



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE 9 OF 2007**

**REPUBLIC.....PROSECUTOR**

**-VERSUS -**

**NOOR ALIO OMAR.....ACCUSED**

**JUDGMENT**

The accused person Noor Alio Omar faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on the 24<sup>th</sup> January 2007 at Bulla – Jamhuriya location in Mandera District, he murdered Makai Hillow Omar.

All the eight prosecution witnesses in this case were heard by Hon. Justice Muga Apondi who was later transferred to another division of the High Court of Kenya Nairobi. The honourable judge put the accused on his defence. I took over the case on complying with **Section 200** and **201** of the **Criminal Procedure Code**. I heard the defence and gave a judgment date in the case.

Precisely, the evidence was that the accused person who was the husband of the deceased suspected that his wife was having a love affair with one Mohamed Mukhtar. Shortly before the incident, the deceased had left the matrimonial home to go and live with her sister within Mandera town. On the 24<sup>th</sup> January 2007, the accused left his house and went to the place of business of the deceased. He attacked his wife with a sword stabbing her on the left side of the chest. The deceased died as a result of the injury a short while later. The accused surrendered himself to the police at Mandera police station where he was detained and later charged with the offence.

PW1 the daughter of the accused and the deceased was staying with her father in the family's home at Mandera town. She testified that the accused had asked her three days before the incident whether she was aware of her mother's love affair. Her answer was in the negative which made the accused very angry. He chased PW1 away from home and she went to stay with her aunt. On the material day in the evening, PW1 went to the deceased's place of work and found that she had been killed. The body was still lying at the scene. PW2 was present at the scene when the incident occurred. He was selling cattle feeds next to the deceased who sold "miraa". PW2 said that he knew the couple and that he saw the accused go to the miraa shop of the deceased and stab her with a double edged sword which he identified in court. PW3 saw the accused running away from the scene heading to Mandera police station half-naked. He followed him and when he caught up with him, the accused told the witness that he had killed someone. PW3 escorted the accused to the police station.

PW4 and PW5 did not witness the incident. They went to the scene a few moments later and found the deceased's body at the scene.

The report of the incident was received by PW6 at Mandera police station while PW7 the District Criminal Investigating Officer (DCIO) Mandera visited the scene and conducted investigations. He was on his normal patrol duties in the area when he saw a crowd gather at the scene. He received information that the deceased had been killed by her husband. He recovered the murder weapon at the scene and removed the body to the mortuary. The postmortem was conducted and the accused person charged with the offence.

According to the postmortem report, the cause of death was cardio-respiratory arrest due to severe hemorrhage from the fatal stab wound.

The accused person in his defence denied the offence. He told the court that he had received information that his wife was having a love affair with one Mohamed Mukhtar. On the material day, he was informed that the said Mukhtar was at the place of work of the deceased. He proceeded to the place and could not tell what happened at the scene. Later, he found himself in police custody having been charged with killing his wife. The accused pleaded a history of mental illness before and after he was charged with the offence.

There was only one eye witness to the incident PW2. He was a neighbour of the deceased at the market place. The deceased traded in "miraa" while PW2 sold animal feeds. He testified that he was with the deceased at the market when the accused came and stabbed the deceased. He knew the accused as the husband to the deceased. For about a month the witness had seen the accused come to the business premises of the deceased. On that day, the accused did not talk to the deceased. PW2 just saw the accused come to the scene and stab the deceased. The incident took place at around 5.15 p.m. at day time when visibility was very clear. PW2 said he sat only one metre from the deceased when she was stabbed. The evidence of PW1 and PW3 is that the accused had complained of a love affair between the deceased and another man. Neither PW2 nor PW3 had ever seen the man in question. PW1 said in cross-examination that she knew Mohamed Mukhtar but was not aware of a love affair between him and her mother. PW2 did not see any man at the scene with the deceased prior to the assault. The accused was angry with his own daughter PW1 when she said she was not aware of the alleged love affair involving her mother. The negative response cost PW1 her shelter in her parent's home. The defence of the accused is that he was informed that the lover of his wife was at her place of work. He then proceeded to the market and fatally wounded the deceased. No one saw the man known as Mohamed Mukhtar at the scene. Even the very close neighbour of the deceased PW2 did not know him or see him on the material day.

There was evidence that the accused suspected his wife of having a love affair. In his defence, he did not mention that he ever saw the man with his wife. However, the evidence of PW1 and PW5 is that the accused used to complain about the alleged love affair and at one time got angry with PW1 on the issue. There is also evidence that the deceased had moved from the matrimonial home to stay with her sister for an unknown reason. The defence that the accused person was mentally disturbed was not supported by any evidence.

It is my finding that the direct evidence of PW2 corroborated by the circumstantial evidence of PW1 and PW2, PW3 and PW5 proves beyond any reasonable doubt that the accused did the act which caused the death of the deceased. PW8 the doctor confirmed that the fatal stab wound on the left side of the chest caused the death of the deceased.

In a case of this nature, the prosecution must prove that the accused had the intention to kill the deceased. The evidence on record from PW2 that the accused was angry about the deceased three days before the incident was corroborated by that of PW4. It was PW4's testimony that the deceased used to complain that the accused wanted to kill her. This evidence attributes a motive to kill the deceased on part of the accused several days before the incident. The accused had the time to plan the murder of the deceased.

On the material day the accused went to the deceased's place of work armed with a sword. Arming himself was premeditation of the killing. The murder weapon was recovered from the scene by PW7 and produced in evidence. The accused therefore planned and executed the murder.

The accused in his defence pleaded that he was mentally sick and did not know what happened at the scene. He claimed that he was ill during his trial and that he was taken to hospital through orders of the court severally.

I have carefully perused the court record. The accused applied to be taken to hospital on 06/06/07 for treatment due to dizziness and chest pains. The court ordered that he be escorted to Mbagathi District hospital. When the case came for hearing, the order had not been complied with and the court directed that the same be obeyed. There is no other mention of accused being ill throughout the trial. To be specific, the accused has never complained of any mental illness in the course of the trial. The court on the other hand has never made any observation in respect of the accused in regard to mental illness.

It is trite law that whoever makes any allegation has a duty to prove it. The burden of proof is on the accused to prove that he suffered from mental illness when he committed the offence. There has not been such evidence from the defence. There was no evidence from any member of the accused's family that he suffers from mental illness. The mere mention by PW3 that the accused had stripped naked like a mad man after he killed the deceased has no probative value in this case.

Before the accused was charged, he was examined by a psychiatrist and found mentally fit to plead. This evidence remains unrebutted. The defence of the accused that he was insane at the material time or that he was influenced by other factors to an extent that he did not know what he was doing is a sham.

I find that the prosecution have proved the case against the accused beyond any reasonable doubt. I find him guilty of the offence of murder as charged and convict him accordingly under **Section 215** of the **Criminal Procedure Code**.

**F. N. MUCHEMI**  
**JUDGE**

**Judgment** dated and delivered in **Nairobi** on the **4<sup>th</sup>** day of **July, 2012** in the presence of the accused, Mr. Njanja holding brief for Ms Kenyori for accused person and the State counsel Ms Ngetich. Mr. Ibrahim Uka present interpreting in Borana language.

**F. N. MUCHEMI**  
**JUDGE**