



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CRIMINAL CASE NO. 49 OF 2017**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**ABDI ABDILLE ALI Alias ISIOLO....ACCUSED**

**JUDGEMENT**

1. The accused was charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. Particulars being that on 27/9/2014 at Sultan Hamud Township in Mukaa District, Makueni County jointly with others not before court murdered Seif Shutu Kazungu.
3. The accused pleaded not guilty and matter went into trial.
4. The prosecution called eight (8) witnesses and closed the case. The prosecution in summary was that; PW1 says the deceased and accused quarreled over the flashing of motorbike light to accused and accused in return flashed light with his torch to the deceased on 26/9/2014 around midnight. Quarrel ensued between the two.
5. As they quarreled, the deceased then started saying the accused had stabbed him and accused ran away into the darkness. The deceased fell down and he was bleeding from the neck. PW1 took him to hospital accompanied by a fellow watchman. Many people came to the scene. He learnt later the deceased passed on.
6. PW2 witnessed the deceased and accused fight. PW1 told him to go and separate them. The deceased started saying he had been stabbed. He was bleeding from the neck. They rushed deceased to hospital.
7. PW3 identified the deceased body for the postmortem. He was his brother.
8. PW4 was also deceased brother who got a call and rushed to the hospital and saw his deceased brother's body.
9. PW5 was also deceased brother who got a call and went to hospital to see his deceased brother and found he had passed on.
10. PW6 was PC Kennedy Koech who got information of the incident and proceeded to hospital and then to the scene of crime. He found the deceased's body lying on bed. He saw wound on left side of the neck.
11. PW7 also visited hospital and found deceased had died.
12. PW8 Dr. Lyn Martha Kiema conducted postmortem on 27/9/2014, and produced the report in court. The cause of death was by severe hemorrhage due to deep stab wound on the anterior neck.
13. When accused was put on his defence he gave sworn statement but did not call a witness. He stated that on the material night at 9 pm while at his kiosk accused went to his shop, got hold of one young man called Isack Abdi Haji and asked him why he had directed spotlight (torch) light to his motor vehicle. The boy apologised saying "*am sorry if I had offended*".
14. At that time accused intervened and asked accused to go to his motor vehicle where he had parked. Instead accused hit him severally with a fist. On seeing that Isack Abdi Haji and Hayu Kasora rushed to rescue him and they beat deceased. Hayu Kasora hit deceased with an object and deceased fell on the ground bleeding profusely on the head. The accused and his other friends left the scene as other people came;

among them watchman Shekhal; who was with others took deceased to hospital.

15. He then went home and slept. He was arrested later in his house and taken to Sultan Hamud and later charged with the offence.

16. Parties agreed to have submissions via written and filed arguments of which only the accused side did file.

17. After going through submissions on record and the evidence, I find the issue is;-

- i. Whether the prosecution proved its case beyond reasonable doubt.**

#### **DEFENCE SUBMISSIONS:**

The 3 ingredients of murder are set out in case of *Anthony Ndegwa Ngari vs Republic (2014) eKLR*, the court found the elements of the offence of murder to be:

- i. That the death of the deceased occurred.**
- ii. That the accused committed the unlawful act which caused the death of the deceased; and**
- iii. That the accused had malice aforethought.**

18. Also in the case of *Republic vs Titus Mbia Singi* the court relied and quoted this case of *Anthony Ndegwa Ngari vs Republic (2014) eKLR* where the court held that elements of the offence of murder are listed as follows:

- i. The death of the deceased occurred.**
- ii. That the accused committed the unlawful act which caused the death of the deceased and**
- iii. That the accused had malice aforethought.**

19. The court held that these are the crucial ingredients of the offence the prosecution was required to prove the same beyond any reasonable doubt in the instant case.

20. In the Court of Appeal decision in *Ramanlal Trambaklal Bhatt vs Republic* at page 3 and 5 of the bundle of authorities of the accused, it held that **“a prima facie case means one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence it is not for the defence to fill in the gaps in the prosecution case.”**

21. In this, the prosecution has failed again. The accused person remains a suspect. The real culprit has never been arrested and is still at large. This demonstrates the inability of the prosecution to prove their case to the required standards and their case fails thus.

22. The accused submitted that the prosecution has not met the standards set out in the above decision by the Court of Appeal. The prosecution has failed to meet this test.

23. Accused submitted that no evidence was adduced to show;

- a. That the accused murdered or that he was involved in the death or murder of the deceased,**
- b. Any direct evidence linking the accused to the death or murder of the deceased.**
- c. Cause of death was not proved.**

24. On cause of death, PW8 Dr. Kiema testified and produced the postmortem report which was carried out on 27/9/2014. The observations were that the external injuries the deceased had was a stab wound 6 x 2cm up on left side of anterior neck other parts of the body was normal.

25. The doctor did not note any internal injuries on the body of the deceased because he did not open the body because the Muslim family objected. He noted that the cause of death was due to severe stab wound. The doctor also found that the weapon used was of a blunt nature e.g. a machete and not a sharp object.

26. Evidence that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, PW1 Fredrick Mwendwa Mutisya testified that when the motor vehicle of the deceased was leaving it was blocked by another vehicle whose driver was sleeping in the motor vehicle and the accused directed a torch towards the direction of the deceased and told him to put off the motor vehicle lights then the deceased left the lights on and went to where the accused was and asked him why he was flushing the torch light on him and quarrel ensued between the two then he sent his colleague to go and see what the two were upto.

27. On cross examination he stated that the motor vehicle of the deceased was blocked and he asked the other driver to give way and the

deceased and the other driver wanted to fight and they stopped and the accused was seated in his kiosk with somebody else and the accused and the other man came to where the deceased was and both of them started struggling with the deceased then he heard the deceased say that he had been stabbed.

28. PW2 – Adan Kassin told the court that he was called by PW1 saying that the deceased was quarreling with the driver of the motor vehicle that had blocked him. They asked the other driver to give way after he intervened as they were fighting and giving each other head butts, it is his evidence that he saw deceased lift the accused up and threw him down and he saw another short man throw a seat from far and hit the deceased with it. That seat also hit another motor vehicle the seat was a small wooden bench.

29. On cross examination he told the court that the deceased is the one who gave the other driver of head butt and the second shuffle was between deceased and the accused. It is his other evidence that he did not see any knife and the deceased was hit with a form at the shoulder and the deceased was stabbed on the same side of the body that he had been hit with a form by the **short man. The short man ran away and he did not see his face.** He told the court that he did not witness the actual stabbing.

30. Accused submits that these two witnesses are the key witnesses and both of them did not witness the actual stabbing of the deceased, they did not see any knife. They gave evidence that there were two scuffles. The first was between deceased and his fellow driver the second was between deceased, the accused and a short man, it is clear that they said the deceased fought with head butts with the fellow driver and the short man. It is on record the short man is the one who hit the deceased with a form the same shoulder alleged to have been stabbed. He submits that it is not clear whether it is the accused who stabbed the deceased or the short man and the doubt the prosecution did not explain the same. They did not produce any evidence to disprove that it is the short man who injured the deceased.

31. Further the evidence of the doctor on the cause of death and the weapon used to exonerates the theory that the deceased was stabbed as he indicated that a blunt object was used and not a sharp object. No witness saw the actual stabbing of the deceased person but they witnessed deceased being assaulted by his fellow driver and by the short man whom they did not see his fact with a form/chair.

32. In the case of *Joan Chebichii Sawe vs Republic [2003] eKLR*, sets out the principles that guide the court on circumstantial evidence. three tests were set out in the case of *Erick Odhiambo Okumu vs Republic [2015] eKLR*, as follows –

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

33. In the case of *Simon Musoke vs Republic [1958] EA 925*, the court reiterated the same principle as follows:-

**“Before drawing the inference of the accused’s guilt from circumstantial evidence the court should ensure that there are no other co-existing circumstances which would weaken or destroy the inference.”**

34. The accused submits that the evidence does not link him irresistibly to the commission of the offence. The fellow driver and the short man with whom the deceased fought, were never arrested and given that the weapon used was a blunt object. This wanting prosecution evidence should work against the prosecution case and afford an acquittal to the accused person.

35. On malice aforethought – malice aforethought is the *mens rea* or the intention to kill another person. Section 206 of Penal Code defines malice aforethought the facts of this case does not point to the malice aforethought because there was a scuffle and fights between the deceased and his fellow driver and the short man who hit the deceased with a form/chair.

36. Accused submits that the State did not lead any evidence to prove malice aforethought as alleged or at all. When the evidence adduced is examined in its totality, it does not lead to any irrefutable conclusion of the deceased’s guilt.

37. As the malice aforethought is missing in this case the prosecution has failed to prove the offence of murder against the accused.

#### **ANALYSIS AND DETERMINATION:**

36. The 3 ingredients of murder are set out in case of *Anthony Ndegwa Ngari vs Republic (2014) eKLR*, the court found the elements of the offence of murder to be:

- i. That the death of the deceased occurred.**
- ii. That the accused committed the unlawful act which caused the death of the deceased; and**
- iii. That the accused had malice aforethought.**

39. Also in the case of *Republic vs Titus Mbia Singi* the court held that these are the crucial ingredients of the offence the prosecution was required to prove the same beyond any reasonable doubt in the instant case.

40. On cause of death PW8 examined the deceased body and found a stab wound 6 x 2cm anterior neck. Cause of death was due to severe stab wound on anterior neck. The cause of death was established.

41. As to who occasioned the unlawful act which caused death, PW1 witnessed accused and deceased fight and it was in the cause of that fight that the accused said Abdi Isiolo had stabbed him.

42. This was corroborated by PW2 who also witnessed the two fight and also heard deceased say accused had stabbed him. The accused ran away and was arrested from his house.

43. The court has no doubt that the stab was occasioned by the accused. The accused theory in his defence is that deceased attacked him severally then in a mission to rescue him (accused) Isack Abdi Haji and Hayu Kasora beat deceased and in the process Hayu Kesora bit deceased with object and he bled profusely from the head.

44. The defence on the face of it is incredible. First the accused did not spot any injuries despite allegedly being beaten severally by the deceased.

45. The eye witnesses PW1 and PW2 did not see Isack Haji and Hayu Kesora beat deceased as alleged. In any event the deceased mentioned only accused as the person who stabbed him. The police investigation also confirmed that it was accused who stabbed the deceased.

46. The deceased was the only person who fought the deceased at the moment he said he was stabbed also had quarreled him of flashing the lights. Thus the court is convinced beyond reasonable doubt the accused stabbed the deceased the fatal wound.

47. On whether there was malice aforethought, it would appear vide PW2 that the accused in course of the fight was being overpowered as he was being thrown down and that is the time the stabbing occurred. Though he never mentioned in his defence, the circumstances suggest that he stabbed deceased to be able to escape from the fight he was losing.

48. The court thus would hold that the malice aforethought is not established. However the accused did not exonerate himself from the blame of use of the excessive force in the circumstances via user of stabbing object rather than his natural tools of hands, kicks/legs, head inter alia.

49. The court holds that the accused committed the offence of manslaughter and thus the charge is reduced accordingly.

50. Thus the court makes the following orders:

**i. The accused is hereby convicted of manslaughter and will thus be sentenced.**

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12<sup>TH</sup> DAY OF JULY, 2019.**

.....

**C. KARIUKI**

**JUDGE**