



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO.8 OF 2011

FORMERLY HIGH COURT OF KENYA AT NAIROBI CRIMINAL CASE NO. 93 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

ADAN HASSAN OMAR.....ACCUSED

JUDGEMENT

Background

The plea in this case was taken in Nairobi on 29th November 2011. Adan Hassan Omar, the accused, was arraigned before the court to face charges of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on 9th November 2010 at Wajir Township in Wajir East District within North Eastern Province, murdered Ibrahim Haji Ali.

Following his plea of not guilty, hearing commenced in Nairobi. Three witnesses testified in Nairobi before the case was transferred to Garissa by the order of the court dated 31st October 2011. Hearing in Garissa commenced *de novo*. The prosecution called a total of seven witnesses. The accused testified as the only defence witness.

Onus and standard of proof

The onus to prove a murder charge lies with the prosecution and never shifts. Where exceptions to this rule exist, this is specified. The standard of proof is beyond reasonable doubt. To discharge the onus of proof to that standard, the prosecution has to tender evidence to prove that:

- i. The deceased person in the case before the court is dead.
- ii. The death of the person killed was caused by the accused person under trial.
- iii. The cause of death is an unlawful act or omission perpetrated by the accused person before the court.
- iv. The accused before the court possessed the intent to cause the death or grievous bodily harm and knew the act or omission will cause the death or grievous bodily harm of the person killed.

Evidence

To determine whether or not the above ingredients have been proved, the court examines and analyzes the

evidence tendered in support of the case and the defence.

The facts of the case can be summarised that the accused attacked and stabbed Ibrahim Haji Ali, the deceased, on the upper right arm near the armpit causing him serious injuries. It is alleged that at 11.30am on 9th November 2011 at the Diff Matatu stage in Wajir town, the accused who was behaving insane passed by, pulled a knife and stabbed the deceased. It is alleged that the deceased was assisted to the Wajir West District Hospital. The accused was chased by the members of public. He ran towards the Police Station where he was cornered. He was arrested and detained.

Evidence further states that the deceased succumbed to injuries and died. The accused was charged with this offence.

The accused has testified that he arrived in Kenya in November 2011 from Somalia to escape insecurity in that country; that he intended to go to a refugee camp and register and later go to Kenyatta National Hospital for treatment of the injuries he had sustained in Somalia. He said he did not have means of subsistence and used to beg for alms at the mosques in Wajir; that being a stranger in the town women and children used to insult him that he was a wizard and a spy; that they used to stone him and call him names; that on the day in question he was stoned and chased by members of the public and he ran towards Wajir Police Station to escape; that it was alleged that he had stabbed a man to death and was charged. He denied stabbing the deceased and denied that he did not have a knife he was alleged to have dropped as he ran to the Police Station. He denied confessing that he had stabbed the deceased and stated that when he was taken before Wajir Senior Resident Magistrate he was informed that he had stabbed someone but he never admitted the same to the magistrate.

Determination

I will be determining one major issue, whether the evidence tendered proves beyond reasonable doubt that the charge of murder as defined under section 203 was committed by the accused person.

Did the deceased die?

Evidence by prosecution witnesses show that the deceased died at Wajir District Hospital. Yusuf Ismail Ahmed, PW1, said he accompanied deceased to hospital and that the deceased was treated but died under treatment. Delow Hussein Yahya, PW2, said he learned that the deceased had died and he attended his burial the following day. Abdullahi Abdi Ali, PW3, said that after learning of deceased's stabbing he went to hospital and that after deceased died he identified the body to the doctor who performed the post mortem.

The post mortem report and the evidence of Dr. Denis Onanda, PW4, confirm the death of the deceased. He testified that he performed the post mortem on the body of the deceased on 9th November 2011 at 3.30pm. He said at the time of the examination the body had changed due to the onset of rigor mortis and the body had been dead for the last six to eight hours.

The doctor told the court that he found a cut on the right side of the chest and another cut on the right shoulder. The post mortem report shows the cause of death was cardiorespiratory arrest secondary to haemopneumothorax secondary to penetrating chest injury. In the doctor's own words: **"my opinion was that he died of heart attack caused by bleeding in the lungs"** (*sic*).

The evidence by the prosecution proves beyond doubt that the deceased died and the cause of death was heart failure due to bleeding in the lungs caused by penetrating chest wounds. This is consistent with the injuries suffered by the deceased.

Who caused these injuries on the deceased?

According to the prosecution witnesses, it is the accused before the court who inflicted fatal injuries on the deceased. PW1 testified that he was at the Diff Matatu stage at Wajir town when the accused passed

by behaving as though insane; that he pulled a knife which PW1 describes as having a wooden handle and in PW1's own words:

“He stabbed the old man on the shoulder. He stabbed him on the right upper arm (pointing at the inner arm pit). The old man turned. He opened his mouth. Blood was oozing out of the wound. The accused ran away. The old man did not make any noise or talk. He was standing until the blood stopped oozing. Someone came to hold him. I chased the suspect and left the victim being assisted.....”

PW1 said the accused turned on him on several occasions as he (PW1) chased him and threatened PW1 with a knife. He further stated that he chased him as he threw stones at him; that on reaching the police station he threw the knife away and entered the station; that PW1 told police what had happened. PW1 did not know the accused but said he had seen him two to three days before the incident.

PW2 told the court that he was at his kiosk situated at 50 to 70 metres from the scene; that he saw the suspect running away and people running away from the scene and that he went to assist the victim by holding him. He said he helped tie the wound. He further stated that the accused was a stranger in Wajir town and that he had seen him two days before the incident and the accused used to beg at the mosques and from the public; that children used to follow him as he begged.

PW2 and PW3 are the key prosecution witnesses on the identity of the person who stabbed the deceased inflicting on him fatal wounds. Identification of a suspect is one of the key issues in a criminal trial. The time of the alleged stabbing was 11.30am. The circumstances of the stabbing are described by PW1 and PW2. PW1 told the court that the accused removed a knife and held it by his left hand. He stabbed deceased once inflicting a cut wound on the right upper arm. PW1 demonstrated in court by pointing at the area near the right armpit as the place the deceased was stabbed. He did not change his evidence that the stabbing was once and that the deceased did not suffer any other injury. This witness contradicted himself as to where he recorded his statement. In evidence in chief, he said he recorded it at the hospital where he had accompanied the deceased but on cross examination, he said he recorded it at the police station. He also testified that the deceased was taken first to the police station and later to hospital. This evidence is not confirmed by the police. Police Constable George Odhiambo, PW6, told the court that he learned of an assault case and of the victim having been rushed to Wajir District Hospital and that he went to the hospital where he found the victim admitted. Corporal Ibrahim Karanja, PW7, also testified that he the accused went to the police station with members of public in hot pursuit. He said he was informed that the accused had stabbed someone who had been taken to Wajir District Hospital.

PW2 who said he witnessed the stabbing from across the road at a distance of 50 to 70 metres admitted in cross examination that there is the main Garissa/Wajir road between him and the Matatu stage the scene of the alleged stabbing. He said the road is busy and that there was no commotion before the stabbing to attract his attention to the scene. He also contradicted himself by stating that he recorded his statement at the police station and again on cross examination that the police went to his kiosk to take down his statement.

Did these two, PW1 and PW2, witness the stabbing? Did they positively identify the accused as the person who stabbed the deceased?

Before answering these questions, I need to analyse the evidence further. The accused has a physical disability. His right hand is broken around the elbow. It is completely severed and it hangs by the skin. He actually walks holding the loose lower limb with his left hand. The wounds inflicted on the deceased were deep going by the evidence of PW4. Those wounds were two, one measuring 4cm by 1cm on the right side of the chest and the other measuring 3cm by 2cm on the right shoulder.

To inflict such deep wounds, someone must have used some force. The court was not told whether the accused is left or right handed. If he is right handed, in my view, he could not have exerted such force to inflict the wounds by stabbing because that hand cannot hold anything. If he is left handed this is possible but with some difficulty. That is not all. PW1 was emphatic that the accused stabbed the deceased once

and that he did not see any other injury on the deceased except the one on the right upper arm. PW2 said he saw the wounds on the arm running across to the chest.

My critical examination and analysis of the evidence of PW1 and PW2 leaves me with doubts as to whether these two witnesses saw the stabbing and who did it. If PW1 witnessed the stabbing, he would not have said the stabbing was done once. He could not have insisted that there was only one cut wound. PW2 in my view could not have seen the stabbing clearly from 50 to 70 metres away across a busy road especially when there was not commotion to attract him from his business of the kiosk. Again, their contradicting evidence on certain aspects like where they recorded the statement casts doubt as to their truthfulness. The two witnesses may have found the deceased stabbed but may not know who stabbed him.

There is the issue of the knife used to stab the deceased. Evidence by PW1 is that the accused ran towards the police station still carrying the knife and dropped it at the compound of the police station. The knife is said to have been picked from where it had been dropped by PW7. PW6 said he was shown a knife and told it had been recovered by PW7 after the accused dropped it. PW6 said he was told that PW7 witnessed the accused dropping the knife.

PW7 testified that he was standing outside the police station when he saw the accused being chased by the members of public and on asking he was told the accused had stabbed someone and had dropped a knife; that he went and found the knife outside the police building but in the police station compound. PW7 identified a knife in court (Exhibit 6). The knife was in a sheath. He said that was the knife he picked after he was told the accused had dropped it.

PW7 said he did not see the knife being dropped. This contradicts what PW6 said that PW7 had seen the knife being dropped. PW6 did not mention anything about the sheath. PW6 said the sheath was recovered from the accused. Who recovered the sheath from the accused and at what stage? Further, the logical thing for anyone chasing a suspect to do is to pick anything that the suspect drops as he flees. Why did not the members of public chasing the accused pick the knife after he allegedly dropped it? In my view the prosecution evidence leaves more questions than answers.

Still on this issue, the accused has a physical disability as I have indicated. It is not possible for someone with this disability to run fast due to lack of balance. It is not explained why the members of public did not catch up with him and overpower him.

PW6 is the investigating officer. He told the court that the bloodstained white trouser and white shirt, exhibits '2a' and '2b' were being worn by the accused. He insisted that he was positive about this. He contradicted all other witnesses who said the heavily blood stained white trouser and white shirt were worn by the deceased. His evidence is further contradicted by the report from the Government Analyst. He examined the stains on the knife, white shirt, white trouser and white vest and found them to be human blood of type B. This is the deceased's blood type.

The evidence of the Government Analyst confirms that the knife produced in court was used to stab the deceased and confirms that the white trouser, white shirt and white vest were worn by the deceased and not accused.

Before concluding this judgement, I wish to analyse the statement recorded by Mr. Linus Kassan, PW5, Senior Resident Magistrate at Wajir Law Courts. PW5 told the court that the accused made his statement voluntarily without coercion to the effect that he had been contracted by some people to kill the deceased for Kshs 80,000 and that Kshs 4,000 had been paid to him with the balance to be paid later; that the accused had been shown the people from the Makabul clan to murder as a revenge for having killed a girl and a boy; that the deceased was one of the people to be killed; that when the chance came, the accused threw soil on deceased face and deceased hit him with a stick; that the accused stabbed him killing him immediately.

The confession is indicated to have been given in Somali Language. The handwritten statement is

indicated to have been recorded on 15th November 2010. This would make it six days after the alleged stabbing.

I have evaluated the statement and I find it at variance with the evidence of PW1 and PW2. The statement indicates that the accused threw soil at the face of the deceased and the deceased hit him with a stick; that the deceased stabbed the deceased who died immediately. This cannot be true because PW1 and PW2 did not mention any commotion. PW1 said the accused just pulled a knife and stabbed. According to his evidence there is no motive at all why the accused stabbed the deceased. PW2 said he did not see or hear any commotion before the stabbing.

If indeed the accused confessed as alleged and his confession is the one contained in the statement produced in court, then that confession and the evidence of PW1 and PW2 are talking about two different incidences.

I have also analysed the evidence of the accused in his defence. He retracted the statement and said he did not confess to the magistrate. He said he was not asked anything by the magistrate and that the police fabricated the evidence against him.

Conclusion

I have carefully analysed the evidence from the prosecution and the defence. It is trite law that the prosecution bears the burden of proving a criminal case beyond all reasonable doubt. I have analysed the evidence and as explained in the judgement above, the evidence leaves doubts in my mind as to the culpability of the accused. I have analysed the confession made to PW5. I find it lacking in detail as to the caution administered to the accused. Judicial officers are under an obligation to caution an accused person and ensure he/she understands the nature of the charges facing him and the implications of his confession. This is done even in cases where an accused wishes to plead guilty to serious offences. As it was observed in the court of appeal in **Kanini Muli v Republic [2014] eKLR:**

“It is also not lost to us that the practice of the courts in Kenya has been consistently to warn an accused person who, for example has decided to plead guilty to a capital offence, of the consequences of that action. (See *Zaphania Okwoyo Gesure versus Republic Criminal Appeal No. 274 of 2008*). We cannot see any valid reason why that could not have been applied to the appellant before the inquest court where she was an ordinary witness. We note further that the prejudice to the appellant was compounded by the fact that she did not have an advocate when she made her statement before the inquest court.”

Taking the record of the court of the proceedings before PW5 on 15th November 2010 at face value, I note that it does not show the suspect was cautioned.

It is my considered view, with respect, that the accused did not understand the implications of what he was telling the court, if I were to believe that he confessed as alleged. In **Nayinda s/o Batungwa v. R (1959) EA 688** the court stated as follows:

“The Judges’ Rules are not applicable to the taking of statements by magistrates, since they are rules drawn up for guidance of police officers engaged in the actual investigation of criminal offences. There is nevertheless, an established procedure which is normally followed by magistrates and which is designed to the same end, namely, to ensure that a statement taken by the magistrate is a voluntary one. To this end, we certainly think it advisable that a magistrate who is about to take a statement should administer a caution in the normal form as laid down in the Judges’ Rules. If there was anything to suggest that the failure to administer a caution had resulted in the making of a statement which was not voluntary in the sense explained in *R. VSVOISIN [(1918) 1 KB 531]* a trial judge might well, in the exercise of his discretion, reject the statement”.

The manner the statement was recorded is unsatisfactory. It is my view that even if it were to be true that

the accused confessed to killing the deceased, I have stated above that the circumstances surrounding what happened as per the confession and what was witnesses by PW1 and PW2 are at variance. This, coupled with the rest of the evidence as analysed above, casts doubts in my mind about the accused's involvement. In **Tuwamoi v. Uganda, [1976] E.A 84** the court stated as follows:

“We would summarize the position thus: a trial court should accept any confession which has been retracted or repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particulars by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.”

I have explained my misgivings about the confession in this case. I do not find corroboration of the said confession by any other evidence whether direct or circumstantial. The statement recorded by PW5 is completely at variance with the evidence in court.

In these circumstances I find that I have no choice but to give the accused the benefit of doubt. I hereby find him not guilty for the offence of murder and acquit him of the charge forthwith. He shall be set at liberty immediately unless for any other reason he is lawfully held in custody. He shall be repatriated back to Somalia. I make orders accordingly.

Dated, signed and delivered this 11th March 2014

S.N.MUTUKU

JUDGE