



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE NO. 7 OF 2016

REPUBLIC.....APPLICANT

VERSUS

HAWO IBRAHIM.....RESPONDENT

JUDGEMENT

The accused person is charged with the offence of murder Contrary to Section 203 as read with section 204 of the Penal Code, Chapter 63 laws of Kenya. The particulars of the offence are that the accused on the sixth day of April 2011 at Manyatta Lami sub location, Moyale Sub County within Marsabit County murdered Bukei Osman Abdi. The accused denied the charge and the case proceeded to full hearing. The prosecution summoned 8 witnesses in support of its case.

PW1 ANDREW ABDI AYALA is the chief of Lami location in Moyale Sub County. On the 6th of April 2011 at about 2.00pm he heard people screaming saying that someone had been killed. He went to the scene which was about 500 meters from where he was having his lunch. He found villagers had surrounded a house. The accused whom he knew was in front of the house and surrounded by the villagers. He entered the house and found a panga and a knife that had blood stains. He entered the bedroom and saw a box that had been opened. He saw in the box a body of a person that had been cut in pieces. He was shocked and ran out. He called the OCS. The police went to the scene and took the body to the mortuary. It is his evidence that the body inside the box was covered with a black polythene bag. The deceased's legs were outside. The deceased was the accused's mother in law. There were many people at the scene. The deceased was buried the following day on 7th, April 2011.

PW2 IBRAHIM ALI ABDI is the accused's husband. He is a painter by profession. On the 6th of April 2011 he went to work and left their three children with the accused. He did not go back for lunch. At about 3.00pm he got information that his mother had been killed. Someone had been sent to look for him. He went home and found many people including the chief (**PW1**) and the police. He opened the door to the house and saw blood. The house has two bedrooms and a sitting room. There was a bed at the sitting room. There was a metal box under the bed and upon checking he saw his mother's body. Her legs had been cut and she was tied using a headscarf. He lost consciousness. The body was covered with sand and perfume had been applied. There was a gunny bag. Initially the accused had disagreed with the deceased but they later reconciled. At the time the incident occurred the two had no differences. There was also a knife and a panga. It is his further evidence that he had left home on that day at 6.00am. The deceased was not there at that time. He had good relationship with his mother. He denied that the accused went to the market on that day while he stayed at home. The metal box was his. He was painting at Taqwa Mosque. He had not seen the panga in his house before but the knife was in the house.

PW3 ABDI IBRAHIM is a turnboy in Moyale town. **PW2** is his uncle. He knew the accused. On 6th April 2011 he went to **PW2's** home at about 1.00pm. He saw the accused's children outside the gate. He asked them who was inside the house but the eldest child, **NAJMA**, did not respond. Shortly he heard a single shout like someone had been hit. He thought that it was his uncle and his wife had disagreed. He stayed outside the house for 30 minutes. He entered inside the compound. He pushed the door and the accused came out. She came out and went back three times. He checked through the window and saw the accused cutting something with a panga and putting some things in a box. She then tied the box with a rope. The house has a sitting room which had a single bed. The box was put under the bed. He went and called the neighbors. Neighbors told the accused to open the door. They saw blood on the floor. The accused was told to open the box and they saw the deceased's body. It is his evidence that the accused tried to chase him away during the three occasions when she went outside and back to the house. The accused was holding a panga at that time. The deceased was his grandmother. The deceased had disagreed with the accused and she was not visiting the accused regularly. He was not aware if the two had reconciled. He used to be sent to take food to the deceased. He was living with the deceased. He had not witnessed any disagreement between the accused and the deceased. He had gone to the accused's place for lunch. He saw the accused cutting the deceased with a panga. She cut the deceased's legs and hands. He stayed on the window watching for about 5 minutes. After witnessing the incident, he went to call the neighbors. After the accused opened the door to the house he personally went to where the box was and opened it. He was in the company of two women namely **DAKI** and **FATUMA**. There was no other person inside the house. The panga the accused used to chase him away had blood stains. On that day he had left the deceased at home which is about 4km away from the accused's home.

PW4 DAKI MOLU testified that on the 6th of April 2011 at about 1.00pm **ABDI IBRAHIM (PW3)** screamed. She went to the scene and entered the house. The accused and her husband were tenants in the house. Neighbors also went to the scene. The accused was alone in the house. They entered the house and saw the deceased's body had been cut into pieces and put in a box and placed under the bed. The box was tied with a rope. The police went to the scene and opened the box. She saw a panga and a knife next to the body. The panga and knife had blood stains. The deceased was living in Helu within Moyale. She did not see the accused carrying any weapon at the scene. The police took photographs at the scene. At that time the accused's husband (**PW1**) was not present. The accused's husband went to the scene while **PW4** was there. She saw him with some paint on his clothes.

PW5 IBRAHIM SHEIKH HUSSEIN called the deceased his aunt. On 6th April 2011 at about 4.30pm he heard that the deceased had been killed. He went to Moyale hospital and saw the body. The deceased's two limbs were cut from the knees. The neck was also cut. He witnessed the postmortem at Moyale hospital.

PW6 CORPORAL PATRICK OKATA was stationed at Moyale police station. On the 6th of April 2011 he was the officer on duty. He got a call from the OCS who informed him about the murder. They went to the scene and found the accused had been locked inside a house. Members of the public wanted to break the house and assault the accused. They opened the house and found the accused. They also found a box tied with a rope. They opened the box and found the deceased's body. The deceased's two legs had been chopped off. The deceased had a wound on the throat. There was a polythene paper inside the box. At the corner of the room there was a panga and a knife that were blood stained. They arrested the accused. Members of public threw stones at them as they left the scene. They took the accused to hospital as she had suffered some injuries that had been inflicted on her by members of public. They later took the accused to the police station. A post mortem was done. Blood samples from the deceased and the knife were taken to the government analyst. He prepared the exhibit memo. A scene of crime officer took photographs. He was one of the investigating officers. The area chief was also at the scene. They reached the scene at about 3.30pm. It is his evidence that it is the area chief **AYALA (PW1)** who locked the accused inside the house. The deceased was the accused's mother in law. The accused is a Somali while her husband is Borana. The deceased wanted her son to marry a Borana and that is why the accused and the deceased were not in good terms. The deceased was not staying with the accused. The deceased had visited her son's place on that day. When they went to the scene the accused was the only person in the house and had locked herself in the house. The accused's husband arrived at the scene as the police were leaving the compound. It is **ABDI IBRAHIM (PW3)** who discovered the incident. There were many people at the scene and they were very furious.

PW7 Chief Inspector ROBERT SUGUT was the OCS Moyale police station. On 6th of April 2011 he received a call from chief **AYALA (PW1)** who informed him that there was a murder case. They proceeded to the scene and met the chief together with members of public. The members of public wanted to administer mob justice on the accused. They cleared the members of public from the compound and opened the house. Only the accused was inside the house. They found a metal box. They saw the body with two legs having been amputated from the knees. He took photographs using his phone. They took the body to the mortuary. The box was locked using a red wire. He also recovered a panga which had been sharpened using a grinder. A knife, a sack and a scarf were tied on the box. He investigated the case. His investigations revealed that the deceased was not living in the compound. It is the accused who had invited the deceased. When they reached the scene the accused had been locked in the house to save her from being assaulted. There was only one panga at the scene. The deceased and the accused had cordial relationship. It is the area chief who had locked the door from outside to save the accused from the wrath of members of public. The accused had invited the deceased a day before the date of the incident. It is the accused who went to the deceased's place and invited her to her place. The accused's husband was not in the house. He developed the photographs he took using his phone.

PW8 LAWRENCE KINYUA MUTHURI is a government analyst. On 31st May 2011 they received three items from Corporal P. Okata of Moyale police station. A sample marked "**A**" was dried blood sample on a white material indicated as that of the deceased. Item marked "**B**" was dried blood sample on white material indicated to be that of the accused while item marked "**C**" was a knife with a wooden handle in a khaki envelope. They were to examine the knife to determine the process and source of blood. The knife had some human blood. He did DNA profiling on the blood stains on the knife. Blood stains on the knife matched the blood sample on the item marked "**A**" of the deceased. He wrote his report on 29th June, 2012. He did not compare the accused's DNA with those on items "**A**" and "**C**" although he had received the accused's blood sample.

PW9 DR. ADANO DIBA KOCHI was in charge of the Moyale district hospital. On 6th April, 2011 at around 7.00pm he conducted a postmortem on the deceased who had died on the same day. The body was wrapped in a body bag. It was a body of a female elderly above 70 years. The body had a deep cut on the front of the neck. The main veins on the neck were cut. Both limbs were amputated on the knee level and were lying separately. The thigh bones were exposed. He formed the opinion that the cause of death was due to the severing of the great vessel of the neck leading to massive bleeding. The amputation on the knees most probably came after the deceased had been killed. The rest of the body was complete.

The accused tendered sworn defence. She testified that she was a house wife living in Moyale before she was arrested. On the 6th April 2011 she prepared tea after completing her morning prayers. Her husband told her that he had visitors and she was to prepare food. At about 11.00am her husband went home with his friends. They were about five people. There was one **DAKI, ADAN, ISMAIL** and a woman. They were chewing miraa. Her husband had bought a goat the previous day. She gave them food. Her husband had told her that he was having a ceremony. He had called the meeting because he was not in good terms with his mother. Those who had been called were to reconcile the two. Her husband had disagreed with his mother due to a land issue.

The accused further testified that she had delivered twins and one child was living with the deceased. On the material day she left for the market at about 3.00pm. She returned at about 5.00pm. She entered her house through the lower gate. She found **ABDI (PW3)** outside the lower gate and asked him what was the problem. **PW3** told her that her husband was inside. She knocked the door three times but there was no response. Her husband then came out and looked as if he was worried. He pushed her inside the house and started beating her. Her husband started screaming alleging that she had killed his mother. Members of public went to their house and her husband told them that she had killed his mother. At the time she left for the market the deceased was not in the house. She had not disagreed with her mother in law. She had disagreed with her husband as he used to take drugs and alcohol. Whenever he was drunk he would beat her. She was beaten by members of public and her husband until she became unconscious. She regained consciousness the following morning at 5.00am and found herself in hospital while being guarded by two police women. She was told that she had killed her mother in law. She was taken to the police

station and later charged with the offense.

It is her evidence that, **PW3** was to be her witness but he later changed and testified for the prosecution. **PW3** used to visit them. At times **PW3** used to walk around with her husband who is an uncle to **PW3**. She had not seen her mother in law for three days before the 6th of April 2011. **PW3** was not present at the time she left for the market. She left behind her husband and his friends when leaving for the market but when she returned her husband's friends were not present. She had gone to the market to buy food items for the ceremony that was to take place the following day. She was framed and did not kill her mother in law.

After the close of the defence case, Mr. Otieno for the accused relied on the evidence on record and did not make any submissions. Similarly, Mr. Ochieng for the state relied on the evidence on record.

The question to be determined by this court is whether the prosecution has proved its case beyond reasonable doubt against the accused. The prosecution contend that the late **Bukei Osman Abdi** was killed by the accused on the 6th of April, 2011. The accused denied committing the offence and maintains that she was framed. She went to the market on the material day and when she returned she was assaulted by her husband together with members of the public until she became unconscious. She regained consciousness while in hospital and was being guarded by two police women. She was then informed that she had killed her mother in law.

The evidence of **PW1** is that she arrived at the scene on the material day of 6th April, 2011 at about 2.00pm. Villagers had surrounded a house and the accused was standing in front of the home. **PW1** entered inside the house and found the deceased's body. The accused's husband, **PW2**, testified that by the time he left his house for work in the morning, the deceased was not at home. He was informed of his mother's death while at his place of work. He went home and found that his mother had been killed. **PW4** heard **PW3** screaming and she went to the scene. According to **PW4** the accused's husband, (**PW2**) was not at the scene when she went there. **PW2** arrived at the scene later. **PW4** saw a panga and a knife next to the body.

The core ingredient for the offence of murder is malice aforethought as per the provisions of section 203 of the Penal Code and an unlawful act or omission on the part of the accused. Section 206 of the Penal Code defines malice aforethought in the following terms:-

Malice aforethought shall be deemed to be established by evidence providing any one or more of the following circumstances:-

- a) An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- c) An intent to commit a felony;**
- d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

Apart from malice aforethought, the prosecution has to prove that it is the accused's act or omission that caused the deceased's death. In this case, the prosecution has indeed proved that the deceased died on 6th April, 2011. **PW3** testified that he had left the deceased at home that morning. There is no other explanation as to how the deceased met her death. **PW9 Dr. Adano Diba Kochi** conducted a postmortem on the same day the deceased met her death. The post mortem describes the external appearance of the body as follows:

- **Body in right lateral position shift.**
- **Deep cut in anterior neck severing both left and right jugular veins and carotids.**
- **Both limbs were amputated and exposing the lower end femur.**
- **The amputated limbs were lying by the body most likely done after patient's death.**

PW9 formed the opinion that the cause of death was the cut on the throat which damaged the great veins of the neck leading to massive external hemorrhage. **PW1, PW3, PW4, PW6** and **PW7** testified that there was blood at the scene. It is clear that the deceased met her death at her son's house. She was alive in the morning when **PW3** left her at home. **PW3** later left saw her body at the accused's house at about 1.00pm. The evidence on death is conclusive and is not in dispute.

The next question is who caused the fatal injuries on the deceased? According to the accused, when she returned from the market, she found **PW3** outside her house at the lower gate. Her husband came out and looked worried. Her husband pushed her inside and started screaming that she had killed his mother.

The evidence of the accused has to be weighed against that of the prosecution. According to **PW1, PW3** and **PW4**, when they reached the scene the accused's husband (**PW2**) was not there. **PW4** saw **PW2** arriving at the scene with some paint on his clothes. There is no doubt that **PW2** was not at home when the incident took place. There is no proof that it is **PW2** who killed his mother. The accused's evidence is to the effect that it could be **PW2** who killed his mother since the accused left for the market and left her husband with his friends at home. Upon returning she was accused of having killed her mother in law. According to the accused, she left for the market at about 3.00pm. This cannot be true. **PW3** reached her home at about 1.00pm. He stayed outside for about thirty minutes and he pushed the door only to be chased

away by the accused. **PW1** was having his lunch at about 2.00pm when he heard people screaming that someone had been killed. **PW1** immediately went to the scene that was about 500 metres away. It is the evidence of **PW6 Corporal Patrick Okata** that the police reached at the scene at about 3.30pm and found the accused had been locked inside the house. It is the evidence of **PW7** that the mob wanted to assault the accused. **PW7** testified that the report on the death was made at about 2.30 to 3.00pm. They took about five minutes to reach at the scene between 3.00 and 3.30pm. According to the accused, she returned from the market at about 5.00pm. The accused's evidence is displaced by the prosecution evidence. By 5.00pm the accused had already been arrested. Further, by 3.00pm when she allegedly left for the market, the incident had already been reported to the police. **PW1**, the area chief was already at the scene and had locked the accused inside the house. I am satisfied that the accused did not leave for the market on the 6th April, 2011. She was in the house and was arrested at the scene.

The prosecution evidence is not circumstantial. There is the direct evidence of **PW3** and **PW4**. **PW3** arrived at the accused's house at about 1.00pm after parting ways with his friends. **PW3** met the accused's Children who were outside her house. It is **PW3's** evidence that he heard a single shout as if someone had been hit. The deceased had injuries on the neck. **PW7** testified that he recovered a sharp panga at the scene. The panga was produced as an exhibit. The only logical conclusion I can make is that the sound **PW3** heard was a strong blow with a panga on the deceased's neck. The assault must have disabled the deceased. I have seen the photographs showing the deceased's body and compared to the accused's physique, it is clear to me that the deceased had a bigger body compared to that of accused. The accused must have hit the deceased on the neck while the deceased was not expecting to be attacked. **PW3** testified that he stayed outside the house for about 30 minutes. He then went to the window and watched the accused cutting the deceased's legs for about five minutes before he went to call the neighbours. This evidence is direct and it is proved that it was only the accused who was inside the house. The accused's contention that **PW3** was to be her witness cannot be true. **PW3** testified and was not questioned on whether he was to testify for the accused. **PW4's** evidence is that **PW3** went to her house and informed her of the incident. **PW3** and **PW4** went back to the scene and found the accused inside the house.

Given the evidence on record, it is clear to me that it is the accused who caused the deceased's death. She hit the deceased with a panga on the neck and this severed the main jagular veins as per the post mortem report. The accused then started mutilating the deceased's body and succeeded in severing the lower limbs. This must have been the time **PW3** was waiting outside. **PW3** watched through the window and saw the accused cutting the deceased's legs. The intention was to place the deceased's body in the metal box, tie it with a rope and dispose it. The accused's heinous act and elaborate plan was short lived. She managed to kill the deceased, amputate her legs and put her in a box but did not finalize her full plan. **PW3** cut short her plan and she was caught in the act. **PW3** heard the accused hitting the deceased. **PW3** saw the accused dismembering the deceased's body. All the witnesses who went to the scene saw the deceased's body had been separated with the lower limbs. I do agree with the opinion of **PW9** that the amputation of the limbs was done after the deceased had been killed. There is no iota of doubt that it is the accused who killed the deceased. **PW7** investigated the case and found that the accused had the previous day invited the deceased to her place. This cannot be held to be hearsay. Indeed the deceased visited the accused's home the following day after the invitation and that is where she met her death.

There is mixed evidence on the relationship between the accused and the deceased. **PW7**, the investigation officer testified that the accused and the deceased had cordial relationship. **PW2**, the accused's husband testified that the accused and the deceased had initially disagreed but later reconciled. Malice aforethought is not something tangible. It becomes manifest as a result of the perpetrator's action. The perpetrator might harbor some ill feelings against his/her victim while the outside appearance and conduct appears to be friendly. It is difficult to know men's intention. Even the devil does not know a man or woman's next action. Although it appeared that the deceased and the accused had reconciled, it is clear that to the accused their differences were not over. Something was simmering inside her heart and mind. This ill feeling, like an active volcano, erupted and led to the fatal blow on the deceased's jagular through the use of a panga. **PW2**, the accused's husband had not seen the panga in the house before. The accused must have made elaborate plans on how to eliminate the deceased and secured the panga.

Given the evidence herein, I am satisfied that the prosecution has proved the presence of malice aforethought on the part of the accused. The accused's action of assaulting the deceased and amputating her limbs clearly proves that the accused was driven by malice aforethought. The motive was to eliminate the deceased who according to **PW7** was not in favour of her son marrying the accused. In the case of **KARUKENYA & 4 OTHERS VERSUS REPUBLIC (1987) KLR, 458** the Court of Appeal held:-

The prosecution does not have to prove motive, neither is evidence of motive sufficient of itself to prove the commission of crime by the person who possess the motive.

The accused was initially charged in Meru High Court with the same offence. Justice Lesiit convicted the accused on 15th August 2013. The accused filed Criminal Appeal number 46 of 2014 before the Court of Appeal. In its judgment delivered on 18th July, 2016, the court of Appeal allowed the appeal and ordered a retrial. The main contention in the appeal was that the accused did not understand the language used in court and this rendered the trial as not fair as required under Article 50(2) (m). The accused was entitled to a Borana interpreter.

The record shows that the plea was taken on 15/8/2017 before **Justice K.W Kiarie**. The record shows that the charge was read over to the accused in Borana language by Court assistant Kame and the accused denied the charge. I took over the matter on 19/4/2017. All the nine witnesses testified before me. There was Borana interpretation when **PW1, PW2, PW3, PW4, PW6, PW7, PW8** and **PW9** testified. When **PW5** was testifying, the accused informed the court that she understands Kiswahili. It is indeed true that the accused understands Kiswahili as she always complained of having stayed in remand for long. She has been communicating in court in Kiswahili. **PW5** is the only prosecution witness who testified in Kiswahili. When put on her defence, the accused gave sworn evidence and she testified in Kiswahili. It is therefore clear that the accused understands Kiswahili and followed the proceedings when **PW5** testified.

From the evidence on record, I do find that the prosecution has discharged its expected burden of proof. The prosecution has proved beyond reasonable doubt that it is the accused who killed the deceased. The accused's defence does not raise any doubt on the prosecution case. The accused is hereby found guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and is convicted accordingly of that offence.

Dated, Signed and Delivered at Marsabit this 3rd day of May, 2019

S. CHITEMBWE

JUDGE