



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL CASE NO. 3 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

AYUB ABDI.....1ST ACCUSED

AHMED MOHAMED.....2ND ACCUSED

MOHAMED ALI.....3RD ACCUSED

JUDGEMENT

1. The accused persons were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on 15th April, 2017 at Kakuma Refugee Camp in Turkana West submissions-county within Turkana County jointly murdered **MOHAMMED ABDI HIRSI**.

2. On 14/6/2017 they took their pleas before Riechi J, and a plea of not guilty was duly recorded for them. On 20th June, 2017 their trial commenced before the said Judge who heard and recorded the evidence of five (5) prosecution witnesses that is to say PW1 to PW5 before proceeding on transfer. On 2/10/2018 the matter was placed before me for directions under **Sections 200** and **201 (2)** of the Criminal Procedure Code and wherein directions were issued that the matter proceed from where it had reached. In the meantime the accused persons through their Advocate on record on 9/8/2018 wrote to the Hon. Chief Justice that Hon. Justice Riechi be allowed to proceed with the trial to its logical conclusion, which his Lordship conceded to.

3. After several false starts at having the matter heard by Justice Riechi, the accused persons through their letter dated 26/4/2019 wrote to the Hon. Chief Justice requesting him to now allow me conclude the matter and having complied with the provisions of **Order 201(1)** as read with **Order 200(1)** on 3/7/2019 the matter proceeded for further hearing before me for the conclusion of the prosecution case and the defence hearing, having on 4/7/2019 established that a prima facie case had been established to enable me put the accused persons on their defence.

4. For record purposes I did not have the advantage of hearing and seeing five (5) prosecution witnesses but have read their recorded testimony for purposes of this judgment.

PROSECUTION CASE.

5. **PW1 MARIAM JAMA**'s evidence on behalf of the prosecution was that on 12/4/2017 while in the house of PW3 heard noise of people fighting and when they went out to check saw four boys beating a person using fists. She identified the person who was being beaten as the deceased. She stated that she saw the 2nd accused whom she asked why they were beating the deceased and he replied that it was not her business. It was her evidence that the other three boys ran away. On 15th April, 2017 at 8.40 p.m. while on her way to buy medicine, she once again saw six people including the 2nd and 3rd accused beating the deceased. The next day she heard that he had died. It was her evidence that she did not know the 3rd accused.

6. In cross examination she stated that on 12/4/2017 when she witnesses the first fight, it was at night and that she ran away from the scene since the police were coming. On 15/4/2017 she stated that she saw seven people beating the deceased some of whom were wearing masks to conceal their faces. She stated that she was able to recognize the 3rd accused thought it was at night.

7. **PW2 ABUKAR OMAR MOHAMED** an uncle of the deceased stated that on 12/4/2017 the deceased told him that there were people who wanted to kill him. He left him at the hotel and the next day saw him with injuries on the ear and head, which he said had been caused by **AHMED MOHAMED** 2nd accused and **MOHAMED ALI** 3rd accused. It was his evidence that another mzee called Ismael told him that he had seen the deceased being assaulted. He advised the deceased to report to the police. In cross examination he confirmed having not

witnesses the accused persons killing the deceased and further that the deceased had been imprisoned for two years before then.

8. PW3 SAMIA YUSH WARSAME stated that she was with PW1 when they saw four boys beating the deceased on 12/4/2017 at 8.00 p.m. It was her evidence that she knew the three of the boys:- 1st, 2nd and 3rd accused but did not know the 4th accused. The police went to the scene and the boys dispersed. The following day she saw people including PW2 at the hotel making noise and discussing the events of the previous night and told them that she had seen the 3rd accused beating the deceased. In cross examination she stated that she was about 4-5 meters away from the scene and was able to see since there was light from a bulb outside her house.

9. PW4 PC BENARD KILUNDU stated that on 12/4/2017 while at the station, the deceased at 9.30 a.m. made a report that he had been assaulted the previous night at 10.00 p.m. by a gang of Somali Youth popularly known as 'super power'. He was then advised to seek medical attention. On 13/4/2017 the deceased went back to the station and stated that he knew those who assaulted him physically and had with him a P3 form filed at Kakuma Mission hospital. The deceased did not go back to the police station until 15/4/17 when he reported that he had been admitted at Kakuma Mission hospital and since there were ODM nominations he was assigned to the polling centre and did not deal with the case until 16/4/17 when he received information that he had died. He later arrested the accused persons when they reported to the police station.

10. In cross examination he stated that he was the investigating officer on the assault case which was reported on 11/4/2018 and that there was no names of those who assaulted the deceased in the initial report. He confirmed that there were two suspects who were arrested and released.

11. PW5 ROY SITUMA a clinical officer at Kakuma Mission Hospital testified that he examined the deceased on 13/4/2017 who had injuries on the chest and neck with a deep cut on the forehead. He had strangulation marks on the neck, bruises on the front and back of the chest caused by a blunt object. **PW6 DR. KINARA S.** produced post-mortem report on behalf of Dr. Simiyu where the cause of death was stated to be severe head injury. In cross examination he stated that the injuries were inflicted before 14/4/17 since he had a P3 form filed on 13/4/17 where the injury was classified as maim.

DEFENCE CASE

12. When put on their defence the 1st accused gave unsworn statement to the effect that on 16/4/17 he was called on phone and informed that his mother was at the police station and when he went to see her he was arrested and locked into the cell until 4/5/17 when he was charged. The 2nd accused was also arrested when he went to the police station to see his mother. The 3rd accused stated that on 16/4/17 he was called by his father to go home and when he got home was informed that his mother had been arrested. The next day he went to the police station and was arrested.

SUBMISSIONS

13. On behalf of the prosecution it was submitted that the accused persons were identified by prosecution witnesses. It was submitted that PW1 stated that there was moonlight which enabled her identify one of the accused persons which was corroborated by PW3 whose evidence was that she knew the accused persons and therefore her identification was that of recognition.

14. On behalf of the defence it was submitted that the evidence of PW1 was contradictory having stated in her evidence in chief that she saw six people including accused 2 and 3 beating the deceased while in cross examination she stated that they were seven wearing masks to conceal their faces. This evidence was contradicted by PW3. It was submitted that according to PW4 the deceased had reported that he was assaulted on 11/4/2017 by a gang known as 'super power'. It was submitted that the alleged offence was committed on 15/4/17 while the prosecution case was that it was on 11/4/17 and that the deceased was attacked on both occasions by the same people. It was further submitted that the conditions prevailing on 11/12/4/17 were not ideal for positive identification for which the cases of **WAMUNGA v REPUBLIC [1989] KLR**, **NZARO v REPUBLIC [1991] KAR 212**, **KIARIE v REPUBLIC [1984] KLR 739**, **FREDRICK OTIENO JUMA v REPUBLIC [2016] eKLR** and **MORRIS GIKUNDI KAMANDE v REPUBLIC [2015] KLR** were submitted in support.

15. It was submitted that the accused persons took themselves to the police station which conduct was consistent with their innocence. It was further submitted that if the deceased had suffered serious injuries on 11/4/17 he would not have been somewhere away from home on 15/4/17 to be met by attackers. It was further contended that vital witnesses including those who rescued the deceased and took him to the hospital were never called to testify thereby raising doubt in the prosecution case.

ANALYSIS AND DETERMINATION

16. To sustain a conviction on a charge of murder, the prosecution is required to prove beyond reasonable doubt the following elements of the offence:-

a) The fact and cause of death.

b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.

c) That it was caused with malice aforethought as defined under Section 206 of the Penal Code.

17. The fact and the cause of death of the deceased is not in dispute. PW1 heard of the death of the deceased having witnessed him being assaulted on 12th and 15th of April, 2017. PW4 who had received the deceased at the station on 12/4/2017 on 16/4/17 received information that he had died. **PW6 DR. S. KINARA** produced post-mortem report in which he confirmed that the cause of death as severe head injuries. It therefore follows that the death and cause thereof was proved beyond reasonable doubt.

18. On whether the said death was caused by unlawful act on the part of the accused persons:- from the evidence on record, it is not very clear when the accused was first assaulted. From the evidence of PW1, he was assaulted on 12th April, 2017 at 8.00 p.m. This was corroborated by PW3 who had left him at the hotel only to find him the following day with injuries, having earlier told him that there were people who wanted to kill him. This evidence is however contradicted by that of **PW4 PC KULUNDU** who received him at the police station on 12/4/2017 with a report of having been assaulted the previous night at 10.00 p.m. as confirmed through the P3 form produced as PExh 1 'a'.

19. It is PW1 and PW3 who placed the accused persons at the scene of the first attack. It was PW1's evidence that she spoke with the 2nd accused while the others ran away. It was her evidence that they were using their fists to beat the deceased and that the deceased was rescued by the police. It was the evidence of PW1 and PW3 that they knew the three accused persons and therefore their identification was that of recognition. The issue which this court has to determine is whether the condition prevailing were suitable for positive identification of the accused person as was stated in the case of **REPUBLIC V TURNBULL & OTHERS [1976] 3 ALLER 549** and as applied in the case of **WAMUNGA v REPUBLIC (supra)** where it was stated:-

“It is trite law that where the only evidence against a defendant is evidence of identification on recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

20. In this case both PW1 and PW3 confirmed that it was dark and that the assailants fled when they saw an oncoming police car. PW2 had allegedly been told by the deceased that some people whom he did not name wanted to kill him and when he went to the police, the deceased indicated that he had been assaulted by people whom he knew only by physical appearance. He told PW4 that he was allegedly assaulted by a gang of Somali Youths popularly known as **“super power”**. No evidence was tendered to connect the accused persons with the said Somali group. There is also evidence on record that those who attacked the deceased wore face masks and therefore the possibility of an error in their identification is very high. The prosecution further failed to establish the motive on the part of the accused persons for causing the death of the deceased. I am therefore satisfied that the alleged identification of the accused person was not safe and free from error.

21. From the evidence of PW4 and the discharge summary it is clear that the deceased was admitted at Kakuma Mission Hospital from 13/4/2017 and discharged on 14/4/2017. According to the evidence of PW1 on 15/4/2017 she once again saw the deceased being assaulted at 8.40 p.m. by seven people and they were wearing masks to conceal their faces. She allegedly identified accused 2 and 3 who she described as short and fat. The issue which the court has to answer is how PW1 could have identified the accused persons if their faces were concealed.

22. Whereas there is suspicion of the involvement of the accused persons with the assault of the deceased on either 11th or 12th of April 2017, there remains a doubt as to whether they assaulted the deceased again on 15th of April, 2017 leading to his death and or whether the death of the deceased was as a result of the assault and injuries inflicted on 12th of April, 2017. There remains a doubt in the mind of the court on how the accused persons were identified as upon arrest the police failed to conduct an identification parade. Further very vital prosecution witnesses who would have joined the dots were not called to testify.

23. It is trite law that mere suspicion however strong cannot form a basis for conviction in a criminal trial and would therefore give the accused person the benefit of doubt and find and hold that the prosecution has failed to prove that the death of the deceased was caused by unlawful act on the part of the accused person beyond reasonable doubt and accordingly discharge and acquit the same.

24. The accused persons shall be set free forthwith unless otherwise lawfully held. The state has a right of appeal and it is ordered.

Dated, signed and delivered at Lodwar this 4th day of February, 2020

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J. WAKIAGA

JUDGE