



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Muhumed & another (Criminal Case E006 of 2021)  
[2023] KEHC 22275 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22275 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE E006 OF 2021  
JN ONYIEGO, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**AHMED HASSAN MUHUMED ..... 1<sup>ST</sup> ACCUSED**

**IFTIN DAGANE SHEIKH ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. Accused persons herein were arraigned before this Honourable court charged with the offence of murder contrary to section 203, as read with section 204 of the [penal code](#). Particulars were that on 23<sup>rd</sup> day of June, 2021 at stage Griftu Jogoo Location in Wajir East Sub-county within Wajir County, jointly murdered Abey Bishar Hassan.
2. Upon returning a plea of not guilty, the matter proceeded to full hearing with the prosecution calling a total of 9 witnesses. Pw1 Mursal Ali Hassan was on the material day on duty guarding west gate as watchman. At 1. 40a.m, while on patrol with other watchmen, they came across a dead body with blood oozing from the mouth. While trying to alert the police, somebody claiming to be a brother to the deceased arrived while riding on motor-cycle.
3. That he alerted one Kullow Salat who responded. Later, police officers arrived and took away the body. On cross –examination, he denied witnessing the incident and that he did not know who killed the deceased.
4. Pw2 Bishar Hassan Sheikh father to the deceased received a call from his son Mohamed Bishar on June 24, 2021 at 3.00 am who informed him of the death of his son Abey Bishar. He and his daughter Ubar Bishar drove to Stage Griftu where the body of his deceased son was lying. He immediately called the police who responded by visiting the scene and collected the body. According to him, he was informed



- that his son(deceased) had an altercation with the 2<sup>nd</sup> accused who was in company of the 1<sup>st</sup> accused. On cross-examination, he confirmed that he did not witness the attack on his son.
5. PW3 Abdi Salat Omar a watchman at Stage Griftu was on the material night on duty when his colleague Mursal (pw1) called him at 1.30a.m. As they patrolled, they came across a dead body with blood oozing from the shoulder. That while there, a motor-cycle rider passed by. As they stopped him, he identified the deceased as his brother. He however did not see the person who killed him(deceased).
  6. Pw4 Kassim Ibrahim Abdi former Assistant Chief Makonor Sub-location received a call on June 14, 2021 at 2. 30a.m informing him of a deceased person's body lying on the road. He alerted the Local Chief Inspector of Police who took necessary action by visiting the scene.
  7. Pw5 Hared Ahmed Farah, the employer to the deceased received a call at 5a.m on June 24, 2021 from his wife who informed him of Abey's death. He proceeded to the hospital and identified the body of Abey. He confirmed that Abey had sustained a stab injury on the neck.
  8. Pw6 Ali Suleiman Elmi who had allegedly recorded a witness statement implicating the two accused persons turned hostile by disowning his statement (evidence). He denied witnessing the attack on the deceased by the accused persons.
  9. PW7 Dr Ali Yussuf conducted a postmortem examination upon the deceased's body. On examination, he observed that the body had scratch marks on the neck, bruises on the forehead and penetrating stab wound on the neck. He established the cause of death as bleeding due to a penetrating stab wound on the left side of the neck.
  10. Pw8 PC Vyland Malugusi visited the scene of murder and helped in investigating the incident. Upon visiting the scene, he found some police officers already on the ground. He saw the body lying on a pool of blood. They took photographs and delivered the body to Wajir County referral hospital for postmortem. He attended the postmortem examination and observed the body had a stab wound on the neck.
  11. According to his investigations, the deceased was killed by one Ahmed Hassan after the deceased fought with Children below his age one of them being a brother to Ahmed Hassan (1<sup>st</sup> accused). That it was the 2<sup>nd</sup> accused who held the deceased firmly as the 1<sup>st</sup> accused stabbed him on the neck using a knife. That he arrested the two and charged them.
  12. Pw9 Sergeant Peter Mutiso the investigating officer received information from Chief Inspector Kullow who informed him of the murder incident. He mobilized officers and together proceeded to the scene of murder where he found the body of the deceased person lying on a pool of blood. The body had a stab wound on the neck color bone. He took the body to Wajir referral hospital where the post mortem was conducted.
  13. According to his investigations, the deceased had fought with the accused persons after differences emerged while watching a movie at 1.00a.m.
  14. After the close of the prosecution's case, Mr. Dayib submitted for the defence on a no case to answer. It was counsel's submission that the prosecution had failed to establish a *prima facie* case to the required degree. Learned counsel submitted that the prosecution did not call any eye witness. That the only purported eye witness (Pw6) had recanted his witness statement, hence nobody saw the accused fight nor stab the deceased. However, the prosecution did not submit on the case to answer.



## Determination

15. I have considered the charge levelled against the accused persons, oral evidence by witnesses and oral submissions by the defence counsel. Accused persons were jointly charged with the offence of murder. The prosecution called a total of 9 witnesses and closed its case.
16. At this stage, the onerous duty placed upon the court is to make a finding whether the prosecution had established a prima facial case to warrant the accused being put on their defence. See *Ramanlal Bhat vs Republic* (1957) EA 332.
17. In the case of: *Anthony Njue Njeru vs Republic* Cr Appeal No 77/2006(2006) eKLR the court had this to say:

“ ... we wish to point out here that it is undesirable to give a reasoned ruling at the close of the prosecution’s case, as the learned Judge did here, unless the court concerned is acquitting the accused.”
18. Similar position was held in the case of *Ronald Nyaga Kiura vs Republic* (2018) eKLR where the court held that:

“It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court satisfy itself that a prima case has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the *Criminal Procedure Code*. A *prima facie* case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation is offered by an accused...”
19. It is incumbent upon the prosecution to prove that the evidence on record is sufficient enough with a high possibility of conviction in the event the defence opts not to offer any defence. Therefore, in a murder trial, the prosecution is under obligation to establish that; the death of the deceased was caused by an unlawful act; the accused persons committed the unlawful act which caused the death of the deceased, and that there was malice aforethought.
20. This position was succinctly held in the case of *Chiragu & another vs Republic* (Criminal Appeal No. 104 of 2018 (2021) KECA 342 (KLR) (CRM) where the court stated that:

“the prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction. That the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the accused; and that the accused had malice aforethought as he committed the said act.”
21. In the instant case, the death of the deceased is not in dispute. The Doctor’s evidence confirmed that the cause of death of the deceased was bleeding due to a penetrating stab wound.
22. Pw1, and Pw3 stated that while on patrol on the night of June 23, 2021, they came across a dead body. They did not know how the deceased met his death. Pw2 Father to the deceased equally was called and informed of his son’s death. He did not know how he met his death. Equally, Pw4, Pw5, Pw8 and Pw9 did not witness the incident. Their evidence is purely hearsay.
23. The only eye witness the prosecution depended on was Pw6 who recanted his witness statement thus becoming a hostile witness. His testimony was therefore not of any probative value as he denied witnessing the commission of the offence.



24. It is clear from the nature of the cause of death that it was as a result of an unlawful act in this case grievous harm. However, there is no proof of the culprit. There is no direct nor circumstantial evidence to connect the accused persons with the death of the deceased.
25. In the absence of any cogent direct or circumstantial evidence, this court cannot put the accused persons on their defence for the sake of exonerating themselves. To do so will amount to shifting the burden of proof to the accused thus demanding for the accused to prove their innocence which is not their responsibility. I do agree with the defence counsel that the prosecution has failed to establish a *prima facie* case against the accused persons hence I do acquit them under Section 306 of the [Criminal Procedure Code](#) for lack of evidence.

Right of Appeal 14 days.

**DATED, SIGNED AND DELIVERED AT GARISSA THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**J.N. ONYIEGO**

**JUDGE**

