Republic v PGS (Criminal Case 10 of 2017)
[2023] KEHC 19326 (KLR) (27 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19326 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL CASE 10 OF 2017

LM NJUGUNA, J

JUNE 27, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

PGS ..... ACCUSED

JUDGMENT

1. The accused person herein is facing a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. He is accused of murdering ANS on June 11, 2017 at [particulars withheld] village in Kathanjuri sub location within Embu County. To support its case the prosecution called a total of 5 (Five) witnesses.

2. PW1, GMS testified and stated that the accused and the deceased are her sons. That on June 11, 2017 at around 8am while at home, without any provocation or exchange of words, the accused cut the deceased who died instantly. It was her testimony that before the incident the accused didn't have a mental problem. That the accused person used a panga to cut the deceased. On re-examination, the witness stated that she did not see the panga after the accused used it to cut the deceased.

3. PW2, Sgt. Stephen Simba stated that during the incident, he was stationed at Runyenjes police station at Gathanjuri police post. That on June 11, 2017 he received a call from Inspector Mwiti to attend a scene of crime after the incident was reported by the area chief. In the company of PC Kimathi, PC Njeri and the area chief, they visited the crime scene which was the homestead of Samson at Gakwegori area where they found the body lying outside the house next to a huge stone. It was his evidence that the deceased sustained a big cut joining the mouth and the neck. Further that, the mother informed them that the accused was at the nearby shamba next to the house. He arrested him and upon asking him, he said "mimi niligonga yeye na mawe na nimekata na panga". That the accused person was not violent, and on being arrested he told them "mimi nimekata, mimi nimekata, niwekeeni pingu" he had the panga in his hand but he was cooperative.

4. PW3, PC Peter Kithaka, stated that in 2017 he was attached at Runyenjes police station crimes office. He stated that on June 11, 2017, a member of the public reported a murder incident that occurred at Gakwegori village in Kathanjuri location in Embu County. That in company of PC Jackson, they headed to the scene where they met other AP Officers who had arrested the suspect. He stated that the body of the deceased lay on the footsteps of the kitchen, and that it had a deep cut on the throat and the head had been smashed. That they re-arrested the suspect and escorted him to Runyenjes police station.

5. PW4, PC Rose Wamaitha, testified that she took over the matter from Inspector Mbunge who had since retired and that she was familiar with the matter. She stated that the arresting officers from A.P were the first to arrive at the scene followed by officers from Runyenjes police station. He testified that they collected the body and recovered a panga as an exhibit and arrested the suspect who was escorted to the Runyenjes Police Station. The postmortem was conducted on the body and a mental assessment done and later the suspect was charged with the offence herein. That the accused person and the deceased were brothers. She identified the accused person as the one they arrested. She stated that the evidence that she adduced was what was collected by the previous investigating officer. She further stated that the accused was found unfit to stand trial but later found fit.

6. The witness was later recalled to produce the postmortem report following the post mortem which was conducted on the June 19, 2017 and in the opinion of the doctor who conducted the postmortem, the cause of death was head injury.

7. PW5, Dr Sheila Shavulimo, testified that she conducted a mental assessment on Pius Gitonga Samson on February 2, 2022 and at that time he was fit to stand trial but he was on treatment. It was also her evidence that it was highly unlikely that the features of the mental illness would fully resolve.

8. After the close of the prosecution's case, the accused herein was placed on his defence upon the court finding that the prosecution had established a prima facie case.

9. DW1, Pius Gitonga Samson, the accused herein, stated that he knew he was facing a charge of murder of one Charles Njue and that he is not related to the deceased in any way. He testified that PW1 is not his mother as his mother is known as B Lieutenant. He further stated that he was not staying on the same land with the deceased in as much as they were sharing a house. He went ahead to state that the deceased was found dead in the shamba and he was the one responsible for his death.

10. After the close of the defence case, directions, were given for both parties to file their submissions wherein only the defence complied with the said directions.

11. The defence submitted that the prosecution did not discharge the burden of proof. That the accused was at first instance found not fit to stand trial and the same therefore confirmed that he was unwell and that at the time of the commission of the offence, he did not appreciate his actions. Reliance therefore was placed on section 12 of the *Penal Code*. It was submitted that the prosecution failed to establish that at the time of the commission of the offence herein, the accused person was not in his right mind. Further that the accused person's testimony was incoherent and the same is backed by medical report by the psychiatrist that the condition the accused person suffers cannot be cured but can only be managed by medication. The accused submitted that at the alleged time of the commission of the offence, he was suffering from a mental illness. In reference to the above, the defence contended that the accused herein was not criminally liable for any actions or omissions committed on that day. Therefore, this court was urged to acquit the accused person on account of mental illness.

12. I have considered the evidence presented before this court by both the prosecution and the defence. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the same. (See Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya. The degree/

standard of prove is always that of "beyond any reasonable doubts" [See *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373].

13. In the instant case, the accused person is facing a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Murder is defined as "when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder." The elements of murder and which the prosecution ought to prove are;

    i. the death of the deceased occurred

    ii. the death was caused by unlawful acts;

    iii. that the accused committed the unlawful act which caused the death of the deceased; and

    iv. that the accused had malice aforethought.

    [See *Republic v Isaac Mathenge; Republic v Mohamed Dadi Kokane & 7 others* [2014] eKLR].

14. The question therefore is whether the prosecution adduced sufficient evidence to prove the above elements.

15. As to whether the death of the deceased person occurred, it is not in doubt that the deceased herein died. PW4 on behalf of the doctor who conducted post mortem produced the Post Mortem Report as Pex 2. As such, death was proven.

16. On whether the death was caused by unlawful acts, under Article 26 of *the Constitution of Kenya 2010*, right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. (See *Guzambizi Wesonga v Republic* [1948] 15 EACA 63), the court held that;-

    " Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property."

    [See also Sharm Pal Singh [1962] EA 13 and Daniel Nzioka Mbuthi & another v Republic (supra)].

17. From the evidence on record, PW1 stated that the accused person herein and the deceased are her sons. That without any provocation or exchange of words the accused cut the deceased who died instantly. It was her testimony that she saw the accused cut the deceased and further that before the incident the accused didn't have a mental problem. That the accused person used a panga to cut the deceased. PW1 is the mother to the accused and she would not have any reason to lie to the court. PW1 and her two children who are the accused and the deceased were living in the same house. The incident happened at 8.00 in the morning and the three of them were the only people in that compound. PW1 stated in her evidence that the accused person used a panga to cut his brother and the panga was recovered and produced in court as an exhibit.

18. The court has considered the evidence that was adduced by the accused in his defence. He was incoherent in his testimony and though he denied that he committed the offence, at some point he stated that he is the one who killed the deceased.

19. Further, PW3 stated that upon visiting the scene in company of P.C Jackson, they found the body of the deceased lying on the footsteps of the kitchen; that the body had a deep cut on the throat and the

head had been smashed. The same was corroborated by the evidence in the post mortem report which showed that the deceased died as a result of head injury.

20. On whether the accused had malice aforethought, malice aforethought is the mental element (mens rea) of the offence of murder. Section 206 of the *Penal Code* defines it as follows;

> 206. 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 intent 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.

[See *Peter Kiambi Muriuki v Republic* (2013) eKLR]

21. The accused mounted a defence to the effect that he was suffering from a mental illness. In his written submissions, it was submitted that the prosecution did not prove the mens rea for the reasons that the medical history and the evidence produced by the witnesses undoubtedly proved that the accused was mentally ill.

22. Section 11 of the *Penal Code* (cap 63 Laws of Kenya) provides that: –

> " Every person is presumed to be of sound mind and to have been of sound mind at any time which comes into question until the contrary is proved."

23. Further, from the provision of Section 11 the presumption of insanity is rebuttable. Where an accused person raises the defence of insanity, the burden of proving insanity rests with him on a balance of probability (See Marri v Republic [1985] KLR 710 and Muswi s/o Musele v Republic [1956] EAC 622).

24. Under Section 12 it is provided: -

> " A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission, but a person maybe criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effect above mentioned in reference to that Act or omission."

25. It is thus clear that insanity is a defence if proved that at the time the accused committed the offence he was labouring under the disease of the mind. However, for the said defence to be available, it must be shown that the accused at the time of doing the act or making the omission was incapable of understanding what he was doing or of knowing that he ought not to do the act or make the omission as a result of the disease of the mind.

26. The Court of Appeal in the case of *Leonard Mwangemi Munyasia v Republic* [2015] eKLR held that; -

> " if it is shown that the appellant suffered from this condition then under Section 9 & 12 of the Penal Code he could not be held criminally responsible for the murder of the deceased.
>
> Both Section 12 aforesaid and the M/c Naughten Rules recognise that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the accused person by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to the law. The test is strictly on the time when the offence was committed and no other."

27. From the evidence by the prosecution witnesses, it is clear that the accused was suffering from a mental illness. In the same breadth, PW5 testified that she conducted a mental assessment on the accused person herein and formed the view that at the time, he was fit to stand trial as he was on treatment but it was highly unlikely that the features of the mental illness would fully resolve.

28. Of importance to note is the fact that the offence herein was allegedly committed on June 11, 2017 and the accused was examined on February 2, 2022, and by then he was found to be on treatment for schizophrenia for the last five years. From the above evidence, would it therefore be safe to conclude that indeed the accused herein was at the time of the commission of the offence labouring from a mental illness?

29. In Leonard Mwangemi Munyasia v Republic (supra), the court observed that: -

> " We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop."

30. It is outright that the accused herein even prior to the commission of the offence, had presented signs of mental illness.

31. It is my considered view, based on the evidence on record that, the accused person was suffering from mental related illnesses.

32. Having come to that conclusion, I find that the order that commends itself to the court is to proceed as provided under Section 166 (1) of the *Criminal Procedure Code*. Accordingly, I make a special finding under Section 166 (1) of the Criminal Procedure Code to the effect that the accused is guilty of murder contrary to Section 203 of the *Penal Code*, but was insane at the time he committed the offence. I enter a special finding of Guilty but Insane.

33. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

.....for the Accused

.....for the State

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