



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CRIMINAL CASE NO. 37 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

MOHAMED MOGOW SIYAT.....ACCUSED

JUDGEMENT

The accused herein Mohamed Mogow Siyat stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 7th November 2012 at about 0300hrs at Dadaab town in Dadaab District within Garissa county murdered Hassan Anoka. He has denied the offence.

To establish their case, the prosecution has called eight (8) witnesses. Seven (7) prosecution witnesses testified before my predecessor Hon. Justice Stella Mutuku. I heard the evidence of PW8, and the evidence of PW5 who was recalled to produce some exhibits, as well as the defence testimony.

The evidence of PW1 Abdikadir Abdi Farah the location chief was that prior to the killing incident herein he had received a report from Nimoo Abdi Dubat (PW7) that the accused had threatened to kill her. Three days later, he received a report that a worker of the said Nimo Abdi Dubat had been killed. The accused, who was known to him as an uncle was then arrested.

PW2 was Peter Njogu a businessman operating a hotel in Dadaab.

It was his evidence that on 7/12/2011 he was woken up from sleep at night by a sound of a fall and screams. He went out of his hotel and saw someone lying on the ground with the intestines protruding from the left side. With the assistance of a friend Titus, he called the police on phone who arrived within 30 minutes. Later, he realised that the injured person was his customer in the hotel and a neighbour. According to him, the police traced blood stains, in an attempt to track the culprit.

PW3 was William Musyoka Mwiya who stated that on 7/11/2012 at 3am, he heard shouts of pain outside his house. When he peeped in the darkness, he saw someone lying on the ground. He feared for his safety but managed to see the person on the ground rise and chase another who was standing. According to him, at 6am, the police arrived and he told them what he had witnessed.

PW4 was PC Paul Muema of Dadaab Police Station. It was his evidence that on 7/11/2012 at 3.30am he received a call on the mobile phone that a person was lying near Equity Bank suspected to be dead. Together with OCS IP Ngeno and PC Wesonga they proceeded to the scene where they found a man lying in a pool of blood with protruding intestines.

They conducted investigations, recovered a knife, and a knife sheath inscribed “Koch Masser”. They took the body to Dadaab hospital for post mortem examination. On 10/11/2011 they got information that Mogow (the accused) was the suspect in the killing, and they arrested him in a mosque.

According to this witness, after arrest, the suspect took them to the fence of the mosque where they recovered a knife wrapped in a kikoy. The knife had the inscription “Koch Massar” like the knife cover which they had already recovered. The knife was recovered about 300meters from the scene where they found the dead body. As the suspect had bruises, they took him to hospital for treatment.

In cross examination, he stated that the suspect said that he fought the deceased but did not know that he had killed him.

PW5 was PC Nehemiah Karwa Wesonga of Dadaab Police Station. It was his evidence that on 7/11/2012 at 3.30am, he was called on phone by PC Muema (PW4) regarding an incident where someone had been killed. He informed the Deputy OCS about the incident and proceeded to the scene with PC Muema, where they found a man in his 30’s lying at a compound with intestines protruding. The owner of the compound Njogu (Pw2) told them that he heard a fall. PW3 Musyoka also told them that he saw people fighting in the night but was not able to identify them.

The police then followed blood stains and recovered a knife cover yellow in colour inscribed “Koch Masser”. They collected the body of the deceased to Dadaab District Hospital mortuary where post mortem examination was conducted after the employer Nimo (PW7) identified the body. They then carried out investigations and established that someone had 3 days earlier threatened to kill Nimo (Pw7). On information received, they traced the accused and found him in an adjacent mosque where he used to live. He had injuries on the hand and bruises on the other. The suspect (accused) later led them to the mosque and showed them a blood stained knife covered in a yellow stripped kikoi in a bag hidden in the fence of the mosque. The knife was bent and inscribed “Koch Masser”.

It was his evidence that he took the accused back to police station then to hospital and a P3 form issued. He took charge of exhibits, prepared exhibit memo to Government Chemist, but by the time he testified, all the exhibits were with the Government Chemist. He then charged the accused with the offence. He knew him before as a person who had pending criminal cases of creating disturbance.

This witness was later recalled to identify and produce exhibits. He produced the deceased’s blood stained pair of trousers, a kikoi of the accused, a slightly bent knife with black handle, and the exhibit memo as exhibits.

In cross – examination, he stated that accused cooperated in investigations, and that he informed the police that the deceased prevented him from reaching Nimo (PW7). He confirmed the accused had injuries, when they arrested him, and reiterated that Musyoka (PW3) said he saw people fighting.

PW6 was Yusuf Dahir Mohammad a registered Community Health Nurse. He produced a post mortem report prepared on the deceased and also signed by Ken a colleague, who was a Clinical Officer.

According to the entries, in the post mortem form, the body was of a male person in his 20s. There were wounds on the left side of the body with protruding intestines, a small stab wound on the left elbow and bruises on the left thigh. Death was caused by severe bleeding due to multiple injuries.

PW7 was Nimoo Abdi Dubat who at the time of tendering testimony in court lived at Mariakani.

It was her evidence that she previously lived at Dadaab with her two children and a houseboy Hassan Onoka the deceased.

On 7/11/2012, as she was diabetic and pregnant, she left Anoka at home and went to her mother’s place in Dadaab. After morning prayers on the next day, a sister to the chief informed her of the death of the deceased. She visited the scene and saw the body, and also went to the hospital to attend post mortem

examination, but did not enter the hospital.

According to her, the accused who was her neighbour since childhood, had threatened her family on many occasions. It was her evidence that he told people at the mosque that the accused had engaged in affairs with women and had thus become a Kafir and that he would do something about it. Though reported the incident to the threats to the accused's elder brother the chief, no action was taken.

In cross examination, she stated that accused had complained to other people that the deceased had taken over his work of loading trucks.

After the testimony of the above witness, the previous Judge Hon. Mutuku J was transferred and I took over the conduct of the criminal proceedings.

PW8 was Christine Nyawira Matindi a Senior Chemist in the DNA section of the Government Chemist in Nairobi. She produced the report prepared by a colleague Henry Kiptoo Sang a Principal Chemist.

According to the report, an exhibit memo was submitted to the Government Chemist by PC Nehemiah Wesonga together with physical exhibits. The exhibits were a long pair of trousers marked "X" stained with human blood, so was a knife marked "Y", and a kikoy marked "Z" was also stained with human blood. The pair of trousers marked "X" was stained with human blood whose DNA matched that from the kikoy marked "Z". Attempts to generate DNA from the blood stained knife were however not successful.

In cross – examination, he stated that the exhibits were handed in to the Government Chemist on 11/12/2012, but analysis was done on 8/07/2015 – more than two years afterwards. She stated that the blood stains on the knife were degraded due to chemical or biological factors.

That was the evidence for the prosecution.

When put on his defence, the accused gave unsworn testimony. He stated that on the day of his arrest, he did his normal business at Dadaab where people fought. In the course of the fight, a person hit and injured him on the head and his house was also burnt.

The police arrived in the course of the fight and arrested him because he was injured on the head.

The above is the prosecution and defence evidence.

This is a murder case brought by the state against the accused person. It is a hallowed principle of our criminal justice system that the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt, even if the accused raises a defence alibi the accused does not have a burden to prove his innocence. He can raise doubts to the prosecution case. See the case of **Leonard Aniseth Vs. Republic [1963] EA 206.**

In a murder case, the prosecution has to prove the elements of the offence. First, the prosecution has to prove that indeed the deceased died. Secondly, whether the death was caused by the accused. Thirdly, whether the death was unlawful. Fourthly, whether the death was caused with malice aforethought, or was premeditated.

On whether the deceased herein died, all the prosecution witnesses testify to this. PW7 Nimoo Dubat said the deceased was her servant at Dadaab. She left him at her house and proceeded to her mothers house because she was pregnant and suffering from diabetes. She later the next morning learnt that the deceased had died. She saw the body at the scene, and identified the same at the mortuary for post mortem.

Other witnesses Pw1 Abdikadir Farah, Pw2 Peter Njogu, Pw3, Pw4 and Pw5 all stated that indeed the deceased died.

The report by Ken Clinical officer who conducted the post mortem produced by Pw6 clinical officer

Yusuf Dahir was that the deceased died of massive bleeding due to multiple stab wounds to the abdomen.

In my view, the prosecution proved beyond any reasonable doubt that the deceased died.

Was the death caused by the accused? Nobody testified to identifying the accused as the killer. Two witnesses Pw2 Peter Njogu and Pw3 William Musyoka said they saw people fight in the darkness of the night. The police witnesses stated that they gathered information that the accused was the culprit and arrested him a few days after the incident in an adjacent mosque.

Pw7 Nimoo in particular stated that the accused had threatened her family and especially the deceased because he thought that the deceased was involved in infidelity with women. The accused himself stated in his defence that there was a fight that night and he was injured. The prosecution evidence is that the accused led the police to the recovery of a knife wrapped in a piece of kikoy, both of which had blood stains. The Government Chemist's report produced by PW8 Christine Nyawira was that the blood stains on the kikoy matched those in the pair of trousers of the deceased.

In my view, the accused was placed at the scene by his own evidence, and the circumstantial evidence of the prosecution witnesses. I am convinced that he led to the recovery of the knife wrapped in a kikoy. The blood stains on the kikoy matched those on the pair of trousers of the deceased. In my view, therefore he was the one who caused the death of the deceased, through stabbing with a knife.

Was the death unlawful? In my view, from the circumstances of the case, the death was unlawful. There was no suggestion of self defence, and the accused went to the working place of the deceased on his own volition. There is no evidence that the deceased was armed. He did not have any lawful justification to cause the death of the deceased, and as such the death of the deceased unlawfully caused by the accused.

Proof of unlawful death still does not prove the offence of murder. It is an offence that requires the proof of another element, intention to kill, which has over the centuries been described as malice aforethought, which in Kenya is statutorily defined under section 206 of the Penal Code (Cap. 63).

I have considered the evidence before me. The accused used a knife which was a dangerous weapon. The stabbing was also multiple and vicious. Nobody however knows how the fight started and how it progressed. The accused suffered injuries, which were admitted by the police witnesses. When the accused said he was fought by many people, that is my view was a lie. The fight was only between two people.

Since the accused suffered injuries, and there is no evidence as to what initially sparked the fight, I will give him the benefit of the doubt, and find that this was a fight in which one of the combatants was unlawfully killed, but that there was no pre-meditated intention to kill or cause death. I must however say this is a border line case.

Since no malice aforethought was established by the prosecution, I find that the accused committed the lesser offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code, and I convict him of that offence accordingly.

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

GEORGE DULU

JUDGE