2) and children when one Mutama Charles (hereinafter referred to as PW1) came there and informed him of a damaged door which he wanted him to repair for him.



- The deceased agreed to accompany PW1 to his house and they agreed that he pays him Kshs.650.00 for the work he was going to do. They then went to a drinking joint known as Kwa Juma Pili and started drinking Palm wine which was being sold by a certain lady.
6. PW1 told court that suddenly a man emerged from inside the house and stabbed the deceased on the chest. PW1 identified this man as Bakari Swaleh, who was the accused person in the dock. PW1 told court that he was shocked that he walked away to a neighbour's house without talking. He learnt that the deceased had been taken to hospital and later the police came and they went to record their statements at the Police Station.
 7. PW2, wife to the deceased was called by one Mwana Hawa who came to her while screaming and told her that her husband had been stabbed by one "Dume". Accompanied by her children, PW2 rushed to the scene where they found the deceased lying on the floor of the drinking joint. They screamed and people came there. She then requested these people to assist her take the deceased to hospital, where he was confirmed dead on arrival.
 8. The body of the deceased was then taken to changamwe Police Station and later to Coast General Hospital Mortuary from where the same was handed over to them for post mortem examination.
 9. Upon the matter being reported at the Police Station, PW4, I. P Francis Omugi proceeded to the scene where he neither found the deceased nor the accused. He recorded statements from the witnesses and recovered the kitchen knife which was allegedly used to stab the deceased.
 10. A post mortem examination was conducted on the body of the deceased by Dr. Ahmed on the same day at the Coast General Hospital Mortuary who concluded that the cause of his death was haemorrhage from the haemothorax. The report was prepared by the said doctor but was produced by PW4 as P.Exhibit – 2.
 11. As the Investigating Officer, PW4 had the accused person, Bakari Swaleh charged for the offence of Murder of the deceased, Saidi Kibwana and produced the knife (suspected murder weapon), the post mortem report and 15 photographs of the scene of crime and deceased's body as prosecution's Exhibit 1, 2 and 3 respectively.
 12. The prosecution closed its case and upon considering its evidence, the court found a prima facie case had been established against the accused person to warrant him being placed on his defence in compliance with the provisions of Section 306(2) of the Criminal Procedure Code. The accused person opted to give a sworn statement in his defence. He called no witness.
 13. In his defence, the accused, Bakari Swaleh Mohamed told court that on 26th December, 2014, he left his home at about 5.00am to go to Mariakani Hospital to visit his wife who had been admitted there for treatment. When he got there, she gave him a prescription she had been given by the doctor so he could buy her the medicine from the chemist. The accused went and bought the medicine and on his way back to hospital, he heard people who were behind him calling and clapping. That he turned back and saw a group of people, from whom he was able to recognize PW3 who he had lived with at Miritini.
 14. The accused went on to tell court that these people attacked and beat him up while calling him a murderer. They then got hold of him and led him to Mariakani Police Station where he was placed in the cells and was later transferred to Changamwe Police Station where he stayed until 2nd January, 2015 when he was arraigned in court having been charged with the offence of murder.
 15. According to the accused, although he knew the deceased, he did not know what or who caused his death. He also said that he did not know if he was buried. The accused admitted that he was born in Miritini where he stayed for long before moving and was staying at Ganze at the time of his arrest.



- He denied the offence and any allegations against him. Although the defence indicated that they were to file their submissions, they did not. The prosecution opted to rely on the evidence that had been adduced at trial.
16. Having considered all the evidence adduced by both the prosecution and the accused person in regard to the murder of the deceased, the main issue for determination is whether the prosecution has proved their case beyond any reasonable doubt as against the accused person.
 17. For the offence of murder, the prosecution is required to prove three elements or ingredients to secure a conviction for a person charged with the said offence. These three elements/ingredients are:-
 - a. Death of the deceased occurred and its cause;
 - b. That the accused person omitted or committed the unlawful act which caused the death of the deceased; and,
 - c. That the accused had malice aforethought in committing/omitting the said unlawful act.
 18. On the issue of the deceased's death, it was the evidence of PW1 that on 7th June, 2014, he was with the deceased at a drinking place when he saw him being stabbed at the sternum, a result of which he died. The deceased's wife, PW2 testified that on the fateful day, PW1 came and took the deceased from their house so he could go and repair a door for him. But after thirty (30) minutes, she was called by one Mwana Hawa who was screaming and asking her to hurry up because one Dume had stabbed SAIDI with a knife. PW2 said that she rushed to the scene and found her husband lying on the floor of the drinking joint at Dume's home where Mwana Hawa used to sell alcohol. She saw his intestines out and he was not talking. She was assisted to take him to Port Reitz Hospital where he was pronounced dead. PW3, the deceased's cousin stated that he was called and informed that the deceased had been killed by one Dume and he went to Changamwe Police Station where they confirmed that the deceased was dead. PW4, the Investigating Officer recorded statement from the witnesses and produced the post mortem report which confirmed that the deceased had died. (P.Exhibit 2). The evidence of the four (4) witnesses and the accused in his defence confirms the death of the deceased. According to the prosecution witnesses, the deceased died as a result of being stabbed with the post mortem report indicating there were cuts on the chest, abdomen and dorsum of the right foot and right forearm and that he died as a result of haemorrhage from the haemothorax.
 19. With regard to whether the deceased had died as a result of an unlawful act caused by the accused, it is not in dispute that the accused was arrested and charged with the offence of murder of the deceased. It was the evidence of PW1 that the deceased and he were drinking palm wine at a drinking joint when he saw Bakari Swaleh, who he identified in the cock stab the deceased at the sternum (chest). PW2 said that she was called by a lady by the name Mwana Hawa who informed her that her husband had been killed by one Dume. And although she confirmed knowing who Dume was, she did not witness the deceased being stabbed. PW3, a cousin to the deceased also told court that he was informed by his mother that the deceased had been killed by one Dume, who they all knew very well. He was the one who later spotted the accused person at Mariakani, six months after the death of the deceased and had him arrested. The Investigating Officer (PW4) charged the accused person with the offence of murder after he was identified to him as the one who had killed the deceased. He established that the deceased's real name is Swaleh Mohamed Bakari but his nickname was Shindano Dume.
 20. In his defence, the accused denied the claim that he killed the deceased. He told court that he did not know who caused the deceased's death. And although he could not recall where he was on 7th June, 2014, he said that he was not with the deceased. He also denied having disagreed with the deceased over



the deceased's wife. He however admitted that he was also known as "Dume" a nickname he said had been given to him by his mother since he was the only son.

21. By that as it may, it is worth-noting that PW1, the only eye witness who testified before this court, told court that the accused stabbed the deceased at the sternum. He also said that the knife, which he identified in court (P.Exhibit 1) stuck on the deceased's chest. In her evidence, PW2 who received information of the accident about thirty (30) minutes after she had seen the deceased and PW1 leave their house, rushed to the scene and she saw her husband's intestines out, which can only mean that the injury was on the abdomen (stomach). She did not mention seeing a knife or any weapon on his body and or at the scene. PW4, the Investigating Officer testified that he looked at the deceased's body and noted that it had visible injuries on the chest, ribs and leg. As for the knife which he produced as P.Exhibit 1, PW4 said that he had received information from the village elder that a kitchen knife had been received at a place with a lot of water outside the primary scene of incident on the evening of the same day. He went on to state that he sought advice on the same from the scenes of crime personnel and they told him that they would not get any evidence from it because it had mud and water.
22. It is not disputed that a post mortem examination was conducted on the body of the deceased, as evidenced by the post mortem examination report which was produced by PW4, the Investigating Officer as P.Exhibit 2. The same indicates that the examination revealed that the deceased's body had wounds on the left side of his chest, on the abdomen with superficial cuts on the dorsur of the right foot and right forearm. According to the doctor, the deceased's lungs collapsed and he found two libs in the haemothorax. It concluded that the deceased's death was caused by haemorrhage from the haemothorax.
23. It is unfortunate that the doctor who conducted the postmortem examination on the body of the deceased was not called to testify so that the findings in his report could be tested against the evidence of the prosecution's witnesses. This court notes that this is an ideal case where the attendance of a medical officer necessary.
24. However, the court has on its own motion gone on to distinguish what a 'stab wound' and 'cut wound' are and established that a stab wound is one of the types of a cut wound. A cut is defined as a break or opening in the skin and may be a straight line, jagged (laceration). Deep (penetrating) or just an abrasion. (see <http://www.future-learn.com.steps>) and <https://www.health.gov.au/7w>). They are usually caused by a sharp object when a knife or broken glass or even a sheet of paper.
25. Haemorrhage is defined as the medical term of bleeding, and mostly, excessive bleeding from a damaged blood vessel. Haemothorax is a collection of blood in the space between the chest walls and lungs and is caused by an injury to the chest either a puncture wound from broken skin or blunt trauma.
26. Therefore, from this definitions, this court finds that although there is a difference in the evidence of the prosecution's witnesses as to what injuries they saw on the deceased's body, the same have been reconciled by the findings in the post mortem examination report (P.Exhibit 2) as to the cause of deceased's death to a large extent. It is appreciated that where several witnesses testify to a fact that are said to be inconsistencies, which can be granted. However, the superficial injuries on the right foot and right forearm are unexplained with the only evidence being that the was stabbed.
27. Having established that the deceased died as a result of an injury to the chest, the commission of the act that caused the injury was by one witness, PW1. It is trite law that a court can and may convict on the basis of the evidence of a single witness as long as the evidence of such witness is trustworthy and believable beyond reasonable doubt. However, there is need to test the evidence of such witness with great care so as to satisfy itself or the safety of relying on it for a conviction.



28. PW1 identified the knife (P.Exh.1) as the one that had been used to stab the deceased and said it got stuck in his chest. PW2 who went to the scene immediately after the incident did not mention anything about the knife or any other weapon. PW4 said that the knife was recovered some distance from the scene and even then it had no evidence that would assist them in their investigations. There is no evidence as to how the knife was removed from the deceased's body to where it was recovered. In cross examination, PW4 admitted that he never found out from the village elder who sighted the knife and gave the infraction.
29. PW1 told court that he was with the deceased and the lady who was selling the palm wine to them when the deceased was stabbed by the man he identified as the accused person. PW2 was called to the scene by a lady she identified as Mwana Hawa who was selling the palm wine at the joint where the deceased was killed. PW4 told court that he recorded evidence from some witnesses. What is questionable here is why these witnesses, if they recorded their statements did not come or were not called to testify so as to clearly set out the circumstances under which the offence was committed?
30. It also came out from the evidence of PW1 both in-chief and in cross examination that he got disturbed that he went away and alter sent his wife to check if the deceased had died. It is worth-noting that it is PW1 who went to the deceased's house and insisted on him leaving his house in the pretext that he was going to give him Kshs.650.00 for repairing his house but instead led him to the drinking joint.
31. Clearly, all that such circumstances end up doing is shroud an incident in mystery that it is difficult to tell what really transpired. And when this happens, even though it is clear that the death and cause of deceased's death is not in dispute, there is a doubt as to who caused his death, and the benefit of this doubt is for the benefit of the accused person.
32. Consequently, on the third issue of whether there was malice aforethought, this court finds that having found a doubt in the evidence as to whether or not the accused person committed the offence, the prosecution is found to have failed to prove their case beyond any reasonable doubt. Thus, the accused is found not guilty of the offence of murder contrary to Section 203 of the Penal Code and is hence acquitted under Section 210 of the Criminal Procedure Code

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF APRIL 2023.

D. O. CHEPKWONY

JUDGE

In the presence of;

M/S Valerie counsel for the State

M/S Ochieng counsel for the accused

Court Assistant – Mwenda/Hamisi

