



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL CASE NO. 35 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ILMI MAHDI SALEBAN.....ACCUSED**

**JUDGMENT**

The accused 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 15th October 2012 at IFO Refugee Camp in Dadaab District within Garissa County murdered Mahad Mohamed Shaib. He has denied the charge. In proving the allegation against the accused, the prosecution called 3 witnesses.

PW1 is Abdullahi Ahmed Hassan. It was his testimony that he was the neighbour of the deceased at IFO Refugee Camp. That on 14th of October 2012 at about 8pm, the deceased went to his homestead and informed him that he had noticed three people tracking him down. The witness advised the deceased to go home and pursue the matter the next day. In the morning of the next day he received a telephone call from the deceased requesting him to go and help as his life was at risk because the three people were following him at IFO market.

As he walked towards the market he heard the sound of gunshots and saw people run away. He observed that somebody had been shot at Maalim's shop at the open market. He proceeded on and saw a person shooting in the air with a woman screaming for help. According to him the person who shot in the air wore a black kanzu and was in the company of two others who wore normal kanzu. He hid somewhere to observe and later proceeded to the scene where he met the woman and another person called Arab (PW2). Arab requested him to guard the scene while he looked for a vehicle which arrived shortly. They took the deceased onto a wheelbarrow, carried him and loaded him onto a motor vehicle and took him then to Ifo Hospital where he was confirmed dead. The body was buried shortly under Islamic rites.

It was his evidence that on 27th October 2012, while coming from prayers he received a telephone call informing him that the culprit had been arrested. He proceeded to Ifo police station where was informed that the culprit had been transferred to Dadaab police station. When he went to Dadaab police station, he did not see the culprit, but on 29th October 2012 he was called to Dadaab Police Station to record a statement. He stated that though he was not able to identify the other two, he was able to identify the person who shot in the air, and according to him that person resembled the accused person who had by now been in custody for a long time.

In cross examination he admitted that the deceased had prior to the incident relocated to Nairobi as many Ifo camp leaders had been killed. He stated that the deceased was the chairman of the security committee and came back from Nairobi on a Thursday and was killed on a Monday. He admitted that, in his witness statement he said that the assailant faced the other direction and that he did not record any statement

before the arrest of the accused, nor did he give any description of the suspect before arrest. He admitted that no identification parade was conducted and that after the incident he saw the accused for the first time in court.

Pw2 was Hassan Mohamed Arab an uncle of the deceased. He stated that on 15th of October 2012 at around 12 noon, he heard gun shots and on arrival saw the deceased bleeding and lying on the ground. With the assistance of other people, they took the body to hospital and later the police came to the hospital. On the same day, he identified the body of the deceased and took the same for burial.

In cross examination, he stated that there were many people at the Ifo market that day. He stated that he did not witness the killing.

Pw3 was Police Constable Lucia Mutinda now of District Criminal Investigation Thika. In 2009 – 2013 she was attached to the District Criminal Investigation at Dadaab.

It was her evidence that on 29th October 2012 at 10.00am, a suspect was brought to Dadaab Police Station by Sergeant Wanyama and Inspector Forum. She later recorded statements from witnesses and received two spent cartridges and a post mortem report. She took the cartridges to the ballistic examiner. It was her evidence that she was the investigating officer and that Pw1 Abdullahi Ahmed Hassan led to the arrest of the accused. She produced the post mortem report form as an exhibit.

In cross examination, she admitted that she did not record any witness statement from Pw1. She stated that Pw1 later recorded a statement and identified the accused person. She then changed and said that no identification parade was conducted and that she relied on information received from the arresting officer. She changed again and said that an identification parade was conducted by inspector Forum, but that no report was filed.

In re-examination, she stated that there were three investigating officers in the case.

After the testimony of this witness, the prosecution sought for an adjournment. The request was opposed by the defence.

This was a case that was filed in 2012. It was adjourned many times. The third prosecution witness PC Lucia Mutinda testified on 21st November 2016 by which time the court had given several adjournments and granted a last adjournment on 27th September 2016. This court delivered its ruling declining to grant the adjournment sought as the prosecution had previously indicated that it was calling its last two known witnesses. The evidence of those two last witnesses including the doctor was tendered. The prosecution thus closed its case.

In his defence, the accused elected to give a sworn statement and did not call any witness. It was in defence that he lived as a refugee at Hagadera Refugee Camp Block C2. That he did not know the deceased or Abdullahi Ahmed Hassan. He also said that he did not know Arab Mohamed Pw2.

He stated that he was arrested at Ifo Hospital where he had gone for treatment, by two uniformed police officers. They took him to Ifo police station then to Dadaab Police Station. He denied participating in an identification parade. He said he was treated at Ifo hospital for chest problems by medical practitioners Peter, Habibo and Feisal. He swore by holding the Quran that he did not kill the deceased.

In cross examination he said that he was a refugee and that Ifo and Hagadera Refugee Camps were 30 kms apart. He said he was a stranger in Ifo but had gone there for treatment. He stated that on 15th of October 2012, the day of the incident he was at Ifo.

This is a murder case. The prosecution has the burden in criminal cases to prove their case against the accused beyond any reasonable doubt. An accused person does not have a burden to prove his innocence. He can merely raise doubts in the prosecution case. See the case of ***Woolmington Vs. DPP [1932] AC 462.***

In a murder case, the prosecution is required to prove the following elements. Firstly whether the deceased died. Secondly, whether the death of the deceased was caused by the accused person. Thirdly whether the death was unlawful. Fourthly whether that unlawful death was caused with malice and forethought.

In our present case, did the deceased die? The doctor who conducted the post mortem examination did not come to court to testify. The post mortem report was produced by the investigating officer PW3 PC Lucia Mutinda with the consent of the defence. It was dated 15th of October 2012. It is recorded therein that the deceased Mahad Mohamed Shaib died due to damage to the brain leading to cardiopromary arrest. It was completed by a doctor Victor.

Though nobody who knew the hand writing of Doctor Victor came to court to testify, since the report was produced by consent of the parties, in my view, the court has to take that report into account as valid evidence, under section 77 of the Evidence Act (Cap. 80), and these days there is a requirement that witness statements and technical reports of the prosecution, be availed to the defence before trial. In addition, the civilian witnesses who knew the deceased that is Pw1 Abdullahi Ahemd and Pw2 Hassan Mohamed Arab stated clearly that he died and was buried under Islamic Customs. In my view therefore the prosecution proved beyond any reasonable doubt that the deceased died.

Was the death caused by the accused? The evidence on record is circumstantial. Nobody witnessed the deceased being shot. Nobody saw the accused person shooting the deceased.

The evidence on record is that the deceased complained to Pw1 the previous night that some three people were tracking him down. He feared for his life. He was the security headman of Ifo Refugee Camp and all other elders had been killed. He had relocated to Nairobi for some time and had come back the previous Thursday. He complained on Sunday night, and on Monday morning around 11.30am, he phoned Pw1 to tell him that he needed assistance as he was at Ifo market and his life was in danger. As Pw1 walked towards the market, there was sound of gun shots. PW1 still proceeded and saw a woman wailing and a person shooting in the air. He laid down somewhere and then Pw2 arrived at the scene. They took the deceased to Ifo hospital on a motor vehicle but he was pronounced dead.

On the 29th of October 2012, around 14days thereafter the accused was arrested at Ifo Hospital and handed over to the police.

The circumstances under which circumstantial evidence can be used to establish a fact were considered by the Court of Appeal in the case of **MWITA VS. REPUBLIC [2014] 2KLR 60**.

Does the circumstantial evidence herein point conclusively or irresistibly lead to the conclusion that it was the accused and no other person who killed the deceased? In my view the answer is no. There is no evidence that the deceased described any of the people who were tracking him down which could indicate that such description tallied with the appearance of the accused. Even when the deceased phoned Pw1 in the morning, there is no evidence that he gave the description of any of the assailants. When Pw1 approached the scene he stated that the person whom he saw shooting in the air was facing the direction away from him. Therefore in my view, though the shooting incident occurred in broad daylight at around 10.30am, it was not possible for this witness to have identified the assailant. In addition to this there is no evidence that when Pw1 met Pw2 at the scene, he indicated that he could identify any of the assailants.

The arrest of the accused also had nothing to do with a description given by Pw1. The police officers who arrested the accused did not come to court to say why and in what circumstances they arrested the accused. Pw3 merely received the accused at Dadaab Police Station. Lastly, after the arrest of the accused no identification parade was conducted.

Though Pw3 talked about an identification parade conducted by Inspector Forum, that was not admissible evidence as Inspector Forum did not appear in court nor was the identification parade form produced in court. Pw1 who could be the identifying witness clearly stated that no such identification parade was conducted as he saw the accused for the first time in court.

Pw2 stated very clearly that on arrival at the scene he did not either witness the shooting nor did he see any of the assailants. He did not give any evidence about any information that he might have received relating to the assailant. The woman who was described by PW1 as having been screaming at the scene, was not called to testify. No reason was given for that failure. In my view this woman would have been the person most likely to connect the accused to the offence.

From the evidence on record, it cannot be said that the totality of the circumstances are that the shooting or killing of the deceased was caused by the accused person. On that account he is entitled to an acquittal.

Was the killing of the deceased unlawful? There is no evidence that there was any justification for the killing of the deceased. There was, from the evidence on record, no lawful reason for the killing of the deceased with a bullet. I thus find that the killing of the deceased was unlawful.

Was the death of the deceased caused with malice and forethought? This question can only be answered if all the circumstances of the shooting were testified to in evidence. The burden was on the prosecution to establish the premeditation of the assailant in killing the deceased. Again, in my view the evidence of the woman who was screaming at the scene would be very crucial in establishing malice forethought in addition to the evidence of Pw1 who stated that the deceased told him that he was being tracked by three people.

The prosecution did not call the woman to give the circumstances of the killing. It cannot just be assumed that the three people who were alleged to be following the deceased the previous night were the same people who killed him. In my view the prosecution failed to prove malice forethought in this matter.

I find that the prosecution failed to prove their case against the accused person for the offence of murder beyond any reasonable doubt. They did not prove that the accused caused the death of the deceased nor that he was one of the people who caused the death of the deceased. Certainly the deceased was unlawfully killed, but in my view from the evidence on record the killing was not proved to have been caused by the accused person. I thus find the accused not guilty of the offence of murder and acquit him accordingly.

**Dated and delivered at Garissa this 5th day of April, 2017**

**GEORGE DULU**

**JUDGE**