



**Republic v Alami (Criminal Case E008 of 2021)
[2023] KEHC 23019 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL CASE E008 OF 2021
JN NJAGI, J
SEPTEMBER 20, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

TARIKU ISAAC ALAMI 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 12th June 2021 at Hantharaka area in Danaba location in Wajir North Sub-County he murdered one Khalid Abush (herein referred to as the deceased).
2. The case for the prosecution is that the deceased was an Ethiopian national and was employed as a herder by one Abdullahi Sheikh Omar, PW1. Abdullahi was staying at Danaba township while the deceased was staying in the livestock grazing area at Hantharaka with Abdullahi's brother. That on the 12/6/2021, the said Abdullahi Sheikh Omar went to his livestock boma and did not find the deceased. He started to look for him. On the following day he informed his sons that the herder was missing.
3. Abdullahi's son called Adan PW2 mobilized his friends, Mohamed Gabor PW4 and Abdullahi Isaac Abdi PW5 and started to look for the missing herder. They looked for him from the 13/6/2021. On the 21/6/2021 they met a certain person who told that the deceased was a friend to a person called Tariku who was a herder for one Oshmael Abdullahi, PW3. They went to the home of the said Oshmael where they found a person who introduced himself as Tariku, the Accused. They found him in possession of a phone and a small torch that Adan PW2 identified as belonging to the deceased. The Accused had another phone that he said to be his. Adan took possession of the items. They thereupon inquired from the Accused where the deceased was. He confessed that he had killed the deceased. He took them to the bush about 3 km away and showed them the body of the deceased. At the said scene they found a torch that the Accused said belonged to him. Adan PW2 called the area chief PW6 and informed him. PW6



told them to take the Accused to Danaba police post. They escorted the Accused to the said police post. They found the Chief PW6 at the police post. The Accused was received by PC Milimu PW7 who booked him into the cells. Adan handed over the recovered two phones and two torches to PC Milimu. PC Milimu called the OCS Gurat Police Station and informed him. A team of police officers from Bute Police Station was sent to Danaba. They included PC Opondo PW8 and PC Simon Warui PW9, both of DCI's Office Bute. They found the Accused at the police post. They were led to the scene by Adan Abdullahi PW2 and Mohamed Gabow PW4. They collected the body of the deceased and took it to Danaba police post where PC Milimu handed over to them the recovered phones and torches. They picked the Accused at the police post and took him to Bute Police station. PC Opondo PW8 escorted the body to Moyale sub country hospital where a post mortem was performed on the body by Dr.Marsa Hassan Ali PW10 on the same day, 22/6/2022. The doctor found the body with a deep cut wound on the temporal region of the head. He formed the opinion that the cause of death was due to hemorrhage secondary to deep cut wound on the head.

4. The case was investigated by PC Warui PW 9 who recorded statements of witnesses. He charged the Accused with the offence of murder. During the hearing the prosecution witnesses identified the mobile phones and the torches recovered from the Accused, MFI.1-4. PW Warui produced them in court as exhibits, P.exh.1-4. The doctor PW10 produced the post mortem report as exhibit, P.exh.5.
5. Upon close of the prosecution case, the court found the Accused to have a case to answer and he was placed to his defence. The Accused in his defence stated in a sworn statement that he is an Ethiopian national. That in the year 2021 he was working as a herder for Oshmael Abdullahi (PW3). That the deceased herein was his uncle and was working as a herder for Abdullahi Sheikh (PW1). That they were grazing their animals in the same area. That on the 4/5/2021, the deceased moved his animals from the area and went to look for pasture elsewhere. He did not meet him again from that day. Later he was arrested by Adan Abdullahi PW2 and other people. He was taken to the police station. He was questioned on where the deceased was. He said that he had not met him since 4/5/2021. Later a son to his employer called Hassan Abdullahi was brought to the police station. He was placed in the cells as a suspect to the murder of the deceased. His father however paid a bribe of Ksh.500,000/- and he (the son) was released.
6. The Accused denied that he killed the deceased. He denied that he was found with the deceased's mobile phone and torch. He said that his phone was taken away from him at the police station.
7. The above being the summary of the evidence that was adduced before the court, the question is whether the charge of murder was proved against the accused to the required standard.
8. The standard of proof in a criminal case 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.”



9. 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.”

10. 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.”

11. There is no dispute as regards the death and cause of death of the deceased. The fact of death was confirmed by the evidence of the doctor, PW10, who carried out a postmortem on the body and reached a conclusion that the cause of death was due to a deep cut wound on the temporal region of the head. This evidence was not challenged by any other evidence. The elements of the death and cause of death of the deceased were therefore proved.

12. The next issue for determination is whether it is the accused person who killed the deceased.

13. The evidence against the accused is based on circumstantial evidence. In *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of



proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

14. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

15. The circumstantial evidence against the Accused is that at the time of his arrest by Adan Adullahi PW2, Mohamed Gabow PW4 and Abdullahi Isaak PW5 he was found in possession of a mobile phone and a torch belonging to the deceased. Further that he led the said witnesses to the place where the body of the deceased was lying in the bush.
16. It was the evidence of Adan PW2 that while they were in the process of looking for the deceased they met a certain herder who was unknown to him who told them that the deceased was a friend to one person called Tariku. He did not know the said Tariku but Abdullahi said that he knew him and that the person was working as a herder for one Ishmael. Abdullahi led them to the boma of Ishmael. They got there at around 7 pm. There were two houses at the boma. He, PW2 was left outside the houses while Abdullahi and Mohamed Gabow entered into one of the houses. Mohamed then called him into the house. He entered into the house. Mohamed was lighting up the room with the flashlight of his mobile phone. He found the accused lying on a bed while holding a mobile phone on his hand. He saw a torch on the bed. He identified the two items to belong to the deceased. He took possession of them. They interrogated the Accused on the whereabouts of the deceased. After some resistance he confessed to them that he had killed the deceased. He took them to the bush about 3 km away and showed them the body. It had a cut wound on the side of the head. They found a big torch at the place. The accused said that it was his. They took the Accused to Danaba police post and handed him over to PC Milimo PW7. He also handed over the deceased’s mobile phone and torch to the said officer. On the same night he took policemen to the scene and collected the body.
17. Mohamed Gabor PW4 on his part testified that upon reaching the home of Oshmael he was the first to enter into the house where they found the Accused. He was lighting up the room with the flash light of his phone. He found the Accused seated on a bed. He called Adan Abdullah into the room. Adan entered. He saw two mobile phones and a torch lying on the bed. He identified one of the phones and the torch to belong to the deceased. Adan took possession of the items. They interrogated the accused on the whereabouts of the deceased. He denied knowledge. They took him outside. They threatened to take him to the police. He confessed that he had killed the deceased. He took them to the bush where he showed them the body of the deceased. At the scene they found a torch that the Accused said belonged to him. They took the Accused and the exhibits to the police post. On the same night he went with the police back to the scene and they collected the body.



18. Abdullahi Isaak PW5 testified that while they were looking for the deceased they met an Ethiopian national who told them that the person they were looking for was a friend to a person called Tariku. He directed them to where Tariku lived. They went to the place at 9pm. They found a woman at the homestead. She directed them to the house where Tariku was. They entered into the house and found the Accused inside the house. Adan Abdullahi saw a mobile phone and a torch and identified them to belong to the deceased. Adan and Mohamed questioned him where he had gotten the items from. He refused to disclose. They threatened to take him to the police. He said that he had quarreled with the deceased and had killed him. He took them to the bush about 2 km away and showed them the body of the deceased. It had injuries on the head. There was a torch next to where the body was lying. They took the Accused to the police post. Adan and Mohamed took the police back to the scene. He did not go back with them.
19. The witness, PW5, was during cross-examination referred to his statement that he had recorded with the police. The statement stated that upon reaching the homestead of Ishmael, they called out the name of the accused and he came out of his house while holding a mobile phone which Adan Abdullahi Sheikh and a son of Khalid's employer positively identified as the one belonging to Khalid Abush. Asked by the defence as to the correct version on what he had told the court and what was contained in the statement, he stated that he had forgotten the details and that what was contained in the statement was the correct version. In re-examination by the prosecution he insisted that the Accused came out of his house and he was then questioned.
20. Adan Abdullahi PW2 stated that he identified the mobile phone and the torch that they found with the deceased, P.exhs.1 and 2 respectively, as he is the one who had bought them for the deceased. That his father used to take the phone to him for charging after which it would be returned to the deceased.
21. Abdullahi Sheikh Omar PW1, on his part stated that he identified the phone as that of the deceased because he used to take it to kiosks for charging. He showed the court a white sticker on the back of the phone that he said he had put on the phone as his identification mark when he took it to kiosks for charging. He said that it is his son Adan Abdullahi who had bought the torch for the deceased.
22. From the evidence adduced before the court, I have no doubt that the mobile phone and the torch, P.exhs. 1 and 2, were positively identified by the deceased's employer Abdullahi Sheikh (PW1) and Adan Abdullahi PW2 as the property of the deceased. Adan is the one who had bought the items for the deceased and he used to charge the phone for the deceased. PW1 had put a white sticker on the phone for ease of identification whenever he took it for charging. The items were therefore positively identified as the property of the deceased.
23. The question then is whether the Accused was found with the property of the deceased soon after his death and whether he took the prosecution witnesses where the body of the deceased was found.
24. The prosecution gave two versions on how the Accused was found with the deceased's property. Whereas Adan Abdullahi PW2 and Mohamed Gabor PW4 testified that they found the Accused with the items inside his house at the homestead of his employer Oshmael PW3, Abdullahi Isaak PW5 initially stated in his evidence in chief that they found the items inside the house but changed that evidence in cross-examination when he was referred to his statement to the police where he had stated that the Accused came out of the house while holding the mobile phone. He thereupon took the position that the Accused came out of the house while holding the phone. He however, he did not tell the court in his changed evidence how the torch was found.
25. Abdullahi PW5 recorded his statement to the police immediately after the discovery of the body of the deceased. The incident was fresh in his mind at the time. Why then would he have wanted to change



- his evidence to put it in line with the evidence of the other two that they found the Accused with the items inside the house? Was the evidence about the Accused being found with the items a fabrication?
26. Abdullahi PW5 at the same time stated in his evidence that on arriving at the home of Oshmael, they found a woman at the other house who directed them to the house of the Accused. Adan Abdullahi PW2 on the other hand said that they did not find anybody else at the home apart from the Accused. The evidence of Mohamed Gabor PW4 was that they heard people talking in the other house but the people did not come out of the house. So, were there other people at the homestead where the Accused was arrested or the Accused was alone at the homestead? Why would the witnesses give differing evidence on the issue?
27. Further to this, Abdullahi PW5 in his statement to the police stated that at the time they arrested the Accused there was another son of the deceased's employer present who also positively identified the recovered property. PW5 in his evidence in chief did not mention this other son of the deceased's employer to have been present during the arrest. The other two witnesses, PW2 and PW4 never mentioned the said person in their evidence. The Accused in his defence stated that a son of his employer called Hassan was arrested as a suspect to the murder but released on his father paying a bribe. The question then is why PW2, PW4 and even PW5 hid the fact of the said person being present during the arrest of the Accused. The chief PW6 said in his evidence that a brother to Adan Abdullahi called Hassan Abdullahi was present when the Accused was being interrogated by the DCIO. Were the prosecution witnesses then hiding something and settled on the Accused as a scape-goat? Do the discrepancies in their evidence have any effect on the prosecution case?
28. The manner of addressing contradictions in a case was stated by the Court of Appeal in the case of *Jackson Mwanzia v Republic* [2017] eKLR where the court cited with approval the Ugandan case of *Twabangane Alfred v Uganda* (Criminal "Appeal No. 139 of 2000 (UGCA) thus:
- “With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. This court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”
29. Similarly, the same court in the case of *Richard Munene v Republic* [2018] eKLR 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.”
30. In my view the discrepancies in the evidence of PW2, PW4 and PW5 of the manner they arrested the Accused is not a minor contradiction. It is a grave matter that goes into their credibility as witnesses. The Court of Appeal in the case of *Ndungu Kimani v Republic* [1979] KLR 282 said the following on the credibility of witnesses:
- “The witness in a criminal case upon whose evidence is proposed to rely should not create an impression in the mind of the court that he is not 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 unreliable witness which makes it unsafe to accept evidence.”

31. The Court of Appeal in *Ali Salim Awadh alias Majid v Republic* [2015] eKLR said that for a court to base a conviction on circumstantial evidence there should be no exculpatory factors that tend to weaken the inference of guilt. Said the court:

...It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure there are no other co-existing circumstances which would weaken or destroy the inference.”

32. The prosecution partly relied on the evidence that the Accused confessed to the three prosecution witnesses that he killed the deceased and took them to where the body was. This was evidence leading to discovery. In the case of *Republic v Ahmad Mohamed & Said Musaji* Supreme Court Case No. 29 of 2019, the Court dealt with evidence leading to discovery and held though such evidence is admissible in evidence, it cannot found a conviction unless it is corroborated by other evidence. It is the evidence that the Accused was found with property belonging to the deceased soon after his death that would have corroborated the evidence leading to discovery. However, the said evidence was discredited by the discrepancies in the evidence of the witnesses who said that they found the Accused with the items – PW2, 3 and 4. I cannot describe the said witnesses as trustworthy persons. There is thus no evidence to corroborate evidence leading to discovery. I therefore find no credible evidence that the Accused took the witnesses to where the body was. The circumstantial evidence adduced before the court does not unerringly point at the Accused as the one who killed the deceased.

33. The upshot is that the prosecution has not proved that the accused is the person who killed the deceased. The charge has not been proved beyond reasonable doubt. I find the Accused not guilty of the offence of murder and acquit him under section 322(1) of the *Penal Code*.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 20TH SEPTEMBER 2023.

J. N. NJAGI

JUDGE

