



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 7 OF 2013

REPUBLIC.....PROSECUTOR

VS

ABDI SAMAD MOHAMED ALIAS ABDI MOHAMED.....1ST ACCUSED

ABDULLAHI ISMAEL DUBAT.....2ND ACCUSED

JUDGEMENT

The two accused persons herein stand charged with 3 counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of count 1 Are that on the 2nd of April 2013 at Garissa County in the Republic of Kenya, jointly with others not before court murdered No. 44899 Corporal Alfonse Itua Katiku. The particulars of Count 2 are that on the same day and place jointly with others not before court murdered No. 87830 PC Matthew Otieno Yamo. The particulars of count 3 are that on the same day and place with others not before court murdered no. 246114 APC Peter Kabue.

They have denied all the three charges. The prosecution has brought 8 witnesses to prove the charges against the accused persons.

PW1 was PC Richard Kipsang who testified that on the 2nd of April 2013 he was on patrol duty in Garissa town centre with the late Corporal Katiku, PC Yamo and the late APC Kabue together with PC Njagi, PC Chege and APC Mohammed. They were in civilian clothes and were walking in formations of two. They passed Equity Bank to Gulled Road when they heard the sound of shooting from behind. They lay down and saw two people shooting with pistols and people running. According to him, both the people who shot wore headscarfs. Cpl. Katiku entered an Mpesa shop and the short man among the attackers followed him. According to this witness, the tall man among the attackers threw a grenade which affected PC Njagi's ears and injured PC Kabue. In the process, PC Yamo was killed. PC Njagi and PC Chege were taken to hospital.

Reinforcements came shortly led by the OCPD. They searched for the attackers in vain. After several months he was informed that a suspect had been arrested and he attended an identification parade at Garissa Police Station in January 2014 where he identified the tall attacker by face and also the beard. He stated that the attackers did not cover their faces with the headscarfs. He denied being a shameless liar.

PW2 was PC Mark Njagi who stated that he was in the same patrol duty to collect intelligence information, as they had been told that there was suspicion Alshabaab members who had come to Garissa town. When they heard shooting from behind, they moved back to find out what the matter was, when PC Chege informed that there was a grenade and they took cover. There after an explosion occurred, and they took cover on the side of the road and later realized that PC Kabue had been injured. Together with PC

Chege they escorted PC Kabue to the hospital with the assistance of the owner of a Nissan vehicle who had offered to help. It was his evidence that he did not recognize the people who threw the grenade. He stated that the grenade raised dust from the murram road and he could not thus see through the dust. According to him, each police officer was armed with a Ceska pistol.

PW3 was APC Mohammed Idriss Kapasho. It was his evidence that he was in the same patrol duty walking with other officers in formations of two with PC Njagi. Suddenly APC Kabue from behind called out. When they moved back, they saw two people armed with pistols with covered faces. Though the police shot at these people, they did not get them due to the long distance. The attackers then threw grenades and the police who took cover in a nearby school but shortly realized that APC Kabue was seriously injured in the abdomen. He later learnt that Cpl Katiku and PC Yamo were killed. He stated that in total 3 police officers died. He insisted that the attackers covered their faces and eyes though one was tall and one was short and slim. He stated that he was not called to any identification parade.

PW4 was Inspector John Misoi who testified that on 10th January 2014 he was requested by CI Limera to conduct a identification parade on a suspect by the name Dubat. Two witnesses PC Richard Kipsang and PC Aden Guyo participated in the parade. According to him, each of the two witnesses in turn moved from left to right and identified the suspect by touching him. The suspect said that he was not satisfied with the parade as the witnesses wanted to fix him. He produced the identification parade form in which PC Richard Kipsang was the identifying witness. He then stated that actually he did not conduct the identification parade where the witness was PC Guyo though he was initially asked to do so. He stated that during the parade, the head of the suspect was not covered and that the face was open.

PW5 was Supt. Jaffred Matete. It was his evidence that on 2nd of April 2013 while at CID Headquarters Garissa he received a report through the police radio of a shooting along Gulled Road Garissa. He proceeded to the scene with other police officers and saw the body of PC Yamo on the road. He was shot dead and his police pistol was missing. A few metres away, he saw the body of Corporal Katiku in a cyber cafe, also shot with his service pistol missing. According to him, PC Njagi gave him a description of what had happened. They found the owner of the cyber cafe Abdi Ibrahim. They also found three used cartridges on the floor of the cyber cafe. He interviewed people and one called Peter Njeru Mwangi said he could identify one attacker. He proceeded to the Garissa Provincial General Hospital where injured police officers had been taken. In the evening of the same day, he received information that a passenger had alighted from a bus near the police checkpoint at Akapul near Dadaab. On 5th of April 2013, he conducted an identification parade for the suspect known as Abdisamad Salal Khalef who is the 1st accused and that the witness identified him by touching. He found that the 1st accused had an identity card from Ethiopia and was a refugee. He was transferred from the Garissa Police Station before the name of the 2nd accused Abdullahi Ismail Dubat had been known. He stated that the house where the used cartridges were found was surrounded by a perimeter wall. He also stated that during the identification parade, a police officer translated what was taking place into Kisomali language but that police officer did not record a statement. He stated also that he partly investigated the case.

PW6 was Ali Aden Osman a former police officer who operated a herbal clinic and a cyber cafe on Takwa Road Garissa. It was his evidence that on 2nd April 2013 at around noon he heard gunshots towards Gulled street and also grenade explosions. People were running around and he took cover at his herbal clinic and employee from his cyber cafe phoned and told him that a person had been shot near the cyber cafe. He ran to the cyber cafe and closed it and shortly thereafter, he heard a knock on the door and found that it was government security officers. He stated that he did not witness the shooting nor see the man who was shot. He stated that there was smell of teargas at the scene.

PW7 was Senior Supt. Lawrence Kirwa a firearms examiner. He examined to used cartridges sent through a police exhibit memo. According to him, one cartridge was fired through a Ceska pistol while the other one through a Browning pistol. No photographs were taken of the cartridges nor were the cartridges brought to court. He produced the firearms examiner's report and the police exhibit memo as exhibits.

PW8 was George Ochieng' a senior police officer under suspension. It was his evidence in 1st June he took over investigations of the case from Inspector Machete. At that time, a suspect by the name Fainus

was at large. That suspect was said to be a notorious criminal hiding and with no fixed abode. He was told that the suspect had been arrested at Dadaab found that this suspect was 2nd accused Dubat. He stated that Dubat was a retired military officer that and the 1st accused was initially charged together with a businessman called Agawin who was later treated as a witness. He stated that no identification parade was conducted with respect to the 2nd accused and that the bulk of investigation in the case was done by Inspector Machete who should not have conducted an identification parade.

Two postmortem doctors identified as prosecution witnesses did not attend court to testify even after several adjournments were given by the court to enable prosecution call the remaining witnesses. The prosecution closed its case, and the accused put on his defence.

The 1st accused Abdisamad Mohamed gave a sworn statement of defence saying he came from SokoNg'ombe in Garissa. He stated that on the 3rd of April 2013 at 7.30am, he was travelling from Hagadera from Garissa in a lorry as a fare paying passenger. That it was the rainy season and the lorry got stuck near Hagabull. He thus alighted and boarded another vehicle carrying Somali passengers who said they were going to Hagadera and Dadaab. However, at Hagadera they took him to the police station and identified themselves as police officers and he was thus arrested. He stated that he was charged initially with another person. According to him, on the 2nd of April 2013 at around 11am, he was at home at SokoNg'ombe in Garissa. He denied committing the offence and stated that he was arrested with no weapon.

The second accused, Abdullahi Ismail Dubat also gave sworn testimony and said that he was a Kenyan born in Dujis County. His father Dubat died in 1980. That Gellia Maalim was his mother. He was married with children. In 1990, he was recruited in the military at Garissa. He later wanted to leave the service as he was the only child of his mother but the military refused and he left the service in December 2008. He stated that on 6th December 2013 he went to Hagadera to sell camels, arriving e arrived there on 8th December 2013. He slept with a friend but later met 9 administration police officers who questioned him about Ibrahim Harun who had committed rape. They then arrested him and assaulted him. He was taken to DOD Nairobi then later to Garissa and charged with the offences. He denied committing the offences alleged. He stated that the charges were a frame up.

The above is the evidence on both the prosecution and the defence side. The two accused persons were charged with committing murder under 3 separate counts. The burden is always on the prosecution to prove an accused person guilty of the offence beyond reasonable doubt. See the case of WOOLMINGTON-VS-DPP (1936) AC 462. An accused person does not have a burden to prove his innocence. He can only raise some doubts in the prosecution case.

In this case of murder, the prosecution was required to prove that all the three deceased persons died. Secondly, that the death was unlawful. Thirdly, that the deaths were caused by the accused persons. Fourthly, if indeed the accused caused the deaths, then the prosecution was required to prove that the deaths were caused by malice aforethought.

Did the 3 police officers die? The postmortem doctors failed to attend court to produce the postmortem reports. Oral evidence is however abundant on record from witnesses that that the 3 police officers died. The defence does not seriously challenge the fact of death and also the fact that the deceased were injured and killed by gunshots from pistols and a grenade. In my view, this is one of the exceptional cases where death could be proved without the necessity of calling the doctors to produce the postmortem forms.

The prosecuting counsel tried his best he could to get the doctors come to court to testify. The court allowed many adjournments. However, the doctors did not come to court to testify. They are said to be Nairobi doctors. The court does not know the real reason why they were reluctant or unable to come to court and testify. However, with the oral evidence on record, I find that indeed the 3 police officers mentioned in the charge sheet on the 3 counts died as a result of gunshots and grenade explosions.

I now go to the issue as to whether the deaths were unlawful. There is no suggestion both from the prosecution and the defence that the shooting and throwing of a grenade which caused the deaths was a

lawful act. The evidence on record is that police on patrol duty in civilian clothes were ambushed and attacked by assailants from behind resulting in the three deaths. There was no legal justification for the deaths. I thus find that the deaths were unlawful.

I now turn to the issue as to whether the prosecution proved that the accused persons caused the deaths of the 3 police officers. With regard to accused 1 Abdisamad Mohammed a witness called Peter Njeru is said to have identified him as one of the assailants. It was said by PW5 Supt. Jaffred Matete that the same Peter Njeru informed him at the scene that he could identify the tall attacker. The said Peter Njeru did not testify in court though he was said to be the identifying witness at the identification parade. Secondly, the 1st accused was arrested at Dadaab not because of a description given by Peter Njeru, but because he had alighted from a vehicle in what the police considered to be suspicious circumstances. Worse still, the identification parade was conducted by Jaffred Matete who was at the time of conducting the parade, the investigating officer before he handed over to George Ochieng' in June 2013. An investigating officer cannot and should not conduct an identification parade. That was a fatal mistake. Further, the evidence of Jaffred Matete was that the communication between him and the 1st accused at the parade was through a Somali police interpreter who did not come to testify in court. The parade was thus of no evidential value. It was an illegality. It is not evidence against 1st accused.

With regard to the second accused Abdullahi Ismail Dubat, he was arrested several months after the incident. His arrest from the evidence is on suspicion he was deserter from the military and a notorious criminal, not because of the incident where the police officers herein were killed. Though there is an allegation by police witnesses that a parade was conducted, the identification parade form was not produced as an exhibit. The succeeding investigating officer George Ochieng also stated that no identification parade was conducted. I find that no identification parade was conducted in respect of Dubat.

In my view, the evidence connecting the accused persons to the deaths of the three police officers is evidence of mere suspicion. All police officers except PC Kipsang said that the faces of the the attackers were covered with scarfs. PC Kipsang did not describe the physical appearance of the assailants except to say one was tall and one was short. Such a description is not adequate to pinpoint any of these two accused persons. The arrest of both accused persons had nothing to do with the incident except that the police thought that they were acting in a suspicious manner. Mere suspicion cannot be sufficient ground to found a conviction in a criminal case. See the case of SAWE-VS-REPUBLIC (2003) KLR 364. On this account the prosecution has not proved its case against the two accused to connect them to the killing and they are entitled to an acquittal.

With regard to malice aforethought, since I have found that none of the two accused is connected to the deaths of the 3 police officers, I will also find that no malice aforethought was established against any of them.

In conclusion, I find that the prosecution has not proved their case against any of the two accused persons. I thus acquit both on the three charges of murder herein under section 215 Criminal Procedure Code. They will thus be released forthwith unless otherwise lawfully held.

Dated at delivered at Garissa on 15th June, 2017.

GEORGE DULU

JUDGE