



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 52 OF 2010

LESIIT, J

REPUBLIC.....PROSECUTION

V E R S U S

MALKHA DIBA DIBO..... ACCUSED

JUDGMENT

1. The accused person is charged with Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 23rd day of August 2010 at Dukana Division, Dukana Sub Location Marsabit District within Eastern Province murdered Wakolo Sora Guyo.
2. The prosecution called a total of 6 witnesses. The facts of the Prosecution case were that the accused person approached Mr. Adano Koro PW1 who is a Kenya Police Reservist on the 23rd August 2010. According to PW1 the accused reported to him that he had killed someone with his gun which he surrendered to PW1. The gun was exhibit 1. PW1 blew his whistle and among those who responded were PW2 and 3 who together with PW1 were taken to the scene of the incident by the accused. They found the body of a man who was known to them as the deceased in this case. He had a bullet wound on his back and on the front.
3. Police were later called eventually a post mortem was carried out by Dr. Muhoro who was PW6. He said that the body had an entry wound on the back left near the 9th rib and exit gunshot wound on the chest wall near the 4th intercostal space. The cause of death was exsanguination and subsequent cardio vascular collapse due to gunshot wound to the heart.
4. The Investigating Officer of the case produced the ballistic expert report which revealed that the rifle exhibit 1 was in a fair general and mechanical condition capable of firing ammunition it shows that the expert fired two cartridges with the rifle and tested it against the two cartridges recovered at the scene by the Investigation Officer. He found that the rifle had been used to fire the two empty cartridges recovered at the scene of incident. The accused person gave a sworn defence in which he denied reporting the matter to PW1 and also denied ever making the admission that he had killed someone. He said that he was found grazing by PW1 and one Jillo Gombe who arrested him and told him he had murdered someone. He stated Jillo Gombe had disagreed with his brother and that the case was a fabrication. The accused also denied that he owns any gun or rifle.
5. I have carefully considered the evidence which was adduced by the prosecution and also the accused defence. I have also considered the submissions that were made by Mr. Omari for the accused person who took over the case after the close of the defence from Mr. Mutuma. I also

considered the submissions by Mr. Mungai the prosecution counsel.

6. The accused person is facing a charge of murder. Section 203 of the Penal Code defines the offence of murder in the following terms.

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

7. An important ingredient for the offence of murder is malice aforethought. The circumstances which constitute malice aforethought are set out under section 206 of the Penal Code as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

8. The burden lies with the prosecution to prove its case against the accused person on the standard of proof beyond any reasonable doubt. In this case there was no eye witness for the offence. The prosecution is relying on an admission by the accused person to PW1 and also on a retracted confession contained in a statement under inquiry made by the accused to the Investigation Officer of this case, PW5.

9. Turning first to the admission, it was made by the accused to PW1. It was made to the effect that the accused had killed someone with his gun. PW1 testified that upon making that admission, the accused then took PW1 and others including PW2 and 3 to the scene where the body of the person he claims to have killed was lying. The question is whether the statement made by the accused to PW1 is an admission, and whether it is admissible in evidence.

10. The Evidence Act under section 3 gives an interpretation of the term “evidence”. That section provides:

“3. (1) In this Act, unless the context otherwise requires–

“evidence” denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity;”

11. The statement made to PW1 by the accused person is admissible as evidence as defined under section 3 of the Evidence Act. Under section 62 and 63 of the Evidence Act, the law provides that oral evidence must be direct evidence. It will be admissible if it meets the requirements set out under the two sections. In relation to this case sections 62 and 63 (1) and (2) (a) and (b) of the same Act are the provisions relevant to this case. The two sections stipulate as follows:

“62. All facts, except the contents of documents, may be proved by oral evidence.

63. (1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1), “direct evidence” means–

(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;...

12. PW1’s evidence regarding the facts stated to him by the accused person on the 23rd August, 2010 is admissible on account of being statements of facts heard by PW1 from the accused person. The statement by the accused by PW1 is also admissible as proof of a fact which was heard by PW1 in person and directly from the accused.

13. The accused person denied making the statement to PW1 in his statement in defence. I will get back to this at a later stage.

14.The prosecution was also relying on the statement under inquiry which was made to Chief Inspector Ochieng PW5 by the accused. In that statement the accused person stated that the deceased met him grazing his cattle in the fields and that he stood to chat with the accused. The accused stated that the deceased admired his rifle and requested to hold it to which the accused obliged. The accused states that as he took back the rifle from the deceased. The deceased returned the rifle with the muzzle pointing at the deceased and the butt pointing at the accused. The accused states that accidentally his finger pressed the trigger as a result of which two rounds of ammunition were discharged, one hitting the deceased and the other missing him. On seeing the deceased fall down the accused stated that he ran to Kenya Police Reservist by the name Adano KonChoro and one Jillo Gombe to whom he reported the incident. He stated that he was then handed over to the police.

15.The Accused person retracted his statement under inquiry to CIP Ochieng in his statement under ‘trial within a trial’. In cross examination in the mini trial, the accused admitted that he made a statement to CIP Ochieng after he was asked to explain how he killed someone. The accused also stated that he spoke through a Borana interpreter and that he made the statement in answer to the inquiry made to him by the Police Officer. He also admitted thumb printing the statement after making it.

16. The court admitted the statement under inquiry being satisfied that the accused person made that statement voluntarily without any fear, intimidation, inducement or promise of any kind. I was also satisfied that CIP Ochieng cautioned the accused before taking the statement from him. There was an irregularity because the statement was made in the Garbra language according to the record, but it was not recorded in that language. What CIP Ochieng recorded was the translation made to him by the interpreter. The irregularity was not fatal, as the accused admitted making the statement and explaining the circumstances under which he shot the deceased. In spite of that irregularity I was satisfied that the statement was admissible as prove of statements that were made to the CIP Ochieng by the accused.

17. There was a turn around when Mr. Omari for the accused took over the accused defence. In his final submissions, Mr. Omari urged the court to admit as a confession the statement under inquiry made to CIP Ochieng. Counsel urged the court to disregard the line of defence taken by the previous counsel in which the accused was denying any knowledge or involvement in the shooting terming it as misleading to the accused. Mr. Omari submitted that the accused admitted

he shot the deceased by accident and there being no other evidence, accused statement on the incident should be accepted.

18. The submissions by Mr. Omari mean that the accused earlier retraction of his Statement under Inquiry is retracted. That means also that the Statement under Inquiry is admitted without objection by the accused. Being admitted without objection, the court has to consider it as accused statement explaining the circumstances under which the incident occurred.

19. The content in the Statement under Inquiry is in tandem with the evidence of PW1 regarding the statement the accused made to him following the shooting incident. I find that the Statement under Inquiry corroborates the evidence of PW1 that the accused reported the incident to him and admitted having shot the deceased, albeit by accident.

20. The doctor's evidence of his finding at post mortem shows that the deceased was shot on the back and the bullet exited through the chest wall. The question is whether the accused confession is contradicted by the doctor's finding that the shot entered through the back of the deceased and exited through the front. It is the prosecution which has the burden to prove that the shooting of the deceased was not accidental as the accused claims. It is also the burden of the prosecution to adduce evidence to prove that at the time the ammunition which hit the deceased was discharged, the accused had formed the necessary intention to either cause death or grievous harm to the deceased. The standard of proof is beyond all reasonable doubt. The prosecution has failed to adduce such evidence.

21. I have considered the circumstances of this case in order to determine whether malice aforethought has been proved. The accused shot the deceased then presented himself and the murder weapon to PW1. His explanation to PW1 of how the incident occurred was consistent with what he recorded with PW5 in his Statement under Inquiry. In addition, the accused took PW1, 2 and 3 and others to the scene where the dead man was lying. The accused walked a long distance to find PW1 in order to report the incident to him. I find that all these circumstances taken together are proof that the accused may not have had any motive to cause either death or grievous harm to the deceased. Having gone to report the incident and having surrendered the murder weapon, it is clear that the shooting was accidental as the accused explained.

22. The fact the entry wound of the bullet was on the back and not the front, is in my view not glaringly proof that the shot was not fired in the circumstances the accused explained. An accident is an accident. Sometimes it is not possible how it happened. In this case, we have no evidence to contradict the accused statement. In the circumstances, I have to accept the accused explanation of the facts leading to the incident.

23. Having carefully considered all the evidence adduced in this case, I find that the prosecution established beyond any reasonable doubt that the accused caused that death of the deceased. However, the prosecution did not establish malice aforethought, and did not therefore prove the offence of murder contrary to section 203 of the Penal Code. In the circumstances I find that the prosecution has proved the offence of manslaughter contrary to section 202 of the Penal Code.

24. In conclusion I substitute the charge against the accused from murder contrary to section 203 of the Penal Code to manslaughter contrary to section 202 of the Penal Code. I find the accused guilty of the substituted charge of manslaughter and convict him accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 2nd DAY OF October, 2014.

LESIT, J.

JUDGE