



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO 15 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ALI ALIO MOHAMAD HASSAN.....1ST ACCUSED

ABDIRIZAK MOHAMED ABDI.....2ND ACCUSED

MOHAMED RASHID SHABAAN.....3RD ACCUSED

JUDGEMENT

The three (3) accused persons herein stand 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 diverse dates between 26th August 2013 and 31st August 2013 at Quramathow Sub-location in Mandera within Mandera County, jointly murdered N Mohammed Isaack. They have all denied the charge.

The prosecution has called a number of witnesses to prove their case. This case has been conducted by two judges. Three (3) witnesses testified before Stella Mutuku J. I thereafter took over the conduct of the case and heard the evidence of rest of the witnesses.

PW1 is S A a minor witness aged 15 years. She was taken through examination to know whether she understands the nature of an oath as well as the duty to say the truth. The learned judge allowed her to testify on oath.

It was her evidence that in 2013 on a date she couldn't remember, she was herding goats with N the deceased and another girl called F at 4.00pm when two boys Ali Alio and Mohammed Rashid Shaban the 1st and 3rd accused whom she knew before came running. The two threatened to defile them and kill them and the 3rd accused Rashid Shaban inserted his finger in the eyes of N. According to this witness, they reported the matter to the parents and elders and the chief. Five days after this incident, N went missing after she told this witness that Ali Alio had threatened to kill her. It was her evidence that she did not see N again alive but saw her clothes.

In cross examination she stated that she did not know the name of the 2nd accused. She maintained that she grew up with the 1st and 3rd accused and that during the threats the 2nd accused was not present. She clarified that both the 1st and 3rd accused threatened N.

PW2 was S H M the mother of N the deceased. It was her evidence that a report of the threats on the deceased by Mohamed Rashid had been made to her. She stated that thereafter, a report was made that the

boys of Ali Aliyo has assaulted the deceased. On that occasion she rushed to the bush where N was herding the goats and found that she had a swelling on forehead and was informed that Rashid has inserted his finger in N eyes. She reported the incident to the elders but the chief did not resolve the matter. According to her, after five days N disappeared while herding goats alone. A search was conducted for two days and her remains and clothes were found. She stated that signs of a struggle were seen where the remains were found. She confirmed that she knew the 1st and 3rd accused well before.

In cross examination she stated that she knew the 2nd accused Abdirizaak as a herds boy employed in the family of the 1st and 3rd accused. She maintained that N told her that the 3rd accused had threatened to defile and kill her.

PW3 is M I A the father of the deceased. He stated that it was reported to him that the deceased had been chased and threatened by a man called Mohamed Rashid Shaban but he did not take any action. Some days afterward, he received another report of an assault on his daughter by Mohamed Rashid and Ali Alio. He however did not make a report to the police and instructed N and his wife (PW2) to make that report. However, no report was made to the police as the elders and chief intervened though the chief did not resolve the issue before N disappeared. After the disappearance of N a report was made to the police, search conducted and they followed foot prints and found the remains of N at 3.00 am after 2 days. He stated that he saw the 2nd and 3rd accused chewing miraa on the day of disappearance of his daughter.

In cross examination he stated that in the first report, the deceased complained of harassment by Rashid Shaban. In the second incident, the complain was against both Rashid Shaban and Ali Alio. He stated that the deceased complained of threats to kill her.

At this stage, I took over the conduct of the case and after explaining the provisions of section 200 of the Criminal Procedure Code, the accused persons elected to proceed with the case from where it had reached.

PW4 was Habiba Abdullahi Hassan. It was her evidence that on 3rd August 2013 at 4.00pm while herding goats she noted undergarments, slippers and an axe under a tree. Shortly thereafter, a man stopped her and asked whether a missing person had been found but she did not respond. She arrived home later and reported what she had seen to the elders. The next morning, she went with elders and a police to the scene and saw bones and blood stains under a tree together with clothing items and an axe. She was later told to identify the person she had talked with who is the son of Alio at the police station. She did so by touching the 1st accused on the collar of the shirt. She also stated that she knew the two other accused persons.

In cross examination, she stated that she knew of N disappearance before the day she talked to the person she identified. She was aware four days earlier that N had disappeared. She stated that the accused had not been pursued after the disappearance of N though the story of the threats was known.

PW5 was Mohammed Abdow Hussein a Clinical Officer at Elwak Hospital. He received samples of bones, hair and clothes. He was asked to conduct postmortem. According to him the bones were incomplete and he could not determine whether they were human or animal bones. The hair appeared to be more of human hair. The clothes were blood stained and torn. He concluded that cause of death could not be ascertained, and produced the postmortem report.

In cross examination he stated that he could not confirm if the items were from the deceased.

PW6 was Abdnoor Emoi Ali the acting chief of Quramathow location. His evidence was that Ali Alio was from his location and Mohamed Rashid was from Wagadud location. He stated that Abdi Isaack Mohamed was employed as herdsman. It was his evidence that on 30th August 2013 at 4.00 pm he was called on phone by the chief of Wagadud East Location to go to a scene of crime in the bush. He proceeded there and met many people including the Officer Commanding Station of Wagadud police station. He stated that the DC gave names of four (4) people to be arrested. That is how the three accused persons were arrested. According to him Ali Alio was found hiding when he was arrested.

PW7 was Elizabeth Waithera Oyiengo a Government Analyst. It was her evidence that they received samples of the blood of the mother of N and the items i.e bones, torn clothes and an axe. They did the examination and DNA tests. The report is that the blood sample of the mother of N matched the blood stains found on the torn clothes, the axe, and the bones. It was her conclusion that there was 99% likelihood that the blood on the remains belong to a child of PW2 the mother of N.

PW8 was police constable Fredrick Njue Njeru. It was his evidence that in the police briefings at the station they were given names of suspects to be arrested. While at a police road block, they were instructed to inspect buses to find the suspects. They stopped a bus and while trying to inspect the people, one passenger ran off and disappeared in the bush. The remaining passengers informed them that that person boarded the bus with another who was with them. This person was arrested and was 3rd accused who had no identification documents. They arrested him and took him to police station where he was later charged.

Pw 9 was Inspector Samuel Kimani who was the investigating officer together with Corporal Koech, Corporal Wanjala and Chief Inspector Amadi.

It was his evidence that on 8th August 2013, he received information at Elwak Police Station of a missing girl in Wagadud area. He instructed police officers stationed at Wagadud to search for the missing girl in the bushes and later joined them in the search. They did not find the girl and on 31st August 2013 he received information from police constable Mwendwa that the remains of the girl had been found in the bush. According to this witness police constable Mwendwa who visited the scene collected the items i.e. assorted pieces of clothing, bone fragments, slippers an axe and a water container. He produced these items as exhibits to court. Later inspector Samuel Kimani received information from police constable Mwendwa that two (2) suspects Ali Alio and Abdirizak Mohamed had been arrested with the help of local chiefs. It was his evidence that on 1st September 2013, Chief Inspector Amadi conducted an identification parade for two (2) suspects who were positively identified. It was his evidence also that chief inspector Amadi coordinated the collection of blood samples from the mother of the missing girl and prepared an exhibit memo and sent recovered items to Government Chemist for analysis and DNA test. He stated that police constable Mwendwa later called on the phone to say that a 3rd suspect Rashid Shaban had been arrested on the Elwak-Moyale road trying to free. According to this witness who was the investing officer, the three (3) accused were connected with the offence because they had a love interest with the girl who resisted their advances and complained to her mother who made a report to the chief.

PW10 was Isaac Hassan Kulmia a retired chief of Wagadud location. It was his evidence that N the deceased was from his location and that he knew all the 3 accused persons. He could remember that there was a day he received a report from two women that a girl had been molested by Mohamed Shaban. He investigated the incident with elders and found that it was mere seduction. Later he received another complain which he reported to the police. An arrest was made and the suspect was later released. He was aware that N had gone missing and that a search was conducted with the assistance of OCS, DO and elders. He stated that the remains of the deceased and other items were found in the bush by a woman who made a report. The body of the deceased had already been eaten by wild animals. According to him the suspects were four (4) and one had not yet been arrested.

The prosecution then closed their case.

When put on their defences all the three accused persons elected to keep quiet. There after their advocate Arthur Ingutya filed written submissions. The prosecuting counsel Mr. Okemwa stated that they did not have a right of reply in terms of section 161 of the Criminal Procedure Code (Cap 75) as the defence did not tender evidence.

This is a murder case. The prosecution in required to prove that the deceased died. Secondly, they are required to prove that the death was unlawful. Thirdly, they were required to prove that the accused caused the death. Fourthly, they were required to prove that the death was caused with malice

forethought.

The burden is always on the prosecution to prove a criminal case against an accused person beyond any reasonable doubts. The accused does not have a burden to prove his/her innocence. See the case of WOOLMINGTON VS DPP (1935) AC 462.

With regard to the death of the deceased, the Clinical Officer PW5 could not establish the cause of death nor if the remains were for a human being. In his report he stated that he could not establish whether the bone fragments were for a human being or an animal. The Government Analyst (PW7) report was that the blood stains on the clothes and the axe and the blood in the bones matched those of the blood of PW2 the mother of the missing girl. Same were human blood. In my view, though the missing girl was not found, the recovery of the clothes and the connection in the DNA analysis of the blood of the mother established that N died. I thus find the prosecution proved beyond reasonable doubts that the deceased died.

With regard to the issue whether the death was unlawful, the evidence on record is that the death could have been caused by a human being or even a wild animal. Though there is an allegation of a struggle at the scene, no sketch of the scene was taken to indicate that struggle. The photographer who took the photographs did not testify. Therefore it cannot be said that the death was caused by a human being. In any event the scene does not appear to have been condoned and it is possible that many people went there before the photographs were taken. I thus find that the prosecution did not prove beyond reasonable doubt that the death was unlawful.

The third issue is whether the accused or any of them caused the death of the deceased. No one witnessed the killing of the deceased. The case is thus based on circumstantial evidence. In the case of R VS KIPKERING KOSKEY AND ANOTHER 16 EACA 135 the Court of Appeal for EA stated that in order to justify a conviction on circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

The evidence of the prosecution connecting the accused persons with the death of the deceased, according to the investigating officer PW9 and all prosecution witnesses, was that they made love advances on the deceased which she rejected. There is an allegation that they threatened her. However there is no evidence that on the material day any of them was seen going towards her or going away from the scene. There is no indication that any of them on that day or slightly earlier indicated that they would follow her in the bush and harm her. The evidence against them is thus of suspicion. Suspicion however strong cannot be the basis of a conviction in a criminal case. See the case of SAWE VS REPUBLIC (2003) KLR 364 . In my view, the prosecution did not prove beyond reasonable doubt through evidence that any of the accused persons was connected to the death of the deceased.

It is also important to note that there is no clear evidence that immediately after the disappearance of N, anybody sought for the arrest of the accused. It appears that the order to arrest the accused came from the DC of the area. The reason why the DC gave that order is not known. He did not testify in evidence. He gave an order for the arrest of four people, one of whom has not yet been arrested. The fact that the 3rd accused appeared to be escaping during arrest does not on itself mean he was guilty. With the passage of days it must have been that he knew or became aware that the DC had ordered his arrest, and he probably reacted by trying to get out of the area to avoid that arrest. That is not evidenced that he killed the deceased. I thus find that the prosecution did not prove beyond reasonable doubt that any of the three accused caused the death of the deceased.

Coming to malice forethought, since I have found that none of the accused persons caused the death of the deceased, I also find that the prosecution failed to prove malice a fore thought against any of the accused persons. The fact that they made love advances on her as well as the mild threats in my view did not establish malice forethought against any of them. These were young men who were probably overzealous in their pursuit for love.

To conclude, I find that the prosecution did not prove their case of murder against any of the three

accused persons. I thus acquit each of the accused persons, and set them free.

Dated and delivered at Garissa on 12th day of July, 2017

George Dulu

Judge