



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 43 OF 2012

REPUBLIC..... PROSECUTOR

VERSUS

MOULID JALDESA 1ST ACCUSED

IBRAHIM JALDESA 2ND ACCUSED

JUDGMENT

Moulid Jaldesa and Ibrahim Jaldesa are jointly charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge state that on the night of 13/5/2012 at Kinna Area, Kinna Sub-Location, Garbatula District in Isiolo County, jointly with another not before the court, murdered **Abdi Golicha Sora Hapana**.

In support of their case, the prosecution called only one witness, Rashid Sora, a brother to the deceased. The accused were represented by Learned Counsel Ms. Thibaru, while the State was represented by Learned Counsel, Mr. Mulochi.

At the close of their case, the State is supposed to establish a prima facie case against the accused before he can be called upon to defend himself. A prima facie case has been defined as one where a tribunal, properly directing its mind to the law and facts, could convict if no explanation is offered by the defence. See **Bhatt v Rep (1957) EA 322**. I will therefore examine the evidence adduced before me to determine if such a case has been established.

Rashid Sora (PW1), who described himself as a brother of the deceased did not witness the murder. He recalled that he was asleep in his house on the night of 13/5/2011 about 3.50 a.m. when his sister-in-law, Shinda Roba woke him up to inform him that his brother had been murdered by the sons of Golicha. PW1 named the sons of Golicha as the two accused though in his statement to the police, he never mentioned the two names.

The State Counsel informed the court that the other witnesses were unwilling to come to court. Despite the court issuing warrants of arrest for the witnesses, the police reported that the witnesses had disappeared. The court does note that it is not uncommon for such occurrence even in serious cases of this magnitude, for the people of this region - (isiolo, Garbatulla), declining to attend court on grounds that they have resolved the matter traditionally. Murder is not a dispute to be resolved traditionally. However, the court finds its hands tied when faced with such a situation.

In a case of murder, it is the duty of the prosecution to prove beyond any reasonable doubt:

1. The death of the deceased.

2. That the accused caused the death through unlawful act or omission.

3. That accused had malice aforethought.

For unknown reason, the prosecution did not call the Doctor who performed the post mortem though PW1 said he saw that indeed, the deceased had injuries to the forehead, and post mortem was done before burial, on the same day. The prosecution should have called the Doctor to confirm the cause of death.

No witness was called to tell the court who actually caused the death of the deceased. PW1 was not present. PW1 stated that Golicha had 9 sons and any of them could have caused the death. I find that there is no direct or circumstantial evidence linking the two accused with the death of the deceased. The two accused are only suspects.

Having failed to link accused to the death of deceased, the third ingredient of malice aforethought cannot therefore be proved. For the above reasons, I find that the prosecution has miserably failed to establish a prima facie case against accused for them to be called upon to enter their defence. They are hereby acquitted under **Section 306 CPC**.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF SEPTEMBER, 2016.

R.P.V. WENDOH

JUDGE

6/9/2016

PRESENT

Mr. Mulochi for State

Ms. Thibaru for Accused

Ibrahim/Peninah, Court Assistants

Both Present, Accused