



**REPUBLIC OF KENYA**

**High Court at Garissa**

**Cause 9 of 2011**

**(Formerly High Court of Kenya at Nairobi Criminal Case No 61 of 2010)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GEDI BARE BARUW.....ACCUSED**

**JUDGEMENT**

**Facts**

1. Weddings are normally happy occasions for the families of the bride and groom and their invited guests. It was such an occasion at the home of Nur Mohamed Nur at Jaricot sub location of Bulla Argi Location, Garissa on 7<sup>th</sup> August 2010 where family, relatives, friends and guests had gathered to celebrate the wedding of his son Bashow Nur Mohamed. Camels had been slaughtered and there was dancing that went on from midday to about 10.00pm. The traditional Somali dance known as Saar was being performed with girls singing and young men dancing. The dancing was too close to the door of the house where the bride was to be taken for the night and this caused some concern to elders. Led by Nur Mohamed Nur PW2 the father of the groom, a group of elders approached the dancing youth and told them to take the dance away from the compound to some distance outside the compound. Among the people who accompanied PW2 is Roble Hassan PW3, Ibrahim Salat Hussein PW4, Abdi Ahmed Dahir the deceased and other elders. Evidence shows that they asked the youth to move away from near the house; that some dancers complied and moved away while others refused and continued dancing. Among those who refused to move is Gedi Bare the accused in this case. Evidence shows that the accused removed a knife and charged at the elders. In the process of escaping from the accused, the deceased who had physical disability could not escape first enough. He fell down and was stabbed on the back at the left side. His cry of anguish and pain attracted the others and they turned and flashed a torch. They saw the accused running away still holding the knife. They assisted the deceased and placed him on a donkey cart intending to take him to hospital but he died soon thereafter. They took him to his home which was nearby and informed the police who went and collected the body. The accused was arrested the following day on 8<sup>th</sup> August 2010 from the bushes where he was spotted sleeping. Beside him was a knife that was linked to the stabbing. He was escorted to Garissa Police Station and charged with this offence.

2. The prosecution case is supported by the evidence of 10 witnesses namely: Dr. John Mwangi (PW1) who examined the body of the deceased and produced the post mortem report; Nur Mohamed Nur (PW2) the owner of the home where there were wedding celebrations and whose son had wedded that day; Roble Hassan (PW3) and Ibrahim Salat Hussein (PW4) who were with PW2 and the deceased when they told the youth to dance outside the compound; Ibrahim Abdi (PW5) the Chief of Bulla Argi Location who

called police and informed them of the whereabouts of the accused; Ali Ahmed Dahir (PW6) brother to the deceased who identified the body to the doctor who performed the post mortem; No. 69492 Cpl Okembi (PW7) who joined PW5 in tracking and arresting the accused; No. 51678 PC John Nzau (PW8) who issued post mortem form to the relatives of the deceased and joined them to hospital for post mortem; No. 51716 Surg. James Soita (PW9) who received report of murder and in company of other officers went to collect the body of the deceased and No. 63937 Cpl Samuel Mbatia (PW10) from scenes of crime who took photographs of the scene and produced them as exhibits (Exhibits 3 (i) to 3 (xi)).

## **History**

3. The accused had been arraigned before High Court in Nairobi on 7<sup>th</sup> September 2010 but the plea was not taken until 16<sup>th</sup> September 2010. For reasons recorded in the court file, hearing did not commence in Nairobi. On 31<sup>st</sup> October 2011 an order was made to transmit the file to Garissa High Court for hearing and disposal. The file was placed before me on 15<sup>th</sup> November 2011. The case faced several hiccups due to lack of witnesses and absence of defence counsel after the counsel who was handling the matter in Nairobi failed to turn up in Garissa. Hearing commenced in Garissa on 15<sup>th</sup> March 2012 and was concluded a year later due to various challenges including lack of witnesses and absence of defence counsel as indicated in the record. At the close of the trial a total of 10 witnesses had testified for the prosecution. The accused was the only defence witness and he opted to give sworn evidence.

## **The Law**

4. The prosecution bears the burden of proof in a criminal trial and the standard of proof is that of beyond reasonable doubt. In a murder charge, the prosecution has to prove:

- i. That death has occurred
- ii. That the death was caused by an unlawful act or omission
- iii. That an accused person is the one who has caused that death
- iv. That the accused person had the intention to cause that death

5. Section 203 of the Penal Code captures these elements thus:

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

6. Malice aforethought under Section 206 of the Penal Code is proved if there is proof of: 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; 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; an intent to commit a felony; or 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. Did the prosecution prove that the accused before this court caused the death of the deceased under the circumstances defined under section 206 of the Penal Code?

7. It is not disputed that the deceased, Abdi Ahmed Dahir, died on 7<sup>th</sup> August 2010. The evidence of Dr. John Mwangi who testified as PW1 confirms this. He examined the body on 8<sup>th</sup> August 2010 at 9.30 am at the Garissa Provincial General Hospital. He confirmed existence of a penetrating stab wound measuring 4cm on the upper left back. The wound went deep into the chest cavity. The excessive bleeding caused pressure on the lungs and made it difficult for the deceased to breathe. Dr. Mwangi told the court that in his opinion death was caused by loss of blood due to stab wound and inability to breathe due to excessive bleeding in the chest cavity.

8. Was the death of the deceased caused by an unlawful act or omission? Hand in hand with that question is the question as to whether that death was caused by the accused. The evidence of PW2, PW3 and PW4 all agree that on 7<sup>th</sup> August 2010 at 10.00pm at the home of PW2 during celebrations of PW2's son's wedding, the elders told the dancers who were mainly the youth to move away from the compound and dance some distance away. The reason for this was explained that it was late and some people wanted to sleep. Their evidence agree that while others complied and moved away, the accused who was one of the youth dancing the Somali traditional dance known as Saar, refused to move. Evidence is divided on this issue. According to PW3 and PW4, the deceased told the accused to comply with what the elders had told the youth. PW2 did not mention this part of evidence. It seems this is what made the deceased angry because evidence shows that he drew a knife and charged at the elders. PW2, PW3 and other people managed to scatter away avoiding the knife attack. Evidence shows that the deceased had a physical disability on one of his legs and could not move fast enough. He fell down. The accused caught up with him and stabbed him on the upper back at the left. The deceased shouted in pain and this made the others to stop and turn and see what was happening. The evidence of PW2, PW3 and PW4 is that PW2 flashed a torch indicative that it was dark. Through the flash light they saw the accused running away still holding the knife. PW2 also told the court that the deceased was also dancing but PW3 and PW4 said the deceased was handicapped and could not dance.

9. I have taken into account the fact that the accused was known to PW2. He had come to the celebrations at 4.00pm. The three witnesses were present when the youth were being told to move away from the compound. They all saw accused among the youth. They all testify to the accused refusing to comply and move away with the other dancers. Although I note that PW2 said there was a bright moonlight, I find this doubtful especially since no other witnesses mentioned moonlight and given that he had to use a flash light. However, having noted that the accused was someone known to PW2 and PW2, PW3 and PW4 saw him when they were telling the youth to go away I have no doubt in my mind that there is no mistake that the accused is the one who stabbed the deceased. The three witnesses saw him when the torch was flashed at the deceased. He was seen by the three running away still holding the knife. What happened after this incident is also relevant. The accused was found sleeping in the bushes the following day. He was not herding goats as usual. Beside him was a knife in its sheath and attached to the belt. It had blood stains.

10. While I take into account that it was at night and lighting was poor and having warned myself of the dangers that such circumstances could lead to mistakes in identity of an accused person, it is my finding that the accused was properly identified as the one who stabbed the deceased. I have considered decided cases on identification of an accused person under circumstances similar to the ones pertaining to this case, specifically **R v. Turnbull & Others [1976] 3 All ER;** **Roria v. Republic [1967] E.A** and **Anjononi & Others v. Republic [1980] KLR.** I am convinced that the accused was positively identified as the person who stabbed the deceased. There can be no justification for stabbing another person. This concludes and answers the two questions I posed above that the accused unlawfully caused the death of the deceased.

11. Did the accused possess the mental intent; is there proof of malice aforethought? Going by the evidence it is clear that this is one of those unfortunate deaths. Look at the circumstances under which the deceased died. It was a wedding celebration. People had been fed and everyone was happy. The youth were dancing to drumming and singing. The only reason the accused had to attack the deceased was being asked why he was not complying with what the elders had asked the dancers to do. This seems to have angered him. He drew a knife and charged at the elders. A knife is not any other implement. It is a dangerous weapon that can cause serious damage, can maim and can be fatal as was the case here. One does not draw a knife and charge at people without the intention to cause death or without knowledge that the act of charging at people while holding a knife will probably cause death or grievous harm. I am convinced and I have no doubt in my mind, the accused possessed the malice aforethought.

12. In his defence, the accused admits to having attended the wedding celebrations at the home of PW2. He admitted to having been one of the youth dancing Saar dance. He also said the deceased was dancing in the rival group. He stated that at 10.00pm they were told to go outside because it was getting late and some newlyweds wanted to sleep. His group went out but the group led by the deceased remained inside

the compound. He said that a commotion arose due to different dancing styles; that he went back to join the deceased's group but the deceased threw him out; that he asked him why he had thrown him out and the deceased insulted him calling his 'mwanaharamu' which translates into 'an illegitimate child'; that he refused to move; that the deceased slapped him and he slapped the deceased back; that people gathered and because he was the only member of his clan he left; that he lost his torch and lost his way. He denied having had a knife and stabbing the deceased. He said they were not allowed to carry knives in the dance and denied that the knife produced in court as an exhibit was his.

13. The accused further testified that he went to herd goats the following day as usual and police found him. They did not tell him why they were arresting him but alleged that he had murdered the deceased. He said he was beaten by three young men and that although the deceased insulted him, he did not get angry to an extent of stabbing the deceased.

14. I have carefully analysed all the evidence. The accused gave lengthy evidence in his defence. He spoke clearly although he looked frail. I however do not have doubts in my mind that he stabbed the deceased. I find the defence unbelievable especially when the accused says the deceased threw him out and slapped him. This narration of events according to the accused cannot be true given the evidence of three witnesses who testified as to what happened. PW2, PW3 and PW4 had no reason, in my view, to implicate the accused in this matter. I will therefore reject the evidence of the accused as being untruthful. I have explained my findings in this judgement. The prosecution has proved its case to the standard required, beyond reasonable doubt. For that reason, I hereby convict the accused for the offence of murder as charged. That is the order of this court.

**S. N. MUTUKU**  
**JUDGE**

Dated, signed and delivered this 9<sup>th</sup> day of May 2013 in open court in the presence of Mr. Mulama for the State and Mr. Nzili for the defence.

**Sentence; the accused person is sentenced to serve 20 years imprisonment.**