



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 25 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

UGAS BISHAR ISMAIEL.....1ST ACCUSED

SADIK AHMED HASSAN.....2ND ACCUSED

WELI ADAN MURSAL.....3RD ACCUSED

IBRAHIM HARET ABDILLE.....4TH ACCUSED

JUDGEMENT

Introduction

Ugas Bishar Ismaiel, Sadik Ahmed Hassan, Weli Adan Mursal and Ibrahim Haret Abdille, the 1st, 2nd, 3rd and 4th accused persons respectively are charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on 19th July 2012 at Ifo Refugee Camp in Dadaab District within Garissa County jointly murdered Mohamud Baasi Mohamed.

All the four accused persons are represented by Mr. C.P. Onono, advocate. They denied the charges and the case went to full trial where the prosecution presented evidence of nine witnesses. The defence called the four accused persons to give evidence in support of the defence. All save the 4th accused gave sworn statements of defence. The 4th Accused gave an unsworn defence.

Prosecution case

The circumstances leading to the death of the deceased were narrated by Haretha Gure Abdullahi, PW1, who was the wife of the deceased; Habsa Baasi Mohamed, PW2, daughter of the deceased and Rahma Abass Mohamed, PW6, also daughter of the deceased. The evidence of the three witnesses can be summarized as follows: That on 19th July 2012 around 8.30PM, the family comprised of the deceased, PW1, PW2, PW6 and other children was having supper at their house in Ifo Refugee Camp. Some of the children led by PW2 were preparing for Islamic classes known as *duksi*. According to PW2 they were using the mobile phone light to read. The family was outside their house but inside the compound fenced with tree twigs. According to the evidence of PW6, four men invaded the homestead and one of the men held PW6's hand intending to take her away. Three men entered while one was left outside. The men ordered the family to remain silent. The deceased confronted them and a struggle ensued between the deceased and two of the attackers. The men cut the deceased with a *panga*. They called out for help from

the person outside when the deceased overpowered them. The man came and shot the deceased on the neck. The deceased fell down bleeding and the attackers left the scene.

The matter was reported at Ifo Police Station where it was received by Chief Inspector William Ekasi, PW4. In the company of other police officers PW4 visited the scene. He found the deceased inside the house dead. The body was moved to GIZ Hospital where the post mortem was performed by Dr. Victor Nyange, PW3, after which the body was released to the family for burial. The four accused persons were later arrested on 22nd July 2012 in connection with the offence and were charged.

The defence case

The 1st accused said he was a refugee who came to Kenya together with his family in 1991 and lives in Block B14 at Ifo Refugee Camp. He denied having gone to the home of the deceased on 19th July 2012. He admitted that he was a neighbour of the deceased's family and that he knew the co-accused persons before this date. He testified that he was arrested in company of 2nd and 3rd accused persons while riding on a motor cycle commonly known as *boda boda*. He said they were going home from Ifo town at the time of arrest and other than *miraa*, cigarettes and telephone he did not have anything else. He denied owning a gun and denied having anything to do with the deceased's death or going for a robbery mission on the date he was arrested.

The 2nd accused is also a refugee who came to Kenya with his family in 1991. He lives in Block B12 at Ifo Refugee Camp. He said he knew his co-accused persons since 1991. He said he was at home on 19th July 2012 at 10.30PM and that he did not go to the home of the deceased that night. He said he was arrested with the 1st and 3rd accused as they rode on a motor cycle and at the time he had a telephone and a jerrican of fuel for his motor cycle that had stalled. He said he knew the family of the deceased and that their homes were separated by four houses. He said he was at home on 19th July 2012 between 8.00PM and 9.00PM and he did not notice anything wrong at his neighbours' home.

The 3rd accused told the court that at the time of arrest he lived in Block B2 and that he owns a shop. He said he knew 1st and 2nd accused persons before and they used to play football together. He also said that the 4th accused was his neighbour. He said that at the time of his arrest he was with 1st and 2nd accused and he was found with cigarettes, *miraa* and keys to his shop. He said he was at his shop on 19th July 2012 between 8.00PM and 9.00PM. He said he knew PW1 but not her daughters, PW2 and PW6.

On his part, the 4th accused narrated how he was arrested on 22nd July 2012 at 8.30PM from his home and taken to Police Station; that he met 1st, 2nd and 3rd accused persons at the police station. He said he knew his co-accused persons and they used to play soccer together.

Issues for determination

Flowing from the definition of murder under section 203 of the Penal Code, a court trying a murder suspect must determine whether death of the deceased has occurred; whether that death resulted from an unlawful act or omission and whether the accused person before the court caused that death with malice aforethought, which is the guilt mind of the accused. The onus is always on the prosecution to prove these ingredients beyond all reasonable doubt.

Death of the deceased

Dr. Victor Nyange, who worked with GIZ at the time, performed post mortem on the body of the deceased on 20th July 2012. At the time, the deceased had been dead within twelve hours. The doctor confirmed bullet wound on the head of the deceased with the entry point being the lower right side of the ear and exit point being between the upper and lower jaw. According to the doctor the shot was a close range one probably from five metres away.

The deceased had a cut wound on the right hand. The cut was inflicted by a sharp object that was heavier than a knife. The hand was broken bone at the area of the cut. According to the doctor the injury on the hand was inflicted before death due to the amount of blood around the area. His opinion is that the deceased died due to loss of blood leading to hypovolemic cardiovascular arrest.

The evidence of the doctor coupled with that of PW1, PW2 and PW6 confirms that the deceased died as a result of the injuries he sustained during the attack on the night of 19th July 2012. This evidence proves beyond reasonable doubt that the death of Mohamud Baasi Mohamed occurred as a result of injuries inflicted on him on the night of 19th July 2012.

The offender

This case is based on the identification of the people who attacked the family of the deceased and inflicted fatal wounds on the deceased. Of the nine witnesses who testified, only three were at the scene. These are PW1, the wife of the deceased, PW2 and PW6 daughters of the deceased. These three were together at home that evening. The rest of the witnesses were involved with this matter at a later stage.

The other witnesses are PW3 the doctor who performed the post mortem, PW4 the Chief Inspector of Police Mr. William Ekasi who visited the scene after members of public called him, PW5 the Acting Inspector of Police Felix Nkonge Forum who conducted the identification parade in respect of the accused persons. PW7, Senior Sergeant Alkano Indris played the role of interrogating the 1st Accused leading to the recovery of the gun.

PW7 told the court that the gun was later recovered from 4th Accused. Then there was PW8, Mohamed Yussuf Abdille the father of 4th Accused who testified about the recovery of the gun and finally there was the firearm examiner Mr. Lawrence Nthiwa, PW9, who testified on behalf of Mr. Alex Mwandawiro.

It is to the evidence of PW1, PW2 and PW6 this court must turn to get the answers it is seeking in respect of the identity of the person or persons who attacked the family of the deceased, cut and shot the deceased who died from the wounds inflicted on him.

The time of the attack is given at 8.30PM. According to PW1, there was electricity light of the energy saver bulb. She did not say where this light was positioned in relation to the compound where the family was. The family was said to have been outside the house but inside their compound which was fenced. PW1 said she saw the attackers, four in number, enter the compound and she was able to see the attackers very well. She further testified that the deceased was cut on the forehead with a *panga* and several cuts on the arm. She said she saw all the four accused at the scene and also identified them at the parade. She said she knew 2nd Accused who was his neighbour as Abdihakim.

PW2 testified that at the time of the attack, there was light from the bulb which they were using to prepare Islamic lessons for the following day; that the bulb was infested with flies and they moved away from it and started using the light from the mobile phone; that four men invaded the family, one was armed with a knife, another a *rungu*, another a *panga* and one whom she identified as Abdihakim and said to be the 2nd Accused was standing at the door holding a gun. She said that they were ordered to remain silent and that she was slapped and her phone snatched from her. She said her mother's phone was also snatched from her.

The other evidence I want to analyze is that of Rahma Abass Mohamed, PW6. Her evidence is that four

men went to their home, three entered the house and one was left outside, and ordered them to put off the mobile phone light they were using and to keep silent; that they started slapping PW2; that one person whom she named as Awes and said is the 1st Accused held her hand and told her to keep quiet; that 3rd Accused hit the deceased with a *rungu* while 2nd Accused was aiming the gun at them; that her father (deceased) intervened to stop the men from taking PW6 away; the men struggling with her father called for help from 2nd Accused who shot at her father after which the men ran away.

I have critically examined the evidence of the three witnesses. I find it contains inconsistencies and contradictions. PW1 told the court that the four attackers cut the deceased on the head with a *panga*. She never testified to the deceased being hit on the head with a *rungu*. PW2 and PW6 said the deceased was hit on the head with a *rungu*. PW1 did not mention that the attackers wanted to kidnap her daughter PW6 while PW2 and PW6 testified to the attempted kidnap; PW1 did not say the attackers snatched a phone from the PW2 and also from her but PW2 said they snatched the phone from her and also snatched one from PW1.

The three witnesses, PW1, PW2 and PW6 all insisted that they saw the attackers well. Both PW2 and PW6 said they were using light from the Nokia phone marked MFI-3. PW1 said there was electricity light. PW2 said the electricity light had attracted flies and they had moved away from it and started using mobile phone light to read. PW2 added during cross examination that one attacker hit the electric bulb making the whole place dark.

PW4 on the other hand told the court that the scene of the crime was dark when they arrived and that they were using torches to see around. He said the nearest electricity to the scene was one kilometre away. Certainly the issue of adequate lighting during the attack has not been established.

With these contradictions and inconsistencies on the issue of available light at the scene, it is the view of this court that the witnesses were not able to clearly see and identify the attackers. The light from the mobile phone was not adequate to see the attackers well in order to identify them later to the police.

More confusion in the evidence on the identity of the attackers is seen in what PW2 said. She told the court that she knew the 2nd Accused as the person who shot her father. She referred to him as Abdihakim. His name as per the record is Sadik Ahmed Hassan. He was told to stand and the witness confirmed he was the one she knew as Abdihakim. The onus was on the prosecution to prove that 2nd Accused is known by the name of Abdihakim. This onus was not discharged.

Evidence of identification of suspects presents serious issues to a court especially where the conditions of identification were not good. In **Kamau v. R (1975) EA 139**, the court stated that:

“The most honest of witnesses can be mistaken when it comes to identification.”

The same issue was handled by the Court of Appeal in **Cleophas Otieno Wamunga v. R (1989) KLR 424** where it stated that:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of an accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.....”

Still on the issue of identification, Widgery, C.J in **R v. Turnbull (1976) 3 ALL ER 549** stated as follows:

“Recognition may be more reliable than identification of a stranger; but even where the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in

close relatives and friends are sometimes made.”

I have analyzed the above cases to demonstrate that I am faced with circumstances that require extreme caution in respect to the identity of the accused persons as the attackers in this case. I did not find any other evidence on record to show that the police were given any description of the attackers to lead them to arrest them. In fact, PW4 said he received information that there were suspects preparing to commit a felony and acting on that information the police arrested 1st, 2nd and 3rd accused persons riding as passengers on a motor cycle. The owner of that cycle was not a witness.

Were the three going to commit a felony? Court was told that they were found with a rungu and a knife but the three said they did not have those items. They said they were arrested as they rode home carrying various items but not the weapons.

PW5 testified that all the accused persons were identified by the witnesses. The process of conducting the identification parades did not seem to have been without challenges. PW6 said she saw 3rd Accused before the identification parade was conducted when his name was called out. Even without this evidence, this court harbours serious doubts about the identification of the accused persons by PW1, PW2 and PW6 during the night of the attack.

There is the question of the 4th Accused and the recovered gun. 4th Accused was arrested on 23rd July 2012 after the others had been arrested on 22nd July 2012. The circumstances leading to his arrest are not clear. Sergeant Alkano Indris, PW7, testified that he was asked to interrogate the 1st Accused on 23rd July 2012; that 1st Accused confessed to having a gun which was with one Ibrahim Haret whom he said was his friend. The latter is the 4th Accused. PW7 handed over the suspect to PW4 and only learned later that the gun had been recovered. Of course PW7 could not take a confession from a suspect and his evidence to that effect is not admissible. However, a gun was recovered from the 4th Accused. The circumstances under which it was recovered are not clear. The evidence by PW4 on this issue is as follows:

“I got information from Sergeant Indris that accused 1 had a firearm. I got this information when I was in Garissa. When I went back I organized to recover the firearm. Accused 1 sent his uncle. At the time accused 4 was not in custody. Accused 1 informed us that accused 4 had the gun. Through the elders of the community we recovered the firearm. Accused 4 handed firearm to elders. Elders brought the firearm to the police station. It was from block elder. He assists the police in security matters. I was able to identify the firearm. It was an AK 47 serial No. 19746E-9550. I kept the gun in safe custody.”

The person referred to as 4th Accused’s uncle is not disclosed nor did any one of that identity testify. The elders referred to in evidence are not named nor is the block leader who assisted police with security matters. They did not testify. Instead one Mohamed Yussuf Abille aka Haret, PW8 testified and told the court that he was the father to 4th Accused person. This witness told the court that he got information that his son 4th Accused had been arrested with a firearm. PW8 continued to state that 4th Accused told him that the gun belonged to Ugas Bishar, 1st Accused and that he (4th Accused) intended to surrender the gun to the police. He said he accompanied his son to a man called Ahmed Hussein, a section leader, and handed the gun to him. Ahmed Hussein did not testify.

I wish to state at this stage that the prosecution omitted to produce the gun as an exhibit. This is not the only exhibit omitted to be produced. The rungu, knife and phone, though marked for identification were not produced in evidence. It is an oversight on the part of the prosecution. The court record shows that the only exhibits produced are the post mortem report, identification parade forms and the report from the government analyst. The question I have to consider is whether this omission is fatal to the prosecution case.

The gun was sent to the government lab together with 6 rounds of ammunition and the spent cartridge collected at the scene by PW4. The opinion of the expert who examined the gun, ammunition and spent

cartridge is conclusive that the gun and ammunition were a firearm and ammunition of 7.62 by 9mm calibre as defined under the Firearms Act. The cartridge was confirmed to have been fired in the same gun. This evidence confirms to this court without doubt that the firearms and ammunition were recovered from the 4th accused. I do not therefore think the omission to produce the gun and ammunition as exhibits in this court is fatal to prosecution case. This court saw the gun in court and it was identified and marked; the firearm examiner examined the same gun and ammunition and confirmed they were firearm and ammunition respectively and that the cartridge collected outside the deceased's home at the scene of the crime was fired from that gun. It is an error that is curable under section 382 Criminal Procedure Code in my view.

Does the evidence of recovery of the gun connect the 1st and 4th accused with this offence? I answer this in the negative. I do not have evidence to that effect as explained in this judgement. The fact that the 4th Accused had the gun does not mean, in my view that he participated in the attack given that there is no other evidence corroborating that he was one of the attackers. I do not think it is safe to connect the 1st accused with the gun given that he was mentioned by PW8 as the owner of the gun yet 4th accused did not testify to that during his defence.

Conclusion

What is this court saying? I am saying that while there is proof beyond reasonable doubt that the deceased died from a gunshot wound on his head, the evidence tending to connect the four accused persons with causing that death is shaky and unsafe to base a conviction on. Therefore, having found that there is no proof beyond reasonable doubt that the accused persons attacked the deceased it would not serve any purpose for this court to continue to determine their state of mind.

However, the 4th accused was found with a gun which was confirmed by an expert to be a firearm. I find that the 4th accused was found in possession of a firearm and ammunition without a certificate. These are offences under section 4(2) of the Firearms Act. This court will and does hereby invoke the provisions of section 179(2) of the Criminal Procedure Act and convict the 4th accused for the offences which this court finds have been proved beyond reasonable doubt.

As stated above, I find the charge of murder not proved beyond any reasonable doubt against each of the accused persons. As a result, 1st, 2nd, 3rd and 4th accused persons are not guilty of murder. They are acquitted of that charge. 1st, 2nd and 3rd accused persons are free to go home unless for any other reason they are being held in custody. They shall be handed over to the UNHCR through the OCS Garissa Police Station. The 4th accused is sentenced to 10 years imprisonment for being in possession of a firearm and ammunition without a certificate respectively. The sentences will run concurrently. I make orders accordingly.

Dated, signed and delivered this 17th March 2014.

S.N.MUTUKU

JUDGE