



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE NO.8 OF 2017

REPUBLIC PROSECUTOR

VERSUS

ABDI GOLO WALDO ACCUSED

RULING

The accused is charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code, Cap.63 Laws of Kenya. The particulars of the offence are that the accused on the 15th day of November, 2017 at Moyale town in Moyale Sub county within Marsabit County murdered SALADO GEDO YABALLO.

The state called eleven witnesses in support of the charge. **PW1 AJIRA GOLO** is a resident of Moyale and a former wife to the accused. She was a friend to the deceased. She testified that she disagreed with the accused and returned to her parents. She kept her personal items at the deceased's place. She was in Ethiopia when she heard that the deceased had been killed. When she disagreed with the accused she stayed at the deceased's place for two days. It is her evidence that sometimes in September 2017 she visited her sister who had given birth in Butiye. The accused called her and warned her that she was married to him and not her sister. The accused promised to take action on her. She did not report the accused's threats to the Police.

PW2 GEDO YABALLO is the deceased's father. He retired as a Prison officer. On the 15.11.2017 at about 1.00pm he was at his Moyale home. The deceased who used to operate Mpesa business went home at about lunch time and later went back to her place of business. At about 5.30pm he went to the shops and met two people who informed him that his daughter had been killed and she was in the hospital. He went to the hospital and saw the body. The deceased was buried on the same day at about 8.00pm. She had several cuts on the head, behind the neck and on the left hand. The deceased was not married. It is his evidence that the accused used to disagree with his wife (PW1). Whenever that happened PW1 would run to the deceased's place. He told the Police that he suspected the accused due to his disagreement with his wife. The accused went to the prison camp and his father took him to the Police.

PW3 RASHID GEDO YABANO is a teacher in a secondary school and an elder brother to the deceased. On the 15.11.2017 at about 6.00pm he was at an autospare shop when he heard passersby stating that a lady had been killed at an Mpesa shop. He went to the scene and was told that the deceased had been taken to Moyale General Hospital. He went to the hospital and the doctor pronounced her dead. He identified her body to the doctor who performed the postmortem. It is his evidence that PW1 was a close friend to the deceased. He was later shown the panga that was used to kill the deceased. He does not know who killed the deceased. **PW4 DAHABO GEDO** is a sister to the deceased. On the 15.11.2017 she was in Isiolo when she was notified of the incident at about 10.00pm. She told the Court that sometimes in January 2017 she was in Moyale with the deceased when the deceased received a call. The deceased then told her that the caller was saying that if she did not produce PW1 he would take action.

PW5 NASIBO GUYO is a sister-in-law to the deceased. In September 2017 on a date she cannot recall she was with the deceased and PW1. PW1 called the accused and told him that she was with the deceased. The accused told PW1 that from that day on the deceased would be her husband since she was married to him and not the deceased. The deceased told her that she was worried and felt that she could be harmed. She did not know the accused before. **PW6 GOLO WALDO** is the accused's father. He did not know the deceased. He heard about the incident on 15.11.2017 at about 9.00pm. The Moyale Officer Commanding Police Station asked him for the accused's phone number. He gave out the phone number. In the morning the OCS told him that the phone number was not going through and asked him to take the accused to the Police station. He took the accused from the prison camp and handed him over to the OCS. It is his evidence that the accused's wife had left him and from that time the accused used to sleep at his friend's place at the prison camp. That is why he went to the prison camp to collect the accused. At times the accused used to sleep at home.

PW7 NOOR WAKO JATAN is a businessman in Moyale. He had employed the deceased at an Mpesa shop. On 15.11.2017 at 6.00pm he was in Moyale town. He heard that the deceased had been attacked. He rushed to the shop and found her injured. They took her to hospital but she died. The deceased had injuries on the head and neck. They recovered a panga in the shop and there was blood. He lost over Ksh.200,000 as a result of the incident. The incident occurred at about 6.00pm. He recovered about Ksh.2,000/= in the shop. The deceased

had worked for him for over five years. The deceased did not tell him that she had been threatened. He did not know the accused. The drawers in the shop were blood stained.

PW8 Dr. IBRAHIM MOHAMMED is a medical Doctor who was stationed at the Moyale district hospital. He performed postmortem on the deceased on the same day of 15.11.2017 at about 7.30pm. The deceased was about 23 years old. She had multiple deep cut wounds on the neck, face and shoulder. The wound on the face was below the left eye and extended to the ear. He did not open the body. He concluded that the cause of death was cardiopulmonary arrest due to e bleeding. **PW9 ALI ISAAK IBRAHIM** is a driver in Moyale. The deceased was his neighbour. He knows the accused who is a bus conductor. On 15.11.2017 at about 5.00pm he called the deceased in order to make some Mpesa arrangements so that he could pay his rent but could not reach her. He went to her shop and saw blood stains. He called her but there was no response. He then went to inform her family. In the evening he heard that the deceased was dead. He had not seen the accused for sometime. He did not see the accused at the deceased's shop on the material day. There are other shops near the deceased's shop. **PW10 ISMAIL YARROU ISAAK** is a Prison officer in Moyale. On the 15.11.2017 at about 6.00pm he was at the Prison camp. He saw people running towards the scene. He went there and saw the deceased being put in a vehicle. He had a sick relative at the hospital and he spent the night there. The accused used to visit his place for the last eight years and is his neighbour at home. The accused also used to sleep at his place at times. The accused knew where the keys used to be kept and would pick the keys and open the house. The accused was a bus conductor. He had disagreed with his wife. Even before getting married the accused used to visit PW9's place. It is his evidence that the accused slept at his place on 15.11.2017. He did not see the accused at the scene.

PW11 PC JULIUS TUM was based at Moyale Police station. He investigated the case. He came to know about the case on the 15.11.2017 when he was called by the Anti Crime Unit Officers and notified of the incident. He went to the scene and saw blood. There was also a panga soaked with blood. He was told that the victim had been rushed to Moyale district hospital. He collected the panga and went to check on the deceased. He was told that the deceased had passed on. The deceased had injuries on the neck, face and head. He asked PW8 who conducted the Postmortem to draw some blood from the deceased. The following day he prepared an Exhibit Memo for the panga and deceased's blood and sent them to the Government Analyst. The accused who was a suspect was taken to the station on 16.11.2017. The deceased's body was released to the relatives. The accused's finger prints were taken to Nairobi to be compared with those on the recovered panga. The results of that analysis were negative. He produced the fingerprints reports dated 22.11.2017. The blood on the panga matched that of the deceased. It is his evidence that the accused was taken to the station by his father. The accused was a suspect. The accused threatened his wife due to her relationship with the deceased. No one saw the accused killing the deceased. The incident occurred at about 6.30pm.

Mr. Biwott, counsel for the accused, submit that the prosecution evidence is hearsay. All the witnesses testified but no one saw the accused at the scene. The only allegation is that the accused's wife was a friend to the deceased and at one time he called his wife who was with the deceased and threatened her. If the accused wanted to harm anyone then it is his wife and not the deceased. The accused was taken to the police station by his father. The murder weapon had blood stains. The accused's fingerprints were taken for examination and did not match those on the panga. The accused did not participate in the alleged crime. There is no direct evidence linking the accused to the crime. The circumstantial evidence does not link the accused to the crime. The prosecution evidence does not prove the case beyond reasonable doubt. The circumstantial evidence favours the accused. The incident occurred at about 6.30pm at a busy place and no one witnessed the incident. No one saw the accused running away from the scene of crime.

Mr. Mwangangi, prosecution counsel urged the court to put the accused on his defence. Counsel submit that whereas there is no direct evidence linking the accused to the offence, there is abundance of circumstantial evidence. The fundamental question is why is the accused the only suspect. The deceased might have had disagreement with other people. However none of those people was linked to the murder. The question then is why the accused. The prosecution case meets the required threshold and the accused should be put on his defence so that he can give his side of the story. The case will not be complete until the accused gives his narrative of the story. The fact that none of the witnesses saw him at the scene or the absence of his finger prints on the murder weapon does not mean that he did not commit the offence. It is possible that he is good at covering his tracks. He was the prime suspect and that's why he was charged. There must have been something between the accused and the deceased that must have caused the death. The grudge that existed between the accused and his ex-wife cannot be a good reason to transfer that grudge to a third party.

The question for determination is whether the prosecution has established a prima facie case against the accused person. In the case of **BHATT -V- REPUBLIC, 1957 (E.A) 322**, the Court stated as follows:-

A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true, as WILSON J. said that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a "prima facie case," but at least it must mean one of which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

Similarly, in the case of **REPUBLIC V-WACHIRA(1975) E.A. 262, THE Court of Appeal for East Africa** held as follows:-

A court is only entitled to acquit at the stage if there is no evidence of a material ingredient of the offence or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself, could safely convict.

Section 306 (1) of the Criminal Procedure Code, Cap 75 laws of Kenya, states as follows:

(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

The Prosecution evidence does prove that the deceased was killed on the 15th day of December 2017 at Moyale town at about 6.00pm. the deceased was killed inside her place of work. No one witnessed the incident. The evidence proves that it was not very dark when the murder occurred. Its not clear who was the first person to see the deceased's body. The accused was not seen at the scene. His finger prints were taken for analysis and were not found on the murder weapon.

Mr. Mwangangi contends that the Court should hear the accused's side of the incident. Trial Courts do not place accused on their defence as a matter of formality or merely to hear their side of the incidents. It is important to note that the Court has to be satisfied that the prosecution evidence is sufficient enough to call upon the accused to defend himself. The court should be satisfied that in the event that no explanation is given by the accused in his/her defence, the likelihood of conviction is high. In the Tanzanian case of **R.V. JAGJIVAN M. PATEL & OTHERS (1) T.L.R 85** (cited in the case of **BHATT V REPUBLIC** (Supra) the Court stated as follows:-

“...all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that here is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

Does the evidence on record sufficiently calls for placing the accused on his defence? I am satisfied that the answer to the above question must be in the negative. Mere suspicion that the accused could have killed the deceased is not sufficient to place him on his defence. The accused can opt to remain silent and tender no evidence. There is no requirement that the Court should hear an accused's side of the incident. The accused may have nothing to say.

The evidence shows that the deceased was a friend to the accused's former wife. It is alledged that the accused was not happy with that relationship and at one time called his wife (PW1) and threatened her. PW4, the deceased's sister did not testify that when she was with the deceased, the accused called he deceased and threatened her. PW4 did not know who the caller was. The same applies to the evidence of PW5. According to PW5, the accused told his wife that she was married to the deceased and not him. These are normal issues in a marriage. The fact that PW1 was a friend to the deceased could not be the cause of death.

The evidence also confirms that the accused used to sleep at PW10's place. There is no evidence that the accused went to hide at PW10's place. He was taken to the Police station the following day by his father. Nothing unusual was found with him. He voluntary gave out his finger prints for analysis and the results were negative. None of the witnesses saw the accused at the scene. The evidence of **PW7, Noor Wako Jatan** confirms that money was lost from the M-Pesa shop where the deceased was working. It is possible that the deceased was killed by robbers who took over Ksh.200,000. No money was found with the accused.

I am satisfied that the Prosecution has not established a prima facie case that calls upon the court to place the accused on his defence. It does not matter that the accused was the main suspect. There is no evidence linking the accused to the offence. The prosecution should not expect the court to place the accused on his defence in the hope that the accused will incriminate himself. Article 50(L) allows the accused not to give self incriminating evidence. He can decide to keep quite as provided under Article 49 of the Constitution.

I do find that this is a perfect case where the prosecution evidence falls short of the required standard. No prima facie case has been established. There is no need of placing the accused on his defence. The accused is found not guilty of the offence of murder as charged and is hereby acquitted of the charge. He shall be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Marsabit this 12th day of March, 2019

S. CHITEMBWE

JUDGE