



**REPUBLIC OF KENYA**

**High Court at Garissa**

**Criminal Case 2 of 2011**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**ABDIRIZAK DAHIR GURE .....ACCUSED**

**(Formerly High Court of Kenya at Nairobi Criminal Case Number 41 of 2009)**

**RULING**

**Background**

1. This case was transferred to the High Court of Kenya at Garissa following establishment of the High Court in October 2011. Abdirizak Dahir Gure (the accused) was arraigned before High Court Nairobi on murder charges. He is accused of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge read that on 15<sup>th</sup> of April 2009 at Dagahaley Refugee Camp in Lagdera District within North Eastern Province he murdered one Abdi Farah Sahal (the deceased). The court file record reveals that the case was mentioned before various judges in Nairobi and that although the accused was produced in court for the first time on 29<sup>th</sup> April 2009, the plea was not taken until 5<sup>th</sup> April 2011 about two years later. The reasons as can be discerned from the record are that the accused had been under psychiatrist care until 22<sup>nd</sup> March 2011 when he was certified fit to plead to the charges. The plea was taken on 5<sup>th</sup> May 2011 and the hearing fixed for 24<sup>th</sup> and 25<sup>th</sup> October 2011 when an order was made to transfer the file to Garissa for hearing and disposal.

2. The case was mentioned first in Garissa on 14<sup>th</sup> November 2011 and it took a while for the hearing to commence due to challenges involved in sorting out legal representation for the accused person. The counsel who was representing the accused in Nairobi was unable to attend court in Garissa and this court directed the Deputy Registrar to assign another defence counsel. This was done and the hearing commenced on 27<sup>th</sup> February 2012. The matter went on until 18<sup>th</sup> October 2012 when the prosecution failed to produce the remaining witnesses as a result of which the court ordered the case for the prosecution closed and gave a ruling date.

**Prosecution case**

3. The case for the prosecution is supported by evidence of four witnesses. Before analyzing their evidence I wish to comment on the circumstances that led to the court making its order towards the close of the prosecution case. As far as the record stands, the learned state counsel did not close the case for the prosecution. Specifically he was **hesitant to do so stating that he would not want to go on record as having closed the case**. In view of that statement the court ordered the case for the prosecution closed and directed that it would give a ruling on the evidence on record.

4. The case for the prosecution has been dogged by serious challenges. Upon assigning a defence counsel for the accused and the setting the case down for hearing on 19<sup>th</sup> January 2012, the defence sought an adjournment to make consultations with a view to preparing the defence case. The case was adjourned to 27<sup>th</sup> February 2012 on which date the prosecution produced two witnesses. One of the witnesses was not able to testify on that day as she was unwell. The case was adjourned to 26<sup>th</sup> March 2012. One witness for the prosecution was present and the court took down her evidence. The learned state counsel sought adjournment to call three more witnesses, the doctor who had performed the post mortem, a police officer who had been transferred to Mombasa and one other witness identified as Abshira Hassan whom the court was told had been bonded but had refused to attend court. Counsel also sought witness summons. Case was adjourned to 30<sup>th</sup> May 2012. The case did not proceed on 30<sup>th</sup> May 2012 due to the absence of the judge who had attended an official function in Nairobi. A new hearing date was given for 10<sup>th</sup> July 2012.

5. On 10<sup>th</sup> July 2012 the prosecution did not have witnesses. The reasons given were that witness summons had not been served on one witness who was not available and whose relatives had indicated that she had crossed to Somalia. Court was told that the police needed one month to trace and serve her with summons. The doctor was said to have left after the employer GIZ (formerly GTZ) wound up operations in the region. Nothing was said about the police officer who had been transferred. Counsel sought to produce the post mortem report through another doctor and there being no objection from the defence, Dr. Moses Kipchumba (PW3) produced the report. The court allowed the prosecution an adjournment with a caution that the court would not allow further adjournments on the same grounds. The case was put off to 4<sup>th</sup> October 2012.

6. One witness was available on 4<sup>th</sup> October 2012. This witness, PC Geoffrey Maindi (PW4), told the court that he investigated the case and narrated the difficulties the police had been facing to trace and bond one witness whom the prosecution was referring to as the key witness. After his testimony the learned state counsel applied for an adjournment and warrant of arrest for the witness. The defence opposed the application as it did in all other applications for adjournment. The court however allowed the application after taking into consideration of the circumstances of the matter. Hearing was set down for hearing on 18<sup>th</sup> October 2012.

7. On 18<sup>th</sup> October 2012 the state did not have any witness and explained that the police had not executed the warrant of arrest. The reasons were not given why the police did not take any action as regards the warrant of arrest. Given that this was the witness described as the key prosecution witness and who had been said to have crossed to Somalia, and given the history of the case and the numerous adjournments granted to the prosecution on the issue of witnesses, it was imperative that the prosecution persuades the court that no efforts were spared in trying to secure the attendance of this witness. To state that the police had not executed the warrants of arrest without giving reasons as to why reveals lack of seriousness and laxity on the part of the police. The court declined to allow an adjournment and ordered the case for the prosecution closed.

### **The evidence**

8. The court is called upon at this stage to determine if the evidence adduced by the prosecution witnesses on record discloses a prima facie case as to call upon the accused to enter his defence. In order to determine this issue, I will analyze the evidence of the four prosecution witnesses. The evidence on the circumstances surrounding the death of the deceased was adduced by **Kaltumo Hillole (PW1)** and **Sofia Hussein (PW2)**. **PW1** told the court that she served the accused person, who is her brother, with breakfast on the morning of 15<sup>th</sup> April 2009 after which the accused left. After taking the breakfast the accused left. After a while she heard noise from outside her house. She went out to find out what was happening. She found the deceased seated and bleeding from the head. She did not go close enough to examine the injuries but went back to her house shocked. While inside her house, **PW2** arrived and asked her for the wheelbarrow to carry the deceased to hospital. It is her evidence that **PW2** informed her that the deceased had been injured by the accused. She also said that the accused had been carrying a 'rungu' when she went to her house to take breakfast. She concluded her evidence by saying she did not know what had happened to the deceased.

9. The evidence of **PW2** is that she was herding goats when she heard children making noise. She asked them what was happening and she learned that the deceased had been injured. She went to the place where the deceased was. She found him lying down on the side. He had a wound on the head. She looked for water and gave him but he could not drink. They carried him on a wheelbarrow and changed him into a vehicle. They took him to Dagahale Police Station. She later learned that he had died. She did not state anywhere in her evidence that the accused is the one who inflicted the injuries on the deceased's head.

10. **Dr. Moses Kipchumba (PW3)** testified on behalf of Dr. Kanga who examined the body of the deceased. He confirmed that the deceased died of cardio-respiratory arrest due to the fracture of the skull and shock. **PC Geoffrey Maindi (PW4)** testified that he received information of the death of the deceased and went to hospital to attend the post mortem but after the family declined to have the post mortem performed, the doctor examined the body without opening it. He also said that he visited the scene where the deceased had laid after he was injured and observed bloodstains on the sand. He drew a sketch plan and recorded statements of **PW1**, **PW2** and one Abshira Hassan who is at large. He also said he met the accused at the police station.

### Determination

11. Murder is defined in section 203 of the Penal Code thus: ***'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'*** Three elements are disclosed in this definition, malice aforethought (mental intent); the act of causing the death of another and the means of causing the death (unlawful act or omission). The prosecution has to prove these ingredients before an accused person can be found guilty of murder. In the case before me, there is no doubt that death occurred. This has been proved beyond reasonable doubt. A post mortem report was produced confirming that the deceased died of cardiac arrest due to head injuries and shock. The question that has not been answered is, who caused the death of the deceased and by what means was that death caused" Was there unlawful act or omission, if so by whom" Did he intent to cause the death of the deceased"

12. There is no evidence to show what exactly happened to the deceased. **PW1** served the accused with breakfast and after the accused finished eating he left. Later **PW1** heard noise outside and found the deceased injured. **PW2** heard noise too and on going to the scene she found the deceased injured. Although **PW1** said **PW2** informed her that it is the accused that had injured the deceased, **PW2** did not mention that part of evidence. It is clear from the evidence that no one saw the accused hit the deceased. There is no other evidence, direct or circumstantial to connect the accused with the offence.

Why do I say this" When I carefully consider the evidence of **PW1** and **PW2**, what comes out is that none of them saw the accused hit the deceased. If they knew more of this case, they did not tell the court. The police did not call an eye witness or any witness with information regarding the circumstances leading to the death of the deceased. What remains is suspicion that since the accused was carrying a 'rungu' when he left PW1's house, he must have been the one who hit the deceased causing serious injuries that caused his death. This could be so if there is other evidence connecting the accused with the offence. In **Sawe v. Republic 2003 eKLR 364** it is stated that 'suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence'.

13. I am aware that the prosecution has a witness whom they termed 'a key witness' but this witness has been elusive all through the hearing of this case. The record will show that the court went out of its way to accommodate the prosecution to no avail. To my mind it would amount to a miscarriage of justice if this court were to call upon the accused to enter his defence in this case with the available evidence (**see Murimi v. R 1967 EA**).

14. Under section 306 (1) of the Criminal Procedure Code, when the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of the several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty. The burden of proving criminal offences lies squarely on the shoulders of the prosecution. When I consider the evidence before this court it is clear that to put the accused on his defence will not cure the weaknesses in the prosecution case. To my mind, it would be tantamount to attempting to fill the gaps left in the prosecution case and this would lead to great injustice as far as the accused is concerned. The correct thing to do under the circumstances is to find and hold, which I hereby do, that the accused has no case to answer. I hereby acquit him forthwith and order his unconditional release from custody unless he is being held for any other lawful cause. I also order that the Officer in Charge of Garissa Main Prison to ensure that the accused is escorted and handed over to the United Nations High Commission for Refugees for custody and further action as by law provided. I order accordingly.

**Stella N. Mutuku, Judge**

**Signed, dated and delivered this 26th day of November 2012.**



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