



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 19 OF 2013

REPUBLICPROSECUTOR

VERSUS

FARAH MUSE ESKEL.....ACCUSED

JUDGEMENT

The accused herein Farah Muse Eskel stands charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 15th November 2013 at Hagadera Refugee Camp in Fafi District within Garissa County murdered Noor Muse Hassan. He has denied the charge.

To prove their case, the prosecution has called eight (8)

This case was heard by two Judges. The first six (6) witnesses were heard by Hon. Mutuku J. I then took over the case and proceeded with the hearing of the case from where it had reached and heard two (2) prosecution witnesses and the defence evidence.

The evidence of Pw1 Suad Noor Muse is that she was a daughter of the deceased and they lived together at Hagadera Refugee Camp Block No. 1. On the 15/11/2013 while at home watching movies on the television outside the house at 8pm, Farah the accused knocked hard at the gate. She was with Mulki Pw2, and Dahir a brother.

He father Noor who was then sleeping in the house, came out and went to the gate and immediately he opened the gate they heard him cry and they ran towards him only to find him lying on the ground bleeding. When they arrived, the accused Farah was still at the gate and cut her palm with a machete. She saw a knife stuck in the side of her father. She know the accused before as a neighbour for 5 years, and stated that there was sufficient light from the house to identify the accused.

It was her evidence also that when Mulki (Pw2) arrived, the accused also attacked and injured her, and also chased away the brother Dahir Noor Muse. They then looked for a donkey cart and took the deceased to Hagadera Police Station and proceeded to Red Cross (RC) Hospital for treatment. However, on the following morning the deceased was transported to Garissa Provincial General Hospital accompanied by one Mohamed a friend. Later, Mohamed informed them that the deceased had died and buried at Garissa.

In cross – examination, she maintained that she knew Farah the accused for about 4 to 5 years as a neighbour. She denied that the father (deceased) was a witch doctor. She also denied that their family armed themselves and attacked the accused and that in the process they fatally injured the deceased. She stated that she did not know how the accused sustained injuries.

The evidence of Pw2 Mulki Ahmed Warsame was that on 15/11/2013 at 8pm, she was watching TV at home with Dahir, Suad (Pw1) and other children when they heard the door of their gate being banged loudly. The deceased who was her husband then proceeded there and when he opened the gate, the accused Farah hit him with a panga (machette) and the deceased cried for help.

She then proceeded to the gate and found the deceased lying down having been stabbed with a knife on left kidney. Both the deceased and accused (Farah) were holding the knife. The accused then flashed a torch and cut her right hand with a machete.

She removed the knife from the deceased's body and though they screamed no neighbour came to their assistance. She then told Dahir to take care of the children and they used a donkey cart and took the deceased to the police station and then boarded a police vehicle to the hospital. The deceased was later taken to Garissa General Hospital for treatment the next morning in the company of Mohamed, and they were later informed that he had died and was buried in Garissa. She was issued with a P3 form on her injuries.

In cross – examination, she denied the existence of a grudge with the accused on the ground that accused told the deceased that he was fake and an impostor. She denied that their family attacked the accused, and said they did not know how he was injured.

Pw3 was a minor Dahir Noor Muse. It was his evidence that the family watched movies outside TV on 15/11/2013 at 8.00pm and that the deceased who his father had a headache and was resting in this house.

Then the accused Farah banged the gate and the deceased came out of the house and went and opened the gate when he was hit by Farah on the right hand with a machete. The deceased fell down and Farah removed a knife and stabbed him in the left kidney. The deceased then cried and they rushed to the scene where the accused flashed a torch and cut his aunt (step mother) and Suad (Pw1) on the left hand. The accused also chased him away. He later saw his father carried on a donkey cart, and he took care of the children.

In cross examination, he denied that they attacked the accused.

Dr. Julius Rogena was Pw4. It was his evidence that Dr. Adan prepared the post mortem report on Noor Muse Hassan which was countersigned by Dr. Muse Mohamed the medical superintendent of Garissa Provincial General Hospital, who was at the time of testimony on annual leave.

He produced the post mortem report whose entries showed that the deceased died on the operating table due to injuries in his abdomen. There was a stab wound on left upper abdomen which was deep with massive bleeding. There was also an injury and a fracture of vuna bone of the arm. The resultant severe bleeding caused the heart to stop work, and the deceased thus died.

In cross – examination, he stated that the entries in the post mortem report did not indicate that the internal organs of the deceased which had been injured by the assault.

Khalif Ibrahim Muse testified as Pw5. He was a brother of the deceased and lived at Ifo Refugee Camp.

It was his evidence that on 15/11/2013 8pm, his brother's wife Pw2 Mulki phoned and told him that his brother and other family members had been injured. He travelled to Hagadera refugee camp the next morning, and proceeded to hospital where Mulki, Suad and the deceased (Noor) were treated. The doctor transferred Noor the deceased to Garissa Provincial General Hospital, and he later learnt that he died in hospital in Garissa.

Pw6 was Mohamed Abdille Muhamed a friend of the deceased at Hagadera.

It was his evidence that on 15/11/2013 he was called on phone by a lady Sahar Noor and informed that Sheikh Mulki, and Noor Muse had been injured and taken to hospital on donkey court. He proceeded to

the hospital and saw the injuries on the three people Mulki, Suad Noor, and Shiekh Noor Muse.

He then accompanied Sheikh Noor Muse to Garissa PGH Hospital, where he was admitted, the next day, and doctors came at 7pm. At 11pm he was informed that Sheikh Muse said he died. According to him the deceased was buried at Garissa and he conveyed the news to the family.

PW7 was Joseph Gitonga a Senior Chemist at the Government Chemist Department Nairobi. He testified on a report dated 2/06/2015 prepared and signed by a colleague Henry Kiptoo Sang. According to the report, the blood sample of the daughter of the deceased was used for comparison as the deceased's blood sample was not taken due to religious considerations.

The report was that the shirt D1 was heavily stained with human blood. The T-shirt A1 was slightly stained with human blood but DNA could not be extracted as the blood was putrid. Panga (machete) and knife were slightly stained with human blood but attempts to generate DNA were unsuccessful. No blood stains were detected on the knife B3.

The general report was that only the shirt D1, and the daughter of the deceased's blood generated DNA profiles. There were 99.99% chances the blood stains on shirt D1 was from biological father of SUAD NOOR MUSE – daughter of the deceased. He produced the exhibit memo and report.

Pw8 was IP Job Wafula the investigating officer.

It was his evidence that he received a call from Hagadera Police Patrol Base from C.I. Samir on 15/11/2013. At 11pm the said Samir called and said it was assault incident.

On 16/11/13 the said C.I. Samir said a person had died and he commenced investigations.

On 17/11/13 he sent Sgt. Muninda who visited the scene to unravel what transpired and establish the motive of murder. The police recovered weapons at Hagadera Police Patrol Base – matchette with blood stains, a knife with blood stains, and another knife, a maroon shirt of the deceased, and a T-shirt dark green of the accused.

On 21/11/2013, he visited scene, and noted that neighbours were uncooperative with the police. With advice from DPP, the police collected a blood sample from daughter of the deceased for DNA analysis. In the course of investigations he received information that deceased intimidated the accused on the piece of land he lived on. He also received information that the accused attacked the deceased in self defence.

In cross examination, he maintained that the blood stains on the shirt connected the accused to the offence. He did not take fingerprints from the weapons.

When put on his defence, the accused gave unsworn testimony. He said that on 10/11/2013 while he slept in his semi permanent house, he heard loud noise and called for help.

People knocked at the door and when he opened it he saw many people who knocked him down. He suffered injuries on the head, back and shoulder from two strong people. A fight then ensued among the people who came to attack him. Then two women took him to his house and locked him in.

On the next day at 3pm, Government officials surrounded his house and he was taken to the police station with neighbours and they were interrogated. According to him, what happened in his compound was a clan fight.

The above is the evidence both for the prosecution and the defence.

This is a case of murder brought by the State against the accused person. In criminal cases, the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. Courts have consistently followed this time hallowed principle. It will suffice if I cite the case of

LEONARD ANISETH VS. REPUBLIC [1963] EA 206.

In a murder case, the prosecution is required to prove the elements of the offence. Firstly, if the deceased died. Secondly, if the death was unlawful. Thirdly, if the unlawful death was caused by the accused. Fourthly, if the said death was caused by the accused with malice aforethought.

Did the deceased die? Noor Muse Hassan was injured at Hagadera on the night of 15/11/2013. He was found by his second wife Pw2 Mulki Warsame and children lying down at the gate to their house with a knife in his abdomen. He was taken to hospital at Hagadera for treatment in a hand cart. He was referred to Garissa Provincial General Hospital the next day. He did not survive the operation. He died the same night of 16/11/2013 on the operating table. He was buried in Garissa after a post mortem examination, in accordance with Muslim customs, apparently in the absence of relatives. The post mortem report was produced in evidence in court by Pw4 Dr. Rogena, who was not the doctor who conducted the post mortem examination.

In my view, the prosecution proved that the deceased died from the injuries caused to the internal organs of the abdomen and bleeding by a knife, as described by the eye witnesses Pw1 Suad, Pw2 Mulki, and the post mortem report.

Was the death unlawful? No witness has claimed that the death of the deceased was natural. No one claimed that he or she had lawful justification to cause the death of the deceased. In my view, the death of the deceased was unlawful, and the prosecution so proved.

Was the death of the deceased caused by the accused? The prosecution say so. The accused says that the death of the deceased was caused by a clan fight whose aim was to kill the accused, but ended up killing one of their own.

The prosecution called three witnesses, two adults Pw1, and Pw2 and one minor Pw3 Dahir Noor to explain how the deceased was fatally injured that night. They were all close relatives of the deceased, a wife Pw2, and two children Pw1 and Pw3. The accused testified alone on his side about what happened.

Both sides testified to a violent encounter when the deceased got fatally injured, and later died. The prosecution story is that the accused was the attacker who came to their gate. The accused said that a clan attacked him at his house, and as they later retreated, they fatally injured the deceased, apparently after failing to kill the accused. It is of note that accused also suffered injuries.

In my view, the prosecution version is credible. The injuries suffered by the deceased and those suffered by two other witnesses showed that the accused was the attacker. The minor injuries suffered by the accused merely established some defence mechanism employed by those attacked. In my view, the prosecution proved beyond any reasonable doubt that the accused stabbed and caused the death of the deceased, unlawfully.

Was the death caused with malice aforethought? Malice aforethought is defined as intention to cause death or do grievous bodily harm under section 206 of the Penal Code. Death is presumed to be the natural consequence of certain acts.

From the evidence on record, the accused prepared and went to the gate of the deceased armed and ready for a fight and banged the gate loudly. When the deceased opened the door he slashed and stabbed him. There was however the undisputed evidence of an existing and continuing grudge or intimidation over land by the deceased upon the accused.

The accused was a neighbour of the deceased at the refugee camp who appeared to have led an insecure life for sometime, including the date of the incident. In my view that surrounding circumstance of this case mitigates the elements of malice aforethought, and makes the death unlawful, but without malice aforethought. Malice aforethought can not be said to exist in a situation of such continued insecurity in the mind of the accused. In effect therefore, I find that the prosecution did not prove malice aforethought.

The offence committed by the accused is therefore was the lesser offence of manslaughter.

I thus find the accused guilty of manslaughter, contrary to section 202 as read with section 205 of the Penal Code and convict the accused accordingly of the offence of manslaughter.

Dated and delivered at Garissa this 13th day of January, 2017

GEORGE DULU

JUDGE