



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 1 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

WARIO LIBAN.....ACCUSED

JUDGEMENT

1. The accused person is charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya.
2. Particulars being that on 3/1/2016 at Lagdima Location, Habaswein Sub-County, Wajir County, murdered Ibrahim Hussein.
3. He pleaded not guilty and the matter went into hearing.
4. It is worth noting that the proceedings in this matter proceeded as from 30/10/2018 without accused vide Dullu Judge's ruling/order of 30/10/2018. The back ground of the order aforesaid being that on 4/10/2018 when case came for further hearing before my brother Dulu J, the accused on ground of not understanding of Borana language and that he would only understand Amharic language of Ethiopia started interjecting during application for adjournment by the prosecution because there was a witness who was not available. Both counsels agreed matter be adjourned.
5. The accused produced a white folded piece of foolscap paper, gave it to his advocate which contained some substance believed to be bhang.
6. Meanwhile he lifted a glass soda bottle and threw it in the direction of the judge and it hit the upper glass part of the door to the chambers and broke the glasses and glass soda bottle also broke into small pieces all of which spread in the Judge's chambers which disrupted court's proceedings.
7. Accused was also facing other violent crimes in lower court including breaking glass window of Government vehicle ferrying him and other prisoners.
8. Further he was disrupting proceedings when proceedings were ongoing thus the court weighed all options and excluded him from being present during the trial.
9. On 30/4/2019 after I took over the matter herein from Dulu J who was on transfer, the accused was produced for direction. When he appeared he told court that he was annoyed by the Judge thus he threw the bottle to him. He shouted in court saying that if annoyed again he will do the same.
10. The directions were given for matter to proceed from where it had reached.
11. The prosecution called four witnesses to prove its case. The postmortem was produced by PW4 investigating officer by consent of both sides. The same showed the cause of death was due to head injuries.
12. PW1 Assistant Chief Hadado South Location said deceased was his uncle. He stated that on 4/1/2016 at 4.20pm he got information of the deceased's death from one Harun brother of the deceased.
13. He made report to Habaswein Police Station and the police officers from the same station visited scene guided by the son of deceased one Mahat. He was also present and they found decomposing body of the deceased. It had injuries on the front head and back. The deceased

clothing were blood stained.

14. There was also walking stick, water jerrican and footprint at the scene. He identified jerrican which was produced in court. The police then took the body to the mortuary. He did not know the accused.

15. PW2 Adan Ibrahim Yussuf is son of the deceased and brother to Mahat. He testified that he knew accused as herdsman employed by his late father.

16. On 4/1/2016 at 4.20pm while at Bulla Kassab where his mother lived he learned his father had not been seen since previous night nor was accused seen. They were missing. He went to scene and saw his father lying on the ground in the bush dead.

17. Mahat brought the goats home. It is Mahat who telephoned him when he saw his father's body. At the scene the witness saw injuries to the head, abdomen, back and stab wound. There were human footprints all over.

18. He saw jerrican herdsman (accused) was always carrying and a stick for herding goats at the scene. One of his young uncle Harun came to the scene and so is the police. The police carried the body to the mortuary. Accused who used to come back home with animals was nowhere to be seen. He was later arrested at Endera.

19. PW3 minor Myran Osman testified that, she was granddaughter of deceased. She testified that on 2/1/2016 at 4pm she went home with deceased from Bulla Kassab. The herdsman was not at home as he had gone to graze animals.

20. He came with goats at 5pm. He put animals in their shed. Witness gave him Ugali and milk meal and later slept and woke up next morning.

21. In the morning the deceased was milking goats and accused was collecting goats' kids and placing them in their sheds. The accused requested deceased an off but deceased declined to grant same as he had a mission to go in Habaswein that day but said accused could go next day.

22. The deceased removed goats from their shed and accused followed him carrying rungu (club), water jerrican and knife. Witness remained at home. They headed to the grazing grounds. Witness went to their other home at Bulla Kassab and arrived at 10am.

23. She stayed there upto 5pm and returned back to Bulla Musa. She found nobody. While there a stranger brought goats at home. He never talked to her. She went to neighbour to call her uncles.

24. She told them a stranger brought goats but both grandfather and herdsman were nowhere to be seen so she asked them to come. Her uncle Adan and Mahat came within 30 minutes.

25. She remained home with Mahat till morning as Aden went to the other home Bulla Kassab. The next morning Mahat took goats for herding and witness went to Bulla Kassab.

26. At 4.30pm she returned to Bulla Musa where she found Mahat who told her the grandfather had died. Mahat left to go to the scene of crime and he identified the jerrican.

27. PW4 Corporal Isaack Sisika the investigating officer testified that he got report on 4/1/2015 at 4.30pm of the death of Ibrahim Yussuf who was found lying in the bushes in Lagdima Location.

28. With other officers proceeded to the scene. They viewed the body and observed stab wound in stomach, back, injuries to the head. There was a water jerrican which deceased's son Mahat and Aden identified as property of the accused.

29. There was walking stick identified by same persons as property of the deceased. The body was taken to Habaswein Hospital Mortuary for postmortem conducted by Dr. Ibrahim in witness' presence.

30. The body was released to the relatives for burial. They searched for suspect and on 6/1/2016 he was arrested in Eledera Location in Isiolo County as he was escaping to home in Moyale and was later charged. He was arrested 70km from Habaswein.

31. The prosecution closed their case at this stage and the court ruled the accused had a case to answer.

32. In his sworn defence the accused stated "*I killed the deceased and I was jailed.*"

ISSUES, ANALYSIS AND DETERMINATION

33. The court is supposed to establish whether the evidence on record meets the threshold of prove of murder. The elements to be proved under the provisions of Penal Code are:-

- **That death occurred.**
- **The cause of death was due to illegal act of the accused.**

· **The accused had malice aforethought.**

34. On the first element, the postmortem admitted by consent confirmed deceased died. PW1, PW2 and PW4 saw the deceased body with injuries on the stomach, head, back. The facts that death occurred is not disputed.

35. The second element is whether the accused caused the illegal act which caused death of the deceased. PW3 saw accused and deceased go to the herding grounds. Accused carried knife, jerrican and the rungu (club).

36. Before going the accused had sought an off from the deceased who was his employer but same was rejected. They both never returned that day. The accused disappeared and never returned animals the way he used to do after herding and he was not off duty.

37. He was to be arrested later 70km from the area headed to his home Moyale. He never told anyone of his desertion of the work. The deceased body was found at the bushes with a jerrican which was identified as owned by the accused at the scene where body laid.

38. That is the same water jerrican which PW3 saw accused carry when he went to herd together with the deceased. The accused on his defence says he killed the deceased. He left his water Jerrican he carried when they went to herd with deceased at the scene of crime lying next to the deceased body.

39. Thus circumstantial evidence and accused admission leaves this court with no option but to hold that the accused caused the illegal act which caused death of the deceased.

40. As to whether he had malice aforethought, through cross examination there was inference that death was caused by fight between accused and deceased over refusal to grant accused off and failure to pay salaries unpaid. Accused failed to offer that explanation in his defence. He just said he killed deceased but never explained the circumstances of the killing.

41. The injuries noted were grievous harm. They are apparently inflicted with intention to kill or occasion such grievous harm.

42. That the court holds that the accused inflicted the same with malice aforethought. Thus the offence of murder has been proved beyond reasonable doubt and accused is thus found guilty and convicted of murder accordingly.

DATED, SIGNED AND DELIVERED AT GARISSA THIS 20TH DAY OF FEBRUARY, 2020.

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C. KARIUKI

JUDGE