REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: KWACH, SHAH & BOSIRE, JJ.A)
CRIMINAL APPEAL NO. 29 OF 2001
BETWEEN

ABDI YUSUF ADEN alias KOLE .....APPELLANT
AND
REPUBLIC .....RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Meru (Mr. Justice Etyang) dated 31st July, 1997
in
H.C. CR. CASE NO. 16 OF 1995)
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JUDGMENT OF THE COURT

ABDI YUSUF ADEN aka Kole (hereinafter called "the appellant") was charged with 3 counts of murder contrary to section 203 read together with section 204 of the Penal Code.

Particulars in count (1) were that on 14th day of February, 1994 at Rukha Area in Garissa District of North Eastern Province, jointly with others not before the court he unlawfully murdered Adow Gure (the deceased). It was for the murder of the deceased that the appellant was tried and convicted by Etyang J and sentenced to death.

According to the evidence led at the trial Abdi Mohammed Ali (P.W.1), Sahel Abdi Hussein, the deceased, Burale Abdi and Bambil Farah were members of a security group based at Ijara Trading Centre near Lamu. On 14.2.94 they received a report that armed bandits had been sighted at a place called Rukha some 6 km away from Ijara. According to Abdi they were instructed by the Government to go to Rukha and persuade these bandits to lay down arms. At Rukha they found the 3 bandits and appealed to them to surrender their guns to the Kenya Government but they refused. According to Abdi Mohammed Ali the appellant said he could not surrender his gun to the Kenya Government and started shooting at them. As the bandits opened fire on the group Sahel Abdi Hussein ran away. The deceased, Sahel Khoh and Burale Mbumbil were shot and fatally wounded. As the shooting continued, Abdi Mohammed Ali fell down and pretended to be dead. He said that although he had not known the bandits before he was nevertheless able to identify the appellant as the one who opened fire on them.

The deceased's body was collected by his relatives and he was buried the following day. As he was said to be a Muslim, no postmortem examination was conducted to ascertain the cause of death. The appellant was arrested the following day some considerable distance from the scene of crime. He had an AK 47 rifle and said he was walking to Lamu in search of his relatives. He claimed to be a refugee from Kismayu in Somalia who had drifted into Kenya following the disturbances in that country.

The learned trial Judge accepted three pieces of vital evidence and used it to convict the appellant for the murder of the deceased. First was the evidence of Abdi Mohammed Ali (P.W.1), and Sehel Hussein (P.W.2) that they had seen the appellant firing at the deceased. The problem with their evidence is that

Abdi Mohammed Ali was lying down pretending to be dead during the shooting and he also admitted that he had neither seen nor known the appellant before. In his evidence in chief he told the court:-

> "I did not know and had not seen the accused before. But one of the bandits I knew was a Kenyan. This was my first time to see him."

And in cross-examination this witness told the Judge:-

> "The District Officer had instructed us to go and talk to the accused. I didn't know the accused before but I knew the other bandit called Mohammed Kulmei Ruhumet. I was told that the accused was called Yusuf Abdi Aden. The accused and one of his colleagues is Ethiopian. (sic) I know this clan to be Ogaden clan. I also come from Ogaden clan. There is Ogaden clan in Ethiopia, Kenya and Somalia. It is the same clan."

Sehel Hussein also had not had previous acquaintance with the appellant and had, in any case, run away when the bandits opened fire. Since both these witnesses only saw the appellant for the first time at the scene of the murder, the probative value of their evidence would have been greatly enhanced had the police bothered to conduct an identification parade which they did not. No attempt was made to explain this omission. In these circumstances it cannot be asserted with any degree of certainty that the circumstances of the identification of the appellant by these two witnesses was free from possibility of error. Steps should have been taken to have these witnesses identify the appellant at an identification parade.

Secondly, the prosecution alleged that although the deceased's body was not taken for postmortem examination to determine the cause of death, it was obvious that the death was caused by the injuries he sustained when the appellant shot at him. The explanation given by the prosecution for failure to conduct a postmortem examination on the body of the deceased was that the deceased was a Muslim and that it is against the tenets of Islam to subject their dead to postmortem examinations. That may well be so, but the prosecution was obliged to prove the guilt of the appellant beyond any reasonable doubt, and in this regard it was bound to prove by credible medical evidence that the deceased's death was caused by injuries he sustained when he was shot at by the appellant. This was not a case where the body for some reason or other could not be traced so that the prosecution had to rely on some other evidence to establish the fact and/or cause of death. We cannot accept as a general principle of the criminal law the suggestion that the body of a Muslim cannot be subjected to a postmortem examination for the purpose of ascertaining the cause of death. In this case therefore, the prosecution failed to prove a vital ingredient of the offence charged, namely, the cause of the deceased's death.

Thirdly and lastly, was the inconclusive nature of the ballistic evidence. No spent cartridges were recovered from the scene and the tests conducted on the AK 47 found in possession of the appellant when he was arrested did not connect that weapon with the one alleged to have been used to shoot the deceased.

For these reasons, we agree with Mr. Arimi, for the appellant, that the charge against the appellant was not proved and that he was wrongly convicted. And Mr. Oluoch, learned Principal State Counsel, is to be commended in conceding this appeal. Accordingly, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be released forthwith from prison unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 17th day of May, 2001.

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR