



**Republic v Mohamed (Criminal Case 2 of 2020)  
[2024] KEHC 17017 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 17017 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE 2 OF 2020  
JN ONYIEGO, J  
OCTOBER 3, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**NOOR HUSSEIN MOHAMED ..... ACCUSED**

**JUDGMENT**

1. The accused herein faces a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*. Particulars of the offence are that on 15.02.2020 at Bulla County, Garissa Sub County within Garissa County, he murdered Doral Jibil Gurat.
2. He was arraigned before court on 02-03-2020 for plea taking. Upon the charges being read to him, he pleaded not guilty and a plea of not guilty entered accordingly. The matter then proceeded to full hearing with the prosecution calling a total of seven (7) witnesses in order to prove its case.
3. PW1, Dr. Hassan Abdi Mohamed testified that he conducted a post mortem on the body of the deceased. That the body had mild rigor mortis and there was a stab wound on the left side of the chest, a stab wound on the right hand and superficial injuries on the left breast. According to the witness, the stab wound on the left side penetrated and punched the left chamber of the heart and lung which caused profuse bleeding that led to his death.
4. He further stated that there was a scar on the right hand which looked defensive. According to him, the cause of death was as a result of hemorrhage due to stab wound on the left chamber of the heart and lung. He produced the post mortem report as Pex. 1.
5. PW2, Mahat Adoo testified that on 15.02.2020, he was sleeping outside his home due to excessive heat. That at around 1.00 a.m., his wife, Shukri alerted him of the screams she had heard from the house near theirs. He stated that he lived near his brother's house, and that his brother's wife was on the material



- night sleeping with one Doral the deceased herein. It was his testimony that upon rushing to the place where the noise was coming from, he found the deceased crying while bleeding from the left breast.
6. He then organized for the deceased to be taken to the hospital but unfortunately, she died. It was his case that he made inquiries on who possibly could have carried out the heinous act but Fatuma told him that the deceased was stabbed by her husband who disappeared immediately. The witness went further to state that he knew the name of Doral's husband but not him personally. That the accused was previously married to Doral but there were some misunderstandings prompting Doral to return back to her home.
  7. It was his evidence that he suspected the accused to be responsible for the death of the deceased. On cross examination, he stated that Fatuma knew the accused person very well as they were brought up in the same are. He went further to state that although the incident took place at 1.00 a.m there were two security lights in the area.
  8. PW3, Aden Kuhari testified that the accused person was well known to him. It was his evidence that the deceased and the accused person previously lived together as husband and wife but for the reason that the accused could not provide for the deceased, she went back to her home. He stated that he identified the body to the doctor who performed the post mortem.
  9. PW4, Fatuma Kassim Abdullahi, recalled that on the material night, she was at her sister in law's place as they were sleeping outside when an assailant attacked them and stabbed the deceased. That the assailant was in shorts and his face was covered. It was her evidence that she identified the assailant through security lights nearby. She stated that the deceased and the assailant struggled for some time overs the knife before the assailant stabbed her.
  10. It was her testimony that Doral had returned back to her home as there existed misunderstandings between her and the husband. She maintained that she knew the accused very well as he was a relative. On cross examination, she stated that the incident happened between 2-3 a.m., and that it was the accused who stabbed the deceased. On re-exam, she reiterated that she saw the accused person as he was a person who was known to her.
  11. PW5, No. 83536 Cpl. Ronald Emase testified that he is a data analyst based at the DCI Headquarters. That by a letter dated 19.02.2020, the DCIO Garissa requested for call data records in regards to cell phone number 0711707572 registered under the name of Noor Mohamed of ID No. 27293058. He stated that from the analysis he conducted, the number in question between 2030 hrs and 2040 hrs was serviced by PTBTS transformer (mast) Garissa Police Estate. He produced the said findings as Pex 2.
  12. PW6, No. 69632 Cpl. Jane Mamai testified that she was the investigating officer in this matter. That upon being assigned the case to investigate, she went to Garissa Hospital where the body of the deceased had been kept. He stated that later, together with Cpl. Mutundu, PC Manayi, PC Gitonga, PC Noah, PC Ouko and PC Wangila, they visited the scene at Bura province where the said body had been collected from. They confirmed from PW3 that indeed the deceased was allegedly stabbed and thereafter rushed to Garissa Hospital. They thereafter rushed to the hospital to take photos noting that the deceased proscribed to the Islamic religion and burial was to take place any time. It was her evidence that the said photos were to aid in identification of the nature of injuries sustained by the deceased.
  13. She further stated that she checked the assailant's communication log to determine whether he was with the deceased in the same locality on the material night. She also organized for an identification parade which was conducted by C.I.P. Jeremiah Ongaga. Upon carrying out further investigations, she charged the accused with the offence herein. On cross examination, she stated that the offence was allegedly committed at 1.30 a.m.



14. PW7, No. 236096, C.I.P. Jeremiah Ongaga testified that on 18.02.2020, he conducted an identification parade where the accused person together with other 9 members participated. That the members of the parade were of similar height and most of them were of Somali origin. It was his case that he asked the suspect if he had representation or complaint regarding the parade. He further stated that in as much as the suspect was not represented, he had no problem being involved in the exercise.
15. He reiterated that PW4 positively identified the suspect by touching him as he was standing between members No. 6 and 8. Upon asking the suspect if he had anything to comment, the suspect stated that PW4 was a person known to him. Thereafter, he dispersed the parade and then signed the document after which the suspect also signed before being returned to custody. He produced the ID parade Form as Pex 6.
16. Upon considering the evidence of the prosecution, the court via a ruling delivered on 23.05.2024 found that the accused person had a case to answer and therefore placed him on his defence.
17. In his defence, DW1, Noor Hussein Mohamed, a herdsman stated that his wife died while at her home. He denied committing the offence. He claimed that during the occurrence of the incident, he was not in Garissa as he was in the village where he had attended a funeral. He prayed that the court considers his defence and release him from custody.
18. Upon close of the defence's case, Mr. Onono, counsel for the accused registered his intention not to file any submissions while the prosecution filed its submissions dated 19.06.2024 thus urging this court to find the accused person guilty of the offence of murder. While relying on the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR, the prosecution submitted that for the offence of murder to be proven, the elements to be proved are; that death occurred, the accused caused the said death and that the assailant had malice aforethought. The prosecution urged that indeed death occurred as the same was proved vide the testimony of PW2 and PW3 which was later corroborated by the evidence of PW1 who conducted post mortem on the body of the deceased.
19. On whether the said death was caused by the accused person, it was urged that the evidence of PW4, PW5 and PW7 clearly pointed towards the accused person as the one responsible for the death of the deceased. On malice aforethought, the prosecution placed reliance on the case of Republic v Tubere 1945 EACA 63 and Nzuki v Republic [1993] KLR 171 where it was held that malice aforethought in a murder can be established by ascertaining the nature of weapon used and the manner in which it was done. This court was urged to find the accused person guilty of the offence charged. That the circumstances of this case clearly points to malice aforethought by the accused person.

### **Determination**

20. I have considered the evidence tendered before this court both by the prosecution and the defence. I have also taken into account submissions tendered by the prosecution. The accused person was charged with the offence of murder as prescribed under section 203 of the [Penal Code](#) which provides; "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder." From this definition, the prosecution was expected to prove the following ingredients beyond reasonable doubt:
  - i. The death of the deceased and cause of that death;
  - ii. That the accused committed an unlawful act or omission that led to the death; and
  - iii. That the accused committed the unlawful act with malice aforethought.



21. Throughout a criminal trial, an accused person bears no duty to prove his innocence. The burden is always on the prosecution to prove their case beyond reasonable doubt. [ See Stephen Nguli Mulili v Republic [2014] eKLR; Festus Mukati Murwa vs Republic (2013) eKLR].
22. The fact of the deceased's death is not in question. To prove the cause of his death, the prosecution relied on a post mortem report produced by PW1. In the report, Dr. Hassan, indicated that the cause of death was due to hemorrhage occasioned by a stab wound on the left chamber of the heart and lung. In the same breadth, PW2, PW3, PW5 and DW1 also confirmed that they saw the body of the deceased hence death occurred. I therefore find that the prosecution proved that the deceased died due to hemorrhage as a result of stab wound on the left chamber of the heart and lung.
23. As to whether the death was lawful, one would have to consider on how the death in question was occasioned. According to the evidence of pw4, the deceased was attacked by a known person using a knife. The postmortem report equally established the cause of death as a stab wound which penetrated through the left lung and the heart. From this evidence, the attack aiming at critical organs of the body was definitely an illegal act hence the death suffered was occasioned through an unlawful act.
24. The next question is the identity of the assailant. It was incumbent upon the prosecution to prove that the accused person caused the death of the deceased. From the evidence on record, it is clear that the prosecution purely relied on the evidence of pw4 one Fatuma who allegedly was sleeping together with the deceased outside the deceased's house due to excessive heat that time hence identified the accused attack the deceased. To that extent, no other person saw or identified the accused person stab the deceased.
25. The question that begs for an answer is whether the evidence by a single witness in this case PW4 is qualified to clearly hold the accused person liable for the death of the deceased. It is trite that a conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone. The Court of Appeal of Uganda in Okwang Peter vs Uganda (Criminal Appeal No.104 of 1999) [2001] UGCA 6 held as follows: -

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error”
26. According to pw4, while asleep in company of the deceased, a man dressed in a short and covering his face attacked the deceased. That in the course of the assailant struggling over the knife with the deceased, he bent down hence she was able to recognize him as the accused husband to the deceased with whom they had separated. She claimed that she was able to recognize the accused as a husband to her sister in-law (deceased). She also stated that there was sufficient light from two electricity security lights.
27. There is no doubt that visual identification/recognition is more reliable than voice identification. However, such evidence must be absolutely water tight to justify a conviction. See the case of Wachira Wandia v Republic (2006) eKLR where that proposition was emphasized. Courts have however warned time and again that visual identification can sometimes occasion a miscarriage of justice unless



carefully examined. This was the position held in the case of Cleophas Otieno Wamunga vs Republic (1989) KLR424.

28. Similarly, in R vs Turnbull(1976)3ALL ER 552 Widgery, C.J. stated that;

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the Jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”

29. In the instant case, pw4, screamed for help following the attack and people among them pw2 responded. She immediately told them the person she had seen attack the deceased. This a relative known to the accused hence the element of positive recognition. She reiterated her statement to the police that she saw the accused attack the deceased.

30. The attack took some element of struggle between the deceased and the assailant over the knife hence sufficient time for positive identification. As to lighting condition, pw4 stated that there was enough lighting from two security lights outside there. I have no doubt that security lights are brighter hence there was sufficient light for positive identification.

31. From the consistence of her testimony, and the fact that she had no grudge against the accused, I am convinced that, there was positive identification of the accused during the attack. Pw4 had no reason to frame up a case against the accused. I have however cautioned myself that no prejudice would be occasioned against the accused by relying on the evidence of Fatuma a single witness to convict. The law is also clear that there is no particular number of witnesses required for proof of any fact.

32. I must however add that the ID parade conducted was not necessary hence useless as the accused was recognized by pw4 being a person known to her before a fact admitted by the accused in his defence.

33. Regarding the alibi defence raised by the accused that he was not within the vicinity when the attack took place, it was incumbent upon the prosecution to dislodge the same and not for the accused to prove the same. In the case of Victor Mwendwa Mulinge v R (2014) eKLR the court of appeal had this to say;

“it is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution...”

34. However, the Court of Appeal in Erick Otieno Meda vs Republic [2019] eKLR while discussing the defence of alibi laid down rules to be applied in considering the defence of alibi and the Learned Judges held as thus;-

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“23. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:

(a)An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.

(b)An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

(c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.



- (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. [See Mhlungu v S (AR 300/13) [2014] ZAKZPHC 27 2014].

35. In the instant case, pw5 data analyst examined call logs of the accused's phone and found that at the material time he was within the proximity of the scene of murder within Garissa town and not in the village known as Daley. To that extent, accused's alibi was not tenable hence proof that he was lying in his defence.

36. Finally, on the question whether there was malice aforethought on the part of the accused, the Court of Appeal in the case of Joseph Kimani Njau vs R (2014) eKLR held as follows:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

37. In the instant case, PW1 who conducted the post mortem on the body of the deceased formed opinion that the deceased died as a result of hemorrhage due to stab wound on the left chamber of the heart and lung. From this piece of evidence, it cannot be denied that the accused person must have intended to cause the deceased grievous harm or death.

38. Malice aforethought therefore can be inferred from the nature of the injuries occasioned, part of the body targeted and the type of the weapon used. In conclusion, I do not find any merit on the accused's defence which is not tenable and full of lies. He merely tried to run away from liability. The motive of the attack was triggered in my view by the separation of the deceased with the accused hence offending the accused. He had no justification to take away his wife's life in such a cruel manner.

39. In a nutshell, I am satisfied that there is overwhelming evidence by the prosecution to find accused culpable of murder of the deceased and accordingly do convict him of the offence of murder as charged.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 3<sup>RD</sup> DAY OF OCTOBER, 2024**

**J. N. ONYIEGO**

**JUDGE**

