



**Republic v Dabe (Criminal Case 15 of 2019)
[2024] KEHC 799 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 799 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL CASE 15 OF 2019
JN NJAGI, J
JANUARY 31, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

DAIGO AIYANA DABE ACCUSED

JUDGMENT

1. The accused herein is facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 25th October 2019 at Nagayo area in Marsabit town within Marsabit County he murdered Elias Kithinji Munyua (herein referred to as the deceased).
2. The prosecution called 8 witnesses in the case at the close of which the court found the accused to have a case to answer and he was placed to his defence. The accused thereupon defended himself and did not call any witness.

Case for prosecution

3. The first prosecution witness, Moses Mugambi PW1, testified that he is a resident of Marsabit town. That on the 25/10/2019 at around 6 pm he received a report from a person called James that there was a person who was lying bleeding along Manyatta Ote road. He, PW1, called the OCS and informed him. He did not go the scene.
3. PW2 was the Assistant chief of Majengo sub-location within Marsabit town. It was his evidence that on the material day at around 8 pm he received a phone call from PW1 who informed him that there was a person who had been stabbed. PW 2 called the OCS who informed him that he had received the report. That PW1 gave him the phone number of the person called James. He called James who informed him that it is a person called Daiko who had stabbed the injured person. That after some time some policemen passed by his house and he took them to the house of the suspect, the accused. That policemen entered the house of the accused and came out of the house with the accused, a blood-



- stained knife and a club. The accused was taken to the police station. The witness said that he did not enter the accused's house.
4. Sgt Aaron Kinyua PW5 of Marsabit Police Station testified that on the 25/10/2019 at 6.45 pm he was on duty at the police station when he received a phone call from a person called Moses that he had found an injured person lying by the road side in a pool of blood. He, PW5, and PC Nyaga rushed to the scene. They found a person lying on the road side with blood oozing from his right buttocks where there was a deep cut wound. They put the person in their vehicle and rushed him to Marsabit County Referral Hospital where he was admitted.
 5. It was further evidence of PW5 that they later received a phone call from the area chief that she had been given the name of the suspect by an informer. They went and picked the chief from her house and she led them to the house of the suspect. They found the suspect in his house and arrested him. They searched the house. He, PW5, found a blood-stained dagger under the blankets on the bed. They also found a club on the bed. The suspect was wearing a sheath on his waist where it was tied up with a belt. They took the suspect, the accused, and the recovered items to the police station. He handed over the exhibits to the Investigating Officer, Sgt Mbaya.
 6. Cpl Nicholas Yego PW8, then of Marsabit Central DCI office testified that on the 26/10/2019 he was informed by Sgt Mbaya that there was a person who had been stabbed and had been taken to Marsabit Referral Hospital. That he accompanied Sgt Mbaya to the hospital. They found the victim having died. They returned to the police station where they found Sgt. Kinyua interrogating the suspect, the accused, who had been arrested. They found Sgt Kinyua having recovered a blood-stained dagger, a dagger pouch and a club.
 7. It was further evidence of Cpl Yego that he went to the scene and collected blood stained soil. He did not find anybody at the scene. On the following day he re-visited the accused's house in the company of the accused but they did not recover anything. On the 28/10/2019, he attended a post mortem at Marsabit County Referral Hospital. He was handed over blood samples of the deceased after the post mortem. That on the 29/10/2019 he prepared an exhibit memo and forwarded the blood-stained soil, the blood-stained dagger and the blood samples of the deceased to the government analyst. The accused was charged with the offence.
 8. The Government Analyst, Kipngetich Benard PW4, testified that on the 31/10/2019 their laboratory at Nairobi received the following exhibits from PC Robert Nderitu of DCI Marsabit:
 - Fingernail clippings of the deceased,
 - Blood samples of the deceased in a vacutainer,
 - A dagger, and
 - Soil sample enclosed in a khaki envelope.
 9. It was the evidence of the witness that he examined the dagger and the soil and found them to be moderately stained with human blood. That a DNA profile was generated from the blood stains on the dagger and the soil and he found that they matched with the DNA profile generated from the blood sample of the deceased. He prepared a report to that effect. He produced the report in court as exhibit, P.Exh.1.
 10. Dorothy Kagwene Munyua PW3 testified that she was a resident of Meru County and was a brother to the deceased. That on the 26/10/2019 she received a phone call from a policeman that the deceased had died in Marsabit. She came to Marsabit and identified the body to a doctor at Marsabit County Referral Hospital before post mortem was conducted.



11. It was the evidence of Dr. Duba Doyo Abduba PW7 that on the 28/10/2019 he conducted a post mortem on the body of the deceased herein. He found it with a deep penetrating wound on the right gluteal region (buttocks) measuring 4 x 2 cm. He formed the opinion that the cause of death was due to hemorrhage secondary to traumatic stab wound at the right gluteal region. He filled the post mortem report to that effect. He produced it in court as exhibit.
12. During the hearing, Cpl Yego PW8, produced the dagger, the sheath, the club and the exhibit memo as exhibits.

Defence Case

13. When placed to his defence, the accused stated in a sworn statement that the deceased was a tenant on his plot in Marsabit town for a period of 14 years. That on the 25/10/2019 he went to work in the shamba of a certain person in Shrine area of Marsabit town. The deceased said that he was going to wash his clothes. That in the evening he entered the forest and cut some firewood. He went home and sold the firewood to a certain person. He went to his house and did not find the deceased at the house. The deceased's clothes were however outside. It was raining and he collected them for him and placed them in his house. He later slept. At 10 pm policemen went to his house and woke him up. They searched the house and took a long masai dagger and a club. He was told that he had stabbed a certain person. That when they went out of his house they found 2 chiefs outside the house. One of them was holding a knife. He said that it is the one the accused had stabbed the person with. He was taken to the police station. On the following day he was taken back to the house but nothing was recovered from the house. He was later charged with the offence.
14. The accused stated in cross-examination that the dagger that was produced in court is not the one that was recovered in his house.

Submissions

15. The advocate for the accused, Mr. Nyenyire, made oral submissions while the state prosecutor did not make submissions.
16. Counsel for the accused submitted that the prosecution had failed to prove the charge against the accused beyond reasonable doubt. That no one placed the accused at the scene of crime. Further that no murder weapon was produced to link the accused with the offence.
17. It was submitted that there was no intention brought out as to why the accused would have committed the offence as no grudge was shown to have existed between him and the deceased.
18. It was submitted that the accused was only suspected to have committed the offence but suspicion alone is not sufficient to support a charge of murder. Counsel asked the court to give the accused the benefit of doubt and acquit him of the charge.

Analysis and Determination

19. It is the duty of the prosecution in a criminal case to prove the case against an accused person beyond all reasonable doubt. Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 had this to say on that standard of proof:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to



deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

20. The question in this case then is whether that standard of proof was attained.
21. The accused is charged under Sections 203 as read with section 204 of the Penal Code that state as follows:
 - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 204. Any person who is convicted of murder shall be sentenced to death.”
22. The elements of the offence of murder under sections 203 and 204 of the Penal Code were stated in the case of Republic v Andrew Omwenga 2009 EKL to be as follows:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

 - (a) The death of the deceased and the cause of the death,
 - (b) That the accused committed the unlawful act which caused the death of the deceased and
 - (c) That the accused had the malice aforethought”.
23. The death of the deceased in this case is not in doubt. The same was proved by the sister to the deceased PW3 who identified the body of the deceased to a doctor, PW7, at Marsabit County Referral Hospital before post mortem was performed. Cpl Yego PW8 attended the post mortem at the said hospital and confirmed the death. The doctor PW 7 examined the body and confirmed the death. He found the cause of death to have been due to excessive bleeding as a result of a deep penetrating wound on the right buttocks. The death and cause of death of the deceased was therefore proved.
24. The next question is whether the accused is the one who caused the death of the deceased through an unlawful act.
25. There was no direct evidence adduced before this court that the accused is the one who killed the deceased. The evidence that tended to connect the accused with the offence was circumstantial that after the stabbing of the deceased the accused was shortly after found with a blood-stained dagger. The question then is whether the circumstantial evidence proved beyond reasonable doubt that the accused is the person who killed the deceased.
26. In Abamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the Court of Appeal stated the following on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way



back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

27. In the same case, the Court set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

28. In *Sawe v Rep* [2003] KLR 364 the Court of Appeal set out the threshold to be met in reliance of circumstantial evidence as follows:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden

29. I have then to examine the circumstantial evidence adduced in this case and determine whether it meets the threshold stated above.

30. It was the evidence of Sgt Kinyua PW5 that he recovered a blood-stained dagger he produced in court from the accused’s house. The accused admitted in cross-examination that the police retrieved a dagger and a club from his house but denied that the dagger is the one that was produced in court. It is however to be noted that the defence never challenged Sgt Kinyua during cross-examination that the dagger he produced in court is not the one retrieved from the accused’s house. The accused only came to raise the issue that the dagger is not the one retrieved from his house in his defence.

31. It is further to be noted that the accused stated in his evidence-in-chief that when he and the police officers came out of his house, they found a chief holding a knife. That the chief said that it is the one the accused had stabbed the person with. The Assistant chief who testified in the case PW2 was not questioned on that issue. I find the defence by the accused to have been an afterthought. I believe the evidence of Sgt Kinyua that the dagger he produced in court is the one he retrieved from the accused’s house. The attempt by the accused to deny that it was the one was a belated lie.



32. The government analyst PW4 conducted a scientific test on the blood stains on the dagger and came to the conclusion that the dagger was stained with human blood. He generated a DNA profile from the blood stains on the dagger and found them to match the DNA profile generated from the blood samples of the deceased. The result of his examination was that the dagger is the one that was used to stab the deceased. I have no reason to doubt the findings of the government analyst. I find that the dagger was the assault weapon on the deceased as the DNA profile of the blood stains on it matched the DNA profile of the deceased. The fact of the accused possessing a dagger with DNA profile matching that of the deceased proved that he is the one who killed the deceased. Those inculpatory facts in this case are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. More so, the facts and the evidence unerringly pointed at the accused as the person who stabbed the deceased with the said dagger. The prosecution has thereby proved that the accused is the one who killed the deceased by stabbing him with said dagger. The accused thereby committed an unlawful act of stabbing the deceased with a dagger that caused his death.
33. The final question is whether the accused caused the death of the deceased with malice aforethought.
34. Malice aforethought is defined in Section 206 of the [Penal Code](#) in the following terms:
- (a) An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
 - (b) Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.
 - (c) An intent to commit a felony.
 - (d) An intention to facilitate the escape from custody of a person who has committed a felony.
35. In this case, there was no evidence on the circumstances that led to the accused stabbing the deceased with a dagger. There was no malice aforethought proved against the accused. Without proof of malice aforethought, the charge of murder is not proved. In the case of [Roba Galma Wario v Republic](#) [2015] eKLR, it was held that;
- “For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”
36. The same was held in [Nzuki v Republic](#) (1993) KLR 171, where the Court in substituting a charge of murder with manslaughter stated that:
- In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”
37. The accused did kill the deceased. Section 202(1) of the [Penal Code](#) provides as follows:
- (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.



38. Section 205 of the same provides as follows:

Punishment of manslaughter

Any person who commits the felony of manslaughter is liable to imprisonment for life.

39. Section 179 of the *Criminal Procedure Code* provides that:

179.

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

40. The offence of manslaughter is a minor offence to the offence of murder. The accused may therefore be convicted of the offence of manslaughter where facts proved reduce the offence from that of murder to that of manslaughter.

41. I find the offence committed in this case to be manslaughter. I therefore reduce the charge of murder to manslaughter. I accordingly acquit the Accused of the charge of murder but convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 31ST DAY OF JANUARY 2024

J. N. NJAGI

JUDGE

In The Presence Of:

Mr. Nyenyire For Accused

Mr. Otieno For Republic

Court Assistant – Jarso

