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REPUBLIC OF KENYA

High Court at Garissa

Criminal Case 14 of 2011

(Formerly High Court of Kenya at Nairobi Criminal Case No. 74 of 2010)

REPUBLICPROSECUTOR

VERSUS

ALI DUALE 'ALIAS' BOBSIS.....ACCUSED

JUDGEMENT

The Charge

1. Ali Duale 'alias' Bobsis (the accused) was arraigned before the High Court at Nairobi on 23rd September 2010 on a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The plea was however not taken until 30th September 2010. The particulars of the charge read that on the 11th day of September 2010 at Dagahaley Refugee Camp in Lagdera District within North Eastern Province he murdered Abdi Barre Hassan. The record of the court file shows that hearing of this case had commenced in Nairobi with one witness testifying. It was however transferred to the High Court of Kenya at Garissa for trial and the matter was mentioned in the High Court at Garissa for the first time on 22nd November 2011. This court started the case *de novo* and assigned a different defence counsel upon confirming that the defence counsel who had the initial brief did not wish to continue representing the accused at Garissa. Hearing commenced on 30th January 2012.

The Evidence

2. In support of the prosecution case, six witnesses testified. **Osman Badhe Wete** testified as **PW1**. He told the court that he was the councillor at Dagahaley in Lagdera Constituency. His evidence is that on 8th September 2010 a woman he referred to as Dahaba, whom he had known not for long, went to report to him a case of disturbance. She informed him that the accused was disturbing her. It is his testimony that the issue was about a 'love triangle' involving the woman and the accused who was her husband and the deceased who was her lover. Upon receiving this complaint, PW1 summoned the three parties involved, namely the woman, the accused and the deceased to discuss the matter. PW1 was not able to resolve the issue and he referred the matter to the Chief Kadhi. Fearful that the accused may cause problems, PW1 took him to the home of one Ibrahim whom PW1 said was related to the accused until the following morning.

3. PW1 did not testify as to what happened between the time he says he left the accused at the home of Ibrahim on 8th September 2010 to 11th September 2010 when he told the court that the accused went to his (PW1's) house at 7.30pm. It is the testimony of PW1 that on 11th September 2010 at 7.30pm

the accused went to PW1's house bloodied all over his body. He fell down and asked for water which PW1 gave him. The accused informed PW1 that he had been beaten by the man who was friendly with his (accused's) wife. The accused showed PW1 injuries on his left side, at the armpit and head. PW1 told the court that the accused had been carrying a knife which PW1 took from him. PW1 further told the court that he asked the accused what he had done upon being beaten but before the accused responded PW1 received a telephone call from one Mohamed Aden informing him that someone had been beaten to death at the Dagahaley market and PW1 should report the matter to the police. PW1 went further to testify that the police came and arrested the accused and that he handed over the knife he had recovered from the accused to the police. In company of the police they went to the place where the deceased person was. PW1 observed the deceased had bled a lot. He told the court that he knew the deceased who used to live with the accused and his family.

4. On cross examination, PW1 told the court that the accused and the woman he referred to as Dahaba were married and had six children. He said that as far as he knew the two were not divorced. He further testified that at the time of the offence the accused's family was living in Block A11 at Dagahaley but the accused had travelled on safari.

5. The second prosecution witness to testify is **Gedi Mohamed (PW2)**. He testified on the events of 11th September 2011 at about midnight when he said he was woken up at Dagahaley Camp. At the time PW2 was working with MSF (Médecins Sans Frontières) Hospital at Dagahaley Refugee Camp. He was told of two men who had fought and one had died while the other was injured. He identified the dead man as Abdi Bare Hassan whose body he examined. He testified that the body had multiple wounds on the right ear, left scapula area, upper abdomen and around the umbilical area with intestines protruding outside the stomach. He did not open the body upon request by family. He noticed that the lung was visible from outside. After examining the body he formed the opinion that the deceased had died as a result of excessive bleeding and puncture of the lung. PW2 further testified that he attended to the accused person who was critically injured and had been brought to the emergency room.

6. The rest of the prosecution evidence was adduced by **Abdikadir Abdi Ali (PW3)**, **Cpl Keneth Lemiri (PW4)**, **PC Anthony Gitonga (PW5)** and **IP Patrick Alwany (PW6)**. The four witnesses testified that the offence took place on 12th September 2010. The prosecution did not address the issue of conflicting dates especially since the charge sheet reads 11th September 2010. I have considered this anomaly and find that it is curable under section 382 of the Criminal Procedure Code. I find that it does not negatively affect the prosecution case and does not prejudice the accused person. PW3 told the court that while at his house at Dagahaley Refugee Camp on 12th September 2010 he heard people making noise and he went to find out what was happening. He went to a place on a road where the people were gathered and saw a man lying on the road facing up. He had injuries on the left ear and right front shoulder and was bleeding a lot. He knew the person as Abdi Bare. He cautioned those gathered not to disturb the body and he went to report the matter to the police. While at the police station he received a telephone call of another person at the house of the councillor (PW1). He went to PW1's house and found the accused injured with a piece of cloth tying his abdomen.

7. The evidence of PW4 and PW5 confirm that they were instructed by PW6 to accompany him to a scene of a crime at Block A11 at the Dagahaley Refugee Camp. The three police officers confirmed to the court that they went to the house of councillor Osman (PW1) where they found the suspect (the accused) who had injuries on his back and stomach. They put him in the police vehicle and proceeded to the place where the deceased was lying on the ground on a road leading to Block A11. They observed the body lying in a pool of blood had stab wounds below the ear, neck and stomach. PW6 who investigated this case told the court that he found out that the accused had found his entire family missing from Hagadera Refugee Camp and that he had traced his family at Dagahaley Camp. He also

testified that he found out that the accused and the deceased knew each other and that the accused's wife had moved in with the deceased.

8. The accused testified under oath. He told the court that he is a refugee and had been married to Fatuma Diriye Aden for 19 years. Both had five children. They were living in Hagadera Refugee Camp. In 2010 the accused left to go to Ethiopia where his second family lived leaving his other family at Hagadera. On his return from Ethiopia he found his entire family missing and this bothered him. He enquired from neighbours about the whereabouts of his family and he learned that the family had moved to Dagahaley Refugee Camp. He decided to follow his family. He arrived at Dagahaley and about 20 metres away he saw his eight year old daughter namely Suada. She ran towards him and informed him that their mother was in the house with a naked man. He went to the house and pushed the door but found it locked from inside. He pulled the curtain on the window and saw his wife and a man on top of her having sex. He was shocked. He told the man to go away from the house. The man, whom the accused said he did not know, came out and the accused attempted to hold him but he did not succeed. The man removed a knife and stabbed the accused while the knife was still in its sheath. The accused held the knife but the man removed the knife from the sheath and stabbed the accused on the left side of his forehead. The man then chased the accused. As the accused was running he heard his wife telling the man to kill him (the accused) to prevent him revealing their secret. The accused fell down. While attempting to stand the man stabbed him on the back and he fell down. The man stabbed him on the right leg, at the back left arm, the left armpit and at the abdomen near the groin area leaving intestines protruding. The accused managed to hold the knife and in self defence he stabbed the man. Both men walked away bleeding. The accused further testified that he wanted to go to the police to report but he could not make it. He went to the house of the councillor's (PW1) house which was nearby and informed him.

9. The accused was cross examined at length by the learned state counsel. He maintained that he did not know the deceased. He also denied having a relative known as Ibrahim. He said he met the councillor on the night of 8th September 2010 when he was asking him where his (accused's) house was. The accused testified that this is where his family was living and he was shown by PW1 from far and told him that his wife was living with another man in that house but was not told the name of the man. The accused did not believe him. He went to the house to see his family. He also denied that the dispute between him and his wife had been referred to the Chief Kadhi. He denied having disagreed with his wife before leaving for Ethiopia and said he did not know why the wife went to Dagahaley. It is not explained where the accused was from 8th September 2010 when he says he was shown the house where his family lived and 11th September 2010 when he says he found his wife with the deceased.

The law

10. Murder is defined under 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.** Malice aforethought is defined in section **206** of the Penal Code as follows:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

(a) 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;

(b) 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;

(c) An intention to commit a felony;

(d) 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.

11. The accused has put in self-defence and provocation as his defence. Learned counsel for the accused submitted at length that there is no dispute that the accused was married to Fatuma Dariye and had five children; that the accused found his wife in bed with the deceased and was attacked by the deceased and stabbed several times; that the accused managed to snatch the knife from the deceased and defend himself; that there is evidence to show that the deceased and accused's wife had been living as man and wife and that the accused found himself defending himself in circumstances he had not anticipated. Counsel submitted that this is not a case for murder or manslaughter and that the accused ought to be acquitted. With this defence in mind, it is proper to look at what the law says about provocation and self-defence. Provocation is defined by section 208 (1) of the Penal Code as follows:

(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

Issues for Determination

12. The law is settled in this country that in criminal trials it is the duty of the prosecution to prove that an accused person is guilty of the charges she/he is facing beyond any reasonable doubt. The law does not place the onus on the accused to establish her/his innocence. Where doubt as to the accused's guilt exists, the court gives the benefit of that doubt to the accused. This requirement applies to matters of defence such as alibi, provocation, self-defence as well as accident. It is for the prosecution to establish that the accused was not provoked and the prosecution must discharge this burden beyond any reasonable doubt (**see Court of Appeal Decision: Joseph Kimanzi Munywoki v. Republic [2006] eKLR**).

13. After my careful analysis and consideration of all the evidence in support of the prosecution case and the defence, it is my understanding that the issues for determination in this case can be narrowed down as follows:

- a) Whether the accused killed the deceased by an unlawful act or omission.
- b) Whether malice aforethought has been established by the prosecution.
- c) Whether the defence of provocation and/or self-defence is available to the accused.

14. There is ample evidence to prove that the deceased died. He was pronounced dead on arrival at

the hospital. All the witnesses who saw his body lying at the scene testified that the he was dead. The evidence of PW2 who examined the body of the deceased on arrival at the MSF Hospital confirms that the deceased died as a result of injuries he had sustained. Evidence, too, confirms that the deceased fought with the accused prior to his sustaining injuries that led to his death. The defence does not deny that the accused and the deceased fought. The accused testified that he was attacked by the deceased and was badly injured and in self defence he stabbed the deceased using his (deceased's) knife. Going by the evidence of the injuries sustained by both the accused and the deceased, it was a vicious fight. This evidence settles one of the ingredients of murder that death occurred and also settles the first issue for determination.

15. On the second issue for determination, the prosecution has to prove beyond any reasonable doubt that the accused intended to cause the death of or to do grievous harm to the deceased; had knowledge that his actions would probably cause the death of or grievous harm to the deceased; intended to commit a felony and/or intended to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony. I have carefully considered all the evidence. It is clear that the prosecution evidence did not narrate the circumstances leading to the death of the deceased. The only evidence that comes close to narrating those circumstances is that of PW1 but only as far as what was narrated to him by the accused who went to PW1's house injured. There was no eye witness. The accused's wife, Fatuma Dariye, would have shed some light into this matter but she was not called to testify. The court was informed that she had left the Refugee Camp to Somalia. This leaves the court with the evidence of the accused who narrated the circumstances leading to deceased's injuries and subsequent death. It is my finding that the prosecution has not established malice aforethought on the part of the accused. There is absolutely no evidence from the prosecution to support this ingredient.

16. Is the defence of provocation and self-defence available to the accused" This court finds itself with evidence establishing that the deceased died as a direct consequence of a vicious fight between him and the accused. However, the evidence establishing that state of affairs was not adduced by the prosecution but by the accused himself. The accused gave a sworn defence. Throughout his testimony he looked very sad and sorrowful. He testified how he came home from Ethiopia where his second family lives to find his wife and children having moved. He testified how he traced them to Dagahaley Refugee Camp where his wife was living with another man. He testified how he found his wife in bed having sex with that man who is the deceased. He testified how he told the deceased to leave and how the deceased attacked him, stabbed him on several parts of the body and how he managed to snatch the knife from the deceased and defend himself. I have stated above that it is the duty of the prosecution to prove beyond any reasonable doubt that there was no provocation and that the accused was not acting in self-defence.

17. I have no reason to doubt that Fatuma Dariye was married to the accused. There is evidence to show that was the case. PW1 told the court that he was not aware that the couple was divorced. PW6 who investigated this case also confirms this evidence. He told the court in cross examination that **"It is true I found out that the accused went home and found that his entire family missing and he traced them at Dagahaley Refugee Camp"**. To my mind, to find a man in bed with ones wife is **an act of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control and to induce him to act as the accused did in this case**. But it is informative to take note that the accused, according to his evidence and in the absence of other evidence to the contrary, did not attack the deceased. He told him to leave 'his' house, referring to the house where he found his family living. The deceased was attacked with a knife and stabbed on various places of his body, again going by the evidence of the accused and in the absence of other evidence to the contrary. To my mind the accused acted in the manner any ordinary person would have acted faced with similar

circumstances. I find that the accused was provoked by finding his wife in bed with the deceased. I also find that the accused acted in self defence. He did not have time to escape the attack and after being stabbed and seriously injured, the only option left to him was self defence (**see Republic v. Ayub Meme & 2 Others [2005] eKLR**)

18. Having found that the crime defined as murder has not been proved by the prosecution and taking into account that the deceased died as a direct consequence of a vicious fight with the accused, and having found that the accused was provoked and also that he acted in self defence without the intention to kill the deceased, I will now consider the provisions of section 207 of the Penal Code which provide as follows: **“When a person who unlawfully kills another under circumstance which, but for the provisions for this section, would constitute a murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only”.**

19. The circumstances of this case are very sad. Of course all cases of taking of human life are sad but this case is sad in that both the accused and the deceased were seriously injured as a result of a vicious fight. As stated by the accused in his defence, **“each man walked away bleeding”**. The accused happened to be lucky that he arrived in hospital alive and received treatment. The deceased was not as lucky. Actually evidence shows that the accused was treated at MSF Hospital but was later transferred to Ifo, later to Garissa Provincial General Hospital and finally to Nairobi at Mbagathi Hospital. The defence did not however produce the accused’s medical records. When unlawful death is caused by an accused in circumstances which would constitute murder but which there is evidence to establish that there was provocation leading to the accused acting in the heat of passion caused by that provocation the offence is reduced to manslaughter (**see Wero v Republic [1983] E.A 549 and RC v. Republic [2005] eKLR**)

20. I have taken into account of all the evidence and submissions by the defence counsel, particularly that the accused ought not to be convicted of manslaughter but ought to be acquitted of murder. I have taken into account that the circumstances of this case are such that both the accused and the deceased would have died as a result of the vicious fight. It is my considered view that a charge of murder cannot stand. However, I do not agree with the defence that the accused ought to be acquitted. Instead it is my finding that the circumstances of this case fit the definition of manslaughter and therefore I hereby reduce the charge to that of manslaughter. I hold the view that the accused had some reason left before he went to where the deceased and his wife were. He could have called for help from PW1 or any other person instead of going to that house alone. I therefore find the accused guilty of manslaughter under section 207 of the Penal Code and convict him accordingly.

Stella N. Mutuku, Judge

Dated, signed and delivered on this 26th day of November 2012.



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