



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE (M) NO.5 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JARSO SORA WAKO.....ACCUSED

J U D G M E N T

The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that the accused on the 7th day of November, 2018 at KBC area in Saku Sub County within Marsabit County murdered HS.

The prosecution summoned ten witnesses in support of its case. **PW1 Halake Hersi** testified that on 7.11.2018 his children were returning home from herding his cattle when he saw them holding someone. The person the children were holding appeared abnormal as he was not talking even if they talked to him. He handed over that person to the accused so that the accused could take him to the A.P. post. PW1 knew the accused before that day and it is his evidence that the accused is a Kenya Police Reserve (KPR). Later some people went to his place looking for a lost person. The deceased's body was found and it had injuries. The deceased's body had injuries.

PW2 SH is a brother to the deceased. He informed the Court that the deceased was epileptic and had mental and hearing problems. The deceased used to rest near a shop not very far from their home. The deceased did not return home on 7.11.2018. They searched for him for five days. The local radio station was informed to announce the disappearance of the deceased. The body was recovered on the fifth day. Some children together with PW1 informed them that they had handed over the deceased to the accused. The deceased's body was found in some shrubs and had head injury.

PW3 KOSI HALAKE is the chief for Quitakarma location. On 11.11.2018 he was called by the assistant chief **Alex Ali Goresa** and requested to go to the accused's place. He went there and was informed someone had disappeared. Some children had handed over the lost person to PW1 who in turn handed him over to the accused. PW1 was present and stated that he had given the lost person to the accused. PW3 took the accused's rifle and handed over the matter to the APs. The deceased's body was later found in the forest. PW1 knew the accused as a KPR officer. The accused denied that he was handed over the deceased.

PW4 HUSSEIN WARKU WADE is a KPR officer. He was called by the area chief on 7.11.2018 at about 5.00pm and informed that someone was lost. He was in the group that went out to look for the deceased. They were informed by children that they had handed over the lost person to the accused. They went with PW1 to the accused's home. The accused denied that he had seen the deceased. The area chief went to the accused's home. The children and PW1 reiterated that they had given the deceased to the accused. The accused was arrested and taken to the AP camp. They later recovered the deceased's body. The body had been pushed in a ditch but the back side was covered with grass. PW4 knew the accused as a KPR officer. The deceased had mental problems.

PW5 APC King'ori Mwaniki was stationed at the Quita Korma AP camp. On 11.11.2018 at about 5.00pm the chief, his assistant and Burji elders went to the AP camp with the accused. He was informed that the accused was handed over the lost person on 7.11.2018 to take to the AP camp. From where PW1 alleged to have handed over the deceased to the AP camp is less than 50 metres. The accused denied that that deceased was handed over to him. The accused was handed over to the Police. The deceased's body was found on 12.11.2018 a few metres from the AP post. PW5 took the accused's rifle serial number FN 2333 together with twenty (20) rounds of ammunition. PW5 knew the accused was a KPR officer.

PW6 Alex Mudindi Mwandawiro is an assistant Police superintendent. He is based at the Nairobi DCI forensic ballistic laboratory. He produced a report prepared by his colleague **Alex Kimeli Chirchir**. They received a rifle FN 2333, twenty rounds of ammunition, a spent cartridge and a fired bullet core. Alex Chirchir randomly test fired three rounds of ammunition out of the twenty rounds using the rifle. The examination revealed that the rifle was mechanically sound. The three test fired rounds of ammunition had similar markings to the spent cartridge that had been marked as CI. A conclusion was made that the spent cartridge was fired from the rifle FN 2333. The bullet core was found not suitable for any comparative examination.

PW7 PC Abdullahi Jillo is a scene of crime officer. On 12.11.2018 at around 11.00am he was requested by Corporal **Samuel Gichuki (PW9)** to take photographs of the scene. He took 37 photographs at the scene and had them processed.

PW8 Dr. Steve Makori Serete is based at the Marsabit County Referral Hospital. He went to the scene with his colleague Dr. Imbusi who was his lead pathologist. The body had started decomposing. The body was partly buried. The body had an entry wound on the back of the head and an exit wound on the face. The deceased had bruises on the chest, both elbows and wrists. They concluded that the cause of death was excessive bleeding due to a gunshot wound. Blood samples were taken for further analysis.

PW9 Corporal Samuel Gichuki was based at the Marsabit Police station. He investigated the case. The accused was taken to the station on 11.11.2018. Initially they wanted to charge the accused with kidnapping. When the deceased's body was found the accused was charged with murder. His investigations found that the deceased was handed over to the accused so that he could take him to the AP post. The deceased was found to be confused. On 12.11.2018 the deceased's body was found buried partly in a shallow grave. The deceased's family identified the deceased's green sandals and a yellowish multicoloured yellow/green trouser. The body had a wound on the head. There was a pool of blood about 30 metres from the grave. He recovered a cartridge of 7.6 by 5.1mm near the shallow grave. He took the accused's rifle, twenty rounds of ammunition, spent cartridge and a piece of metal for ballistic examination. The examination confirmed that the spent cartridge matches the twenty (20) rounds of ammunition issued to the accused. It is his evidence that the accused had been issued with the firearm, which had a magazine that holds twenty (20) rounds of ammunition. The accused had been issued with thirty (30) rounds of ammunition.

PW10 Corporal Kennedy Onyango Otieno was based at the Marsabit Police station. He was part of the investigation team together with PW9. He also joined the search party. The case was investigated by the Criminal Investigation Section. He obtained exhumation orders from the Court when the deceased's body was found. One of the witnesses who informed them that they had handed over the deceased to the accused was a 17-year-old herder who was not traced to testify. PW10 produced the statement of **JS**. The accused is a KPR officer and had been officially issued with an FN rifle and ammunition. When the accused was arrested the magazine had twenty (20) rounds of ammunition. The deceased was from the Burji community while the deceased was from the Borana community.

The accused tendered sworn defence. He testified that he is a farmer and a herder. He is a KPR officer. On 7.11.2018 he went out of Marsabit town with three other people as there was tension in the area. From 7th to 10th of November, 2019 he was doing security work during the day and at night at a place called Garqarsa. Most people in the manyatta had run away due to tension between the Gabra and the Borana community. He is from the Borana community. He denied that he met the deceased on 7.11.2018. He was framed. He used to leave the manyatta in the morning. He denied that the deceased was handed over to him. The chief asked him if he had seen the deceased. He told the chief that he had not seen the deceased. He was arrested and taken to the AP camp.

The accused further testified that sometimes in October 2018 on a date he cannot recall he was in the company of about six people. They found a mad man in the forest. He was handed over to that person to be taken over to the Police. He called AP officers and handed over the person to the Police. He is not aware of the second incident. He was issued with an FN rifle officially and did not use the weapon on 7.11.2018. He had 20 rounds of ammunition and returned the rifle with the ammunition intact. PW1 had a grudge with him. The rifle he was issued with has serial number 2233. He was initially issued with thirty (30) rounds of ammunition. He returned the rifle with twenty (2) rounds. He used ten (10) rounds. PW1 is from the Borana community. He did not know the deceased.

DW2 Abduba Haro lives at Garqasa. He is a farmer. He is a resident of manyatta Haro together with the accused. On 7.11.2018 up to 10.11.2018 he was with the accused. There was tension in the area. They were guarding the manyatta. He was present when the accused was arrested. He is not a KPR officer. They were four people guarding the manyatta. They used to stay together during the day and sleep together at night.

DW3 Guyo Wario comes from Manyatta Haro. On 7.11.2018 he was with the accused. They stayed together up to 10.11.2018 as there was tension in the area. They used to leave in the morning and return in the evening. He did not see the deceased being handed over to the accused.

DW4 Guyo Boru also lives in Manyatta Haro. Between 7th to 11th November, 2018 they were with the accused. They used to be together during the day and evening. They used to sleep in the same place. They were assisting in keeping security as there was tension in the area.

Mr. Nyenyire Counsel for the accused submitted that the prosecution evidence does not support the charge. The evidence of PW1 is unreliable. All the three defence witnesses testified that they were with the accused at the time the murder is alleged to have occurred. There is doubt as to whether the accused was at the scene of crime. By the time the body was found one cannot say for how long it had stayed. The accused is not in good terms with PW1 and they even don't talk to each other. No fingerprints, DNA or the accused's hair connects the accused to the crime scene. The evidence is circumstantial. There is no evidence that the accused wanted to harm the deceased. The deceased was from the Burji Community while the accused is from the Borana community. There is no animosity between the two communities.

Counsel for the accused relied on the case of **REPUBLIC V KIPKERRING ARAP KOSKEY & ANOTHER 16 EALA 135** where the court held inter alia:-

“In order not to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than of his guilt.”

Counsel further relies on the case of **JOAN CHEBICHII SAWE –V- REPUBLIC, CR APPEAL NO.2 OF 2002** where the Court of Appeal held:-

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The most prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of May Wanjiku Gichira VS Republic (Criminal Appeal No.17 of 1998(unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

It is submitted that no prosecution witness saw the accused committing the offence. PW1 was the last person to be seen with the deceased and should be interrogated further.

Mr. Nyenyire further maintain that the ballistic report cannot be the basis of a conviction. The accused was issued with 30 rounds of ammunition. The magazine had 20 rounds and he accounted for the other ten (10) rounds that had been previously spent. The accused therefore fully accounted for the ammunition issued to him. The charge sheet does not state whether the weapon used was for or G3 which have different firing mechanism. The prosecution did not prove its case beyond reasonable doubt.

Mr. Ochieng, Prosecution Counsel submitted hat the prosecution proved its case beyond reasonable doubt. Although the evidence is circumstantial it leads to the accused’s guilt. The evidence that the deceased was handed over to the accused while alive is credible. The ballistic evidence connects the accused to the crime. Tribal animosity is the motive. The alibi defence does not capture the time of the offence.

The Prosecution evidence does prove that the late HS was seen alive on 7.11.2018. his brother PW2 testified that the deceased did not return home on 7.11.2018. the evidence of PW2 also confirms that apart from having mental problems, the deceased was also epileptic and had hearing problems. Between 7th November and 11th November, 2018 the deceased’s relatives started looking for him but all in vain. His body was found partly burned in a shallow grave on 12.11.2018 before mid-day. **PW7 PC Abdullah Jillo** went to the scene and took photographs at about 11.00am. The deceased therefore died between 7.11.2018 in the evening and 12.11.2018. PW10 produced the witness statement of **JIRMO SARR ALAE** who did not testify. According to that statement, the cattle herders met the deceased at around KBC area in Marsabit at about 6.00pm. This is in line with the evidence of PW1 that they were taking their cattle to the cowshed. The evidence does prove that the deceased was killed and did not commit suicide. The postmortem report dated 12.11.2018 indicate that the deceased died of excessive haemorrhage due to gunshot wound on the head. The gunshot entered from the back of the head and exited through the facial part. There is no doubt that the deceased was killed. He could not have killed himself and thereafter burned himself in the shallow grave. PW9 testified that there was a pool of blood some metres from the shallow grave. The implication of this evidence is that the death occurred where there was the pool of blood and the body was then buried at the shallow grave.

The question for determination is whether the prosecution evidence does prove that it is the accused who killed the deceased. Counsel for the accused contend that there was no motive for the killing. There is no animosity between the Boranas and the Burji community while the accused is a Borana. It is equally submitted that the evidence is circumstantial as no one saw the accused committing the offence.

From the prosecution evidence, it is established that no one witnessed the killing. The deceased’s body was found about five days from the date he was last seen on 7.11.2018. According to PW8 the body had started decomposing and maggots had started attacking the body. It is evident that the deceased could not have been killed on the 12th of November, 2018. The prosecution evidence is circumstantial. There are parameters laid down for the Court in the event that the prosecution evidence is purely circumstantial. In the case of **SIMON MOSOKE V R (1958) E.A 715** the Court of Appeal for Eastern Africa held inter alia at page 716,

(iii) in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.

In the case of **KARIUKI KARANJA –V- REPUBLIC [1986] KLR 190**, the Court of Appeal held:-

2. In order for circumstantial evidence to sustain a conviction, it must point irresistibly t the accused and in order to justify the inference of guilt on such evidence, the inculpatory fact must be incomparable with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.

Similarly, in the case of **PAUL –V- THE REPUBLIC (1976-80) I LKR, 1622**, the Court of Appeal stated at page 1624 as follows:-

In the case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find the at the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than of guilt; see *Simoni Musoke V R [1958]EA 715* where the following extract from *Teper V R [1952]AC 480, 489* was quoted [1958]EA at page 719)

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

The following salutary statement appears in *Taylor or evidence (12th Edn) pages 66 and 67: remains for the jury to perform. They must decide, not whether these facts are consistent with the prisoner’s guilt, but whether they are inconsistent with any other rational conclusion; for it is only on this last hypothesis that they can safely convict the accused. The circumstances must be such as produce moral certainty, to the exclusion of every reasonable doubt. Moral certainty and absence of reasonable doubt are in truth one and the same thing.*

In the case of **JAMES MWANGI V REPUBLIC (1983) KLR 327**, the Court of Appeal held inter alia:

1. In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.

2. In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other coexisting circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature of tendency and should not have been acted on to sustain the conviction and sentence of the accused.

The Court of appeal reiterated the position on circumstantial evidence in the case of **Mwangi V Republic (1983) KLR,522**. It is therefore established that for a conviction to be based on circumstantial evidence the incriminating evidence should not be capable of any other explanation other than the accused's guilt. There should be no other co-existing set of circumstance, that can be used to explain the offence and therefore raise doubt on the accused's guilt. In other words, there should be no parallel hypothesis that can be used to explain how the offence the accused is facing was committing. The existence of such a hypothesis would raise doubt on the prosecution case and such doubt has to benefit the accused.

The prosecution evidence is that the deceased was found by some children who were herding cattle. PW1 met the children and saw the deceased. PW1 testified that he interrogated the deceased and concluded that he was not of sound mind. It was around 6.00pm. the children were taking the cattle home. PW1 testified that he knew the accused before that day. The accused testified that he knew PW1 and they were not in talking terms. Therefore PW1 and the accused knew each other. PW1's evidence is that the accused went to where they were and since he knew the accused was a KPR, they handed the deceased to the accused to take to the AP post. According to PW5 APC Kingori Mwaniki, the deceased's body was found a few metres from the AP post. PW5 also testified that from where PW1 alleged to have handed over the deceased to the accused and the AP post is about 50 metres.

The accused denied committing the offence. The accused testified that between 7th November, 2018 to 10th November, 2018, there was tension in the area and they were guarding the manyattan. Most people in the manyattan had left. They would leave the manyattan in the morning and return in the evening. His evidence is supported by that of DW2, DW3 and DW4. The three defence witnesses testified that they were with the accused between 7th and 10th of November, 2018. They stayed together the whole day and night.

From the evidence of PW1, I am satisfied that PW1 met the deceased on 7.11.2018 in the evening. I am equally satisfied that PW1 handed over the deceased to the accused. Even if the accused and PW1 had their disagreement as per the defence evidence, the facts of the case are that the deceased was alive on 7.11.2018 and PW1 met him. Further, PW1 has no reason to testify that he handed over the deceased to the accused. PW1 told PW3, the chief that he had handed the deceased to the accused on 7.11.2018. By that time PW1 was not aware that the deceased had been killed. By telling the searching team that the deceased was handed over to the accused, PW1 was not driven by any malice. I saw PW1 testifying in Court. He is an elderly man who testified that he had no grudge with the accused before the incident. The grudge has been caused by the case as per PW1's evidence during cross examination.

I am satisfied that the deceased was handed over to the accused on the 7.11.2018 at around 6.00pm. The prosecution evidence does prove that the deceased did not return home on 7.11.2018. The evidence of PW2 is that the deceased used to rest near a shop not far from home. The family expected him to go back home. They got worried when he did not return. The same situation occurred on 8th, 9th, 10th and 11th November, 2018. The deceased was nowhere to be found. His body was found on 12th November, 2018. The body had started decomposing meaning he was killed before 12.11.2018. the accused denied ever meeting the deceased on 7.11.2018. The alibi evidence is displaced by the evidence of PW1. I find that evidence of PW1 quite reliable. PW1 met the deceased, concluded that he deceased was mentally unstable and confused. PW1 handed over the deceased to the accused so that he could have taken him to the nearby AP post. The statement of JS corroborates that line of evidence. Similarly, the deceased's body was recovered not very far from where PW1 alleges to have handed over the deceased. According to PW9, the accused's home is about two (2) kilometres from where the deceased's body was found. The Prosecution evidence does place the accused at the scene of crime. PW1 recognized the accused and there is no issue of mistaken identity.

Apart from the evidence of PW1 there is the ballistic examination report dated 3.1.2019. PW6 testified that the FN rifle serial No.2333 that was issued to the accused together with the twenty (20) rounds of ammunition, one spent cartridge and one bullet lead core were sent for examination. The rifle was marked as A1, the 20 rounds of ammunition were marked as B1-B20. The spent cartridge was marked as CI while the bullet core was marked as DI. The examination report reads partly as follows:-

Three rounds picked at random from the lot in exhibits (A1-A20) were successfully test fired in exhibit (A).

From the examination above, I formed the opinion that Exhibit (A) and Exhibits (B1-B20) are all capable of being fired and that they are a firearm ammunition respectively in terms of Firearms Act Chapter 114 Laws of Kenya.

Exhibit (C) is one expended cartridge caliber 7.62x51mm with markings consistent with those fired in FN rifles.

Comparative microscopic examination of Exhibit (C) in conjunction with the three test cartridge cases fired in Exhibit (A) revealed sufficient matching breech face markings, ejector markings and firing pin indentation markings to enable me to form the opinion that Exhibit (C) was fired in exhibit (A) the FN rifle S/no.2333.

The prosecution produced an extract of the arms movement record. The accused was issued with rifle FN 2333 with 30 rounds of ammunition. Counsel for the accused submitted that the accused accounted for the other ten (10) rounds of ammunition. Apart from the record showing the issuance of the rifle and the 30 rounds of ammunition, there is no record of how the ten (10) rounds were spent. The

accused's copy of identity card was produced. The rifle was withdrawn by PW3 and it is the same rifle that was subjected to ballistic examination. The ballistics report concludes that the spent cartridge that was recovered at the scene by PW9 was fired from the FN 2333 that had been issued to the accused. The explanation for that conclusion is that the spent cartridge was subjected to microscopic examination and compared to the markings of the three randomly picked rounds of ammunition. The spent cartridge exhibited similar markings to those found in the three test fired rounds of ammunition. The ballistic examination evidence is independent evidence and cannot be held as having been conducted with a view to implicate the accused. The ballistic examiner did not know the accused. The conclusion is that the spent cartridge found near the shallow grave was fired from the FN 2333. A photograph was produced showing the spent cartridge. The photograph was taken at the scene. The certificate of photographic prints dated 8.4.2019 by PW7 state that photographs 22-29 show the spent cartridge, blood teeth and a piece of bullet found a few metres from the deceased's body. The spent cartridge was therefore recovered from the scene. Although Mr. Nyenyire is of the view that the spent cartridge could have been fired from a G3 rifle, the evidence on record proves that it was fired from the FN rifle issued to the accused. There is no comparative evidence from spent cartridges fired from a G3 rifle although the two rifles (FN 2333 and G3) use similar rounds of ammunition.

The accused tendered an alibi defence. He denied having been handed over the deceased by PW1. DW1 to DW4 testified that they were with the accused between 7.11.2018 to 10.11.2018. The incident occurred on 7.11.2018 in the evening. There is no evidence that there was tension at the KBC area on 7.11.2018. The accused was not required to prove his innocence. He could have opted to remain silent. He called witnesses with a view to disprove the prosecution evidence. I do find that the prosecution evidence is not shaken by the defence evidence. The defence evidence does not raise doubt on the prosecution case.

From the evidence on record, it is established that the late HS was killed on 7.11.2018. He did not return home on that date yet PW1 met him on that day at around 6.00pm. The prosecution evidence does establish that the deceased was handed over to the accused by PW1. The deceased's body was found buried in a shallow grave on 12.11.2018 some metres from where PW1 handed him over to the accused. The evidence also proves that the accused was issued with an FN rifle serial number 2333. Ballistic examination established that a spent cartridge found at the shallow grave where the deceased was buried was fired from the FN 2333 rifle. Although the evidence is circumstantial, it does irresistibly point to the accused's guilt. There is no any other explanation that the deceased was seen alive on 8.11.2018 and could have been killed by the other people on 8.11.2018 or 9.11.2018, 10.11.2018 or even 11.11.2018. People went out to search for the deceased from 7.11.2018 but did not see him. I do hereby find that the circumstantial evidence is incompatible with the accused's guilt. It is the accused who killed the deceased. The deceased must have been shot from behind as the entry wound is from the back of the head. The prosecution need not prove the motive for the crime (see **Chogo V Republic (1985) KLR I**) the deceased's body was buried in a shallow grave. His relatives properly identified him and there is no doubt that the body found in the shallow grave was that of **HS**. I am satisfied that the prosecution has discharged the burden of proof. The evidence does prove beyond reasonable doubt that it is the accused who killed the deceased.

The upshot is that the accused is found guilty of the offence of murder contrary to section 203 as read with section 2014 of the Penal Code and is convicted of that offence accordingly.

Dated, Signed and Delivered at Marsabit this 22nd day of January, 2020

S. CHITEMBWE

JUDGE