



**Republic v Dabaso (Criminal Case E003 of 2022)
[2024] KEHC 13920 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13920 (KLR)

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

JN NJAGI, J

OCTOBER 23, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

WARIO IBRAHIM DABASO 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 5th March 2022 at Zeemax Petrol Station within Marsabit location in Marsabit Central sub-county he murdered one Guyo Dokatu Huka (herein referred to as the deceased).
2. The prosecution called five witnesses in the case at the close of which the court found the accused to have a case to answer and placed him to his defence. The accused defended himself and called three witnesses.

Prosecution Case

3. The first witness for the prosecution, Abdikadir Mohamed Barako, PW1, testified that he is a resident of Moyale. That the accused was his neighbour at Butiye village in Moyale. That sometimes in the month of February 2022 the accused stole his motor cycle and he reported the theft at Moyale Police Station. After about a week the police informed him that the accused had been located in Marsabit town. He came to Marsabit on 2nd March 2022 and reported at Marsabit police station. He went to the Marsabit matatu stage and made inquiries about the accused. He was directed to the deceased herein. He showed the deceased the photograph of the accused. The deceased said that he knew the accused and that he lived at a place called Shambole. He offered to look for him.



4. That on the 5th March 2022, PW1 met the deceased in Marsabit town and the deceased told him that he was on that day going to bring the deceased to him at Zeemax petrol station at 4 pm. The deceased asked for Ksh.2,500/= for transport but he did not have the money at that time. He and other people went to Zeemax miraa base to wait for the deceased to bring the accused. That at some minutes to 5 pm, the deceased went to Zeemax with his brother who was not known to PW1. The brother to the deceased said that he is the one who was going to bring the accused. The deceased's brother asked PW1 to send him Ksh.400/=. He left on a motor bike. He sent him the money. The deceased remained behind with them.
5. That after about one hour, the deceased's brother went back to Zeemax with the accused. He dropped him about 50 meters away from them and told them to go and arrest him. Two of the people who were in the company of the complainant, Edin Sharambo PW2, Shariff and Abdullahi went and arrested the accused. He, PW1 went there and asked the accused where his motor bike was. The accused denied knowledge about it. The accused started to scream that he was being killed. Many people gathered there. Shariff and Abdullahi released the accused. He, PW1, got hold of the accused by the waist to prevent him from escaping. The accused then removed a knife from the inside of his jacket and stabbed him on the left-hand side of his chest. The accused ran away. He was chased. A police vehicle passed by. Policemen who were in the vehicle took him, PW1, to Marsabit County Referral Hospital. He was admitted. Soon after, Adbullahi and Sharambo were brought to hospital with stab wounds. At around 9 pm, the accused was brought to hospital with injuries. At the same time, the brother to the deceased went to the hospital looking for the deceased but did not get him. He, PW1, was discharged on the following day. He went and reported the incident at Marsabit police station. He was issued with a P3 form. Later in the day, he was called by Abdullahi who told him that the deceased herein had died.
6. Edin Ali Sharamo PW2 testified that he is a teacher at Moyale Boys' High School. That his family lives in Marsabit town. That the accused and PW1 were his neighbours at his residential house in Moyale. That sometimes in February 2022 while at Moyale PW1 reported to him that the accused had stolen his motor cycle. That on 2/5/2022 he was in Marsabit town when PW1 called him and told him that he had come to Marsabit in pursuit of the accused. That at around 5pm, he met PW1 at Zeemax petrol station. They were with other people including the deceased and a brother to the deceased. They arranged for PW1 to give the deceased Ksh.2,000/= as facilitation for the arrest of the accused. The deceased was paid the money. The deceased and his brother left on a motor bike to fetch the accused. They brought the accused after about 30 minutes. They stood about 50 meters from where they were. The deceased approached them and pointed out the accused to them and told them to go and arrest him. Those in his company - PW1, Abdullahi Chute and Nassir – went to arrest the accused. He, the deceased and his brother were left behind. After a short while they joined the others who had arrested the accused. PW1 was at the time calling the police to come and re-arrest the accused. PW1 and Nassir searched the accused but they did not find him with anything. They sat the accused down and waited for policemen to arrive. He PW2 went a distance away to talk to a certain old man. While talking to him he heard some commotion behind him. He turned to check and saw the accused stabbing PW1 with a knife on the chest. He rushed there to assist PW1. He faced with the accused who stabbed him with the same knife on the abdomen and on the left back shoulder. People who were there screamed. He then saw the accused chasing the deceased. He saw the accused stabbing the deceased on the left side of the neck. The deceased fell down. The accused ran away and entered the compound of a nearby mosque. He was chased by many people. The people caught him. He left the accused with the people and went to Marsabit County Referral Hospital where he found PW1 having been stitched of his wounds. At 9 pm the accused was brought to hospital with injuries. He was treated and discharged. He, PW2, was treated and discharged at 11pm. PW1 was left behind at the hospital. On the following day PW1 called



him and told him that the deceased had died. He went to the police station and recorded a statement. He was issued with a P3 form.

7. Dr. Arero Duba PW3 of Marsabit County Referral Hospital testified that he performed a post mortem on the body of the deceased on 6/3/2022 and found it with an extensive deep cut wound on the front and left side of the neck that extended to the deep tissues of the neck and to the first rib of the collar bone. The doctor formed the opinion that the cause of death was due to excessive blood loss due to deep cut wound.
8. The father to the deceased PW4 testified that he received a report of the death of the deceased on 6/3/2022. He went to Marsabit County Referral Hospital where he found the body. He identified the body to a doctor who performed a post mortem. The body was then released to him for burial. He went and buried the body at his home.
9. The case was investigated by Snr Sgt Mbaya Karaka PW5 then of DCI Office Marsabit. It was his evidence that he took over investigations from the OCS Marsabit police station after the deceased was reported to have died after an assault. He recorded statements of Abdikadir PW1 and Edin Ali PW2. They said that the accused had stolen PW1's motor cycle. That on the material day they sought for the services of the deceased to arrest the accused and take him to Zeemax Petrol station. That the deceased did so. That on the accused being brought to the place they attempted to arrest him and in the process, he stabbed them with a knife. The deceased was also stabbed. That policemen who were on patrol went to the place. They arrested the accused and escorted him to Marsabit police station. They recovered a pen knife from his pockets. PW1 and PW2 were treated at Marsabit County Referral Hospital and discharged. Policemen collected the body of the deceased at Zeemax petrol station. PW5 charged the accused with the offence. During the hearing the doctor PW3 produced the postmortem report in court as exhibit, P.Exh.1. Snr Sgt Mbaya produced the pen knife as exhibit, P.Exh.2.

Defence Case

10. The appellant stated in his defence that on the 5/3/2022 at 6.30 pm he was at his home at Qilta Korma in Sagante location of Marsabit county. That his neighbor called Galgalo Dakota went to his home while riding a motor bike. He told him that he wanted him to go with him to Marsabit town and help him carry a luggage on his motor cycle. He agreed and went with him. That on reaching a place called Kiwanja Ndege, they found three people standing on the road. He, the accused is the one who was riding the motor cycle. He stopped it near the people. He had seen one of the people, PW 1, in Moyale. The other two were armed with pistols and were holding handcuffs. He concluded they were policemen. The person he had seen at Moyale told the other two that he was the one. The policemen handcuffed him and started to beat him while threatening him with the pistols. The people had a motor cycle. They brought him towards Marsabit town and stopped near Huduma centre. The policemen demanded for Ksh.100,000/= for him to buy his freedom. He said he had money. He was taken to the police station. The OCS ordered that he be taken to hospital. He was taken to Marsabit County Referral Hospital where he was treated and returned to the police station. He was later charged with murder. He denied ever going to Zeemax petrol station on that day.
11. The second witness for the accused, PC Mausu DW2 produced the OB extracts for 5/3/2022 showing the time the assault report was made to the police, the time the accused was placed in custody (8:53 hours), time he was booked out and taken to hospital for treatment (21:36) and the time he was returned from hospital (22:16 hours).
12. The other two witnesses called by the accused, Huka Kana Duba DW3 and Guyo Huqa DW4 told the court that they are neighbours to the accused. That on the 5/3/2022 at around 6:30 to 7 pm they were



at their respective houses when a neighbor called Galgalo arrived at the village on a motor cycle. He stopped outside the house of the accused. He asked the accused to accompany him to Marsabit own o assist him carry a luggage on his motor cycle. The accused and Galgalo left together.

13. It was further evidence of DW3 that he is a village elder of his village. That the accused did not go back to the village after he left with Galgalo. On the following morning he heard that the accused had been arrested. He went to Marsabit police station and met the OCS who told him and members of the accused's family to raise Ksh.20,000/= for bond. They went to look for the money. When they went back with the money they were told that the accused's case had turned to murder and he could not be released on bond.

Analysis and Determination

14. 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.”

15. In *Elizabeth Waithiegeni Gatimu vs. Republic* [2015] eKLR, Mativo J. (as he then was) expressed himself as hereunder on the issue:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”



16. The accused is facing a charge of murder contrary to section 203 of the Penal Code. The section 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.”

17. The elements of the offence of murder were stated in the case of Republic Versus Andrew Omwenga 2009 eKLR where the court held:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder 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 the 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”.

18. This court has therefore to analyze the evidence in light of these essential elements required to be proved by the state against the accused person. I will deal with the ingredients of the charge as hereunder.

Death of the deceased

19. Dr. Arero Duba PW3 of Marsabit County Referral Hospital performed a post mortem on the body of the deceased and found it with an extensive deep cut wound on the front and left side of the neck that extended to the deep tissues of the neck and to the first rib of the collar bone. He formed the opinion that the cause of death was due to excessive blood loss due to deep cut wound. There was no any other possible cause of death of the deceased other than what was opined by the doctor. I therefore accept the evidence of the doctor as to the cause of death of the deceased. The deceased died as a result of a deep cut wound on the neck. The death and cause of death of the accused was therefore proved.

Whether the accused committed the unlawful act that caused the death of the deceased

20. The prosecution witnesses, Abdikadir PW1 and Edin Ali PW2 testified that they have known the accused from Moyale. PW 1 said that the accused was his neighbour at Butiye village in Moyale. That when they were in school, they were living together. PW 2 on the other hand testified that he was a neighbour to PW1 at Moyale. That the accused was a friend to Abdikadir PW1 as he used to see him visiting PW1 at PW 1's home. The accused himself in his defence admitted that he had known PW1 in Moyale. There is then no doubt that the accused and Abdikadir PW1 were known to each other. I also believe the evidence of Edin PW2 that he knew the accused as he used to see him visiting PW1 in Moyale.

21. It was the evidence of Abdikadir PW1 and Edin PW2 that on the material day they met the accused at Zeemax petrol station where the accused was brought on accusations that he had stolen a motor cycle belonging to Abdikadir. The accused in his defence says that he never went to Zeemax petrol station on that day but that he met Abdikadir at Kiwanja Ndege in company of policemen. That policemen arrested him for reasons not disclosed to him and he was taken to Marsabit police station.

22. Whereas Abdikadir PW1 testified that he met the accused at Zeemax petrol station on the evening of the material day, he was not asked in cross-examination whether the accused was arrested by the police at Kiwanja Ndege. I do not think that this is something that would have escaped the accused's counsel's mind during cross-examination if the accused's allegation was true. The accused's defence that he never



went to Zeemax petrol station on the evening of the material day is not true. The allegations that he was arrested at Uwanja Ndege must have been an afterthought.

23. That the accused was brought to Zeemax petrol station is not in doubt. The accused and his witnesses admit that he was on that evening picked by the deceased at his home on a motor cycle. I believe the evidence of PW1 and PW2 that the accused was taken to Zeemax petrol station after being picked by the deceased at his home. There is no truth that he was arrested by Abdikadir and policemen at Kiwanja Ndege and taken to the police station.
24. I have no doubt from the evidence adduced before the trial court that the accused is the one who stabbed Abdikadir PW1, Edin Ali PW2 and the deceased with a knife. It is clear from the evidence that the three persons had arrested the accused over allegations that he had stolen Abdikadir's motor cycle. Both PW1 and PW2 knew the person they had arrested. It is after arrest that the accused turned against them and stabbed them with a knife. Nobody else could have stabbed them with a knife. I believe the evidence of Edin that he saw the accused stabbing the deceased with a knife. The accused's defence is therefore dismissed. The accused is the one who committed the unlawful act that led to the death of the deceased.

Whether the accused had the malice aforethought in stabbing the deceased

25. 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.”

26. The doctor who performed post mortem on the body of the deceased found it with an extensive deep cut wound measuring 8 x 4 cm on the front and left side of the neck that extended to the deeper tissues of the neck to the first rib and collar bone. In the case of *Karani & 3 Others v Republic* [1991] KLR 622, the Court of Appeal held that malice aforethought can be inferred from the nature of the injuries and weapon used to inflict them. In the case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63, the East African Court of Appeal set out the circumstances in law under which malice aforethought can be inferred, to wit:

- a. The nature of the weapon used (whether lethal or not).
- b. The part of the body targeted (whether vulnerable or not).
- c. The manner in which the weapon is used (whether repeatedly or not).
- d. The conduct of the accused before, during and after the attack.

27. The fact that the accused in this case inflicted a deep injury on the deceased's neck is clear indication that he intended to kill her. Malice aforethought has therefore been proved.



28. The upshot is that the prosecution has proved beyond reasonable doubt the charge against the accused.
The accused is found guilty of the offence of murder as charged and is convicted accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF OCTOBER 2024

J. N. NJAGI

JUDGE

In the presence of;

Mr. Otieno for prosecution

Mr. Halake for accused

Court Assistant – Jarso

14 days R/A

