Republic v NEL (Criminal Case 18 of 2018)
[2022] KEHC 15645 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15645 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL CASE 18 OF 2018

CM KARIUKI, J

NOVEMBER 24, 2022

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

NEL ..... ACCUSED

JUDGMENT

1. NEL, the Accused herein, was charged with the offence of; murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya.

2. The particulars of the offence state that; on the 12th October 2018, at [particulars withheld] Manyatta in Samburu North Sub-County within Samburu County, she murdered LE, the deceased herein.

3. On 10th June 2019, the Accused pleaded not guilty to the charge, and the matter proceeded to trial.

4. Prosecution Case

5. PW1, AN, the Accused's daughter and deceased's sister, testified that on the material day, she went to the forest together with the Accused and her younger sister to harvest 'echichuka' i.e., aloe vera for making soup. She got a panga as requested by the Accused, and they went into the forest. While there, the Accused snatched the panga and sharpened it, and asked PW1 to carry the deceased on her back. The Accused then threw her and the child onto thorns.

6. The Accused began to slaughter her and sat on her chest while she was still on the thorns. PW1 stated that the Accused slaughtered her and drank her blood. That she cut her using the panga on her neck and showed the court her healed scar. That the Accused then began to cut the child, and she fainted, but then she got up and ran.

7. The Accused began throwing stones at her, but she managed to get away. She saw the Accused slaughtering the other child, and she was cut on the neck up to the back of the neck. That the Accused

drank blood with a 'kasuku,' i.e., a container. She ran and went home and found her mother's sister called Naminchoi, who called her father, and a ranger who was guarding the camp.

8. It was PW1's testimony that her father took her for treatment in Baragoi and that she never saw her little sister again.

9. PW2, EL, the Accused's husband and deceased's father testified that on the material day, A came home and reported that his wife had finished the children. That she had slaughtered them. L died, and NE survived. He found N cut in the neck and bleeding and took her to the hospital. Her throat pipe was cut, and she was not able to talk. He stated that N was about 8-9 years and hadn't started going to school while L was trying to walk.

10. They took PW1 to Baragoi then she was transferred to Maralaal Hospital, where she was stitched and admitted for over a month. When she got well, he asked her what happened, and she narrated how they had gone to harvest aloe vera with the Accused and what ensued after, as per her testimony.

11. PW2 stated that he had lived with the Accused for about 15-16 years and that they had 6 children. They lived well, but they would disagree sometimes. That at the time this incident happened, they had no problems. He told the court that there was a time the Accused had heart problems, but she was taken to hospital, and she came back.

12. PW3 Mbukoi Eluto Mareng, a KPR based in Kileboi, testified that he was in Lonyanteng Conservancy when Naminchoi found them and told them that the Accused had slaughtered children. He went to the scene and found villagers there. They followed the offender's footprints and found blood at the scene and nothing else.

13. He saw the Accused being arrested and there was blood on her clothes and on the back, she was carrying the small child who had been killed, but he did not see the injuries.

14. PW4 Ekaale Ome corroborated PW3's testimony that A who is also known as N came and told them that somebody had finished children and that one child had been slaughtered and had come to the village while they were holding a baraza at [particulars withheld]. As they run to the scene, he saw the Accused being arrested. He did not see the injuries but saw the body of the child being removed from her back, and there was blood on her body. He stated that he knew the cause as they come from the same village.

15. PW5, Nabori Kadisho, who was also a KPR, corroborated and reiterated both PW3 and PW4's testimony.

16. PW6 Aroo Lurulia, a ranger based in Baragoi, testified he received a call from Nabukoi, who told him that a person had killed children and was coming towards town. They arrested the Accused along with Matiti as she was headed toward town. She was carrying the child on the back, who was tied using clothing that was blood-stained. They called the Chief, who called the police from Baragoi. The OCPD came and took the child to the hospital

17. PW7 Gabriel Nyagah Lotung was the cyclist who took PW1 to hospital after PW2 called him. He stated that she had a cut on the neck and could not talk.

18. PW8, Regina Ekolmol Lekeen, testified that on 16/8/2012, she went to the mortuary and identified the deceased who was her brother's child. She stated that her neck had been cut.

19. PW9 Dr. Lodule Longolea produced the deceased's post-mortem report. His findings were as follows: -

> He examined the body of a male African child, aged 2 ½ years old, length 1 ½ foot height; the body was fresh with no signs of decomposition.
>
> The body was pale because of loss of blood.
>
> He found that there was anterior neck incision neck all round anterior together with neck up to 2nd cervical collar bone the major blood vessels were all severed. The cause of death was severe hemorrhage secondary to deep incisive wounds causing respiratory depression.

20. PW10 No is 113154 PC Eric Odinga Enoosain, the arresting officer testified that they rearrested the Accused from the villagers. She had a child strapped on her back. She had slit cut her throat. They took the child to hospital where she was pronounced dead and they were told of another who had also been taken to hospital. He took the Accused to Baragoi Police Station.

21. PW11 Daniel Seko ASP No. 232947 DCI, investigating officer, testified that after being informed by the OCPD Samburu that there was a lady who was arrested, he went to the police station to confirm the report was recorded then to the mortuary where he photographed the deceased's body. On 13/10/201, he went to see PW1 who had been cut and was being treated in hospital.

22. He told the court that he proceeded to the scene of the incident and found a panga and pieces of clothing and blood on the ground. He photographed the scene, he also recorded statements from witnesses and leant what had occurred on the material day. PW11 produced the panga as P. Exhibit No. 2

23. Defence Case

24. The Accused gave unsworn evidence and chose to rely on her statement marked D. Exhibit 1 (I the same was not physically produced in court nor was it in court bundle.

25. Submissions

26. The parties' submissions were not in file by the time of drafting this judgement despite requesting for them from the registry.

27. Analysis And Determination

28. The Accused was charged with the offence of murder contrary to Section 203 of the Penal Code. To secure a conviction for the same, the prosecution must prove all elements of the offence beyond a reasonable doubt, that is:

    (a) The death of the deceased.

    (b) That his death was unlawful and inexcusable or and unjustified.

    (c) That cogent and credible evidence exist which squarely places the Accused/offender at the scene of the crime.

    (d) That in causing death the perpetrator(s) was or were actuated with malice aforethought.

29. The first two elements comprise the actus reus, which is the guilty act, whereas the fourth is the element of mens rea, referred to as the guilty mind of the Accused and his/her knowledge that death would ensue from the unlawful acts targeted at the deceased.

30. The prosecution had the burden to lead evidence in support of the facts in issue which pertain to the aforestated material elements of the offence as defined under Section 203 of the Penal Code. Further, Section 107 (1) of the *Evidence Act* articulates the burden of proof in the following language:

> " Whoever desires any Court to give Judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

31. The burden on the prosecution in proving the offence of murder is primarily double-sided; first, it must establish that the unlawful death was caused by an act or omission of the Accused and, second, that the Accused did that act or omitted to act with malice aforethought. Additionally, Section 108 of the *Evidence Act* states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

32. The first element that must be proven in a murder charge is the fact of the death of the deceased. The fact of the deceased's death is not disputed. From the material evidence, it is not in doubt that the deceased, Lorno Emejen, is dead. The evidence of PW2 and PW8, who identified the body during the postmortem, as corroborated by the testimony of Dr. Lodule Longolea, PW9, who carried out the postmortem and produced the post-mortem report, proves the same.

33. The second vital ingredient in a murder charge is that the prosecution must prove that the death of the deceased was unlawfully caused. Section 203 of the Penal Code uses the words unlawful. Therefore, any conduct, i.e., acts or omissions exhibited by the Accused to commit the crime of murder, is presumed to be unlawful and unjustifiable unless it is excusable or authorized by the law. Any criminal offence is an unlawful act founded on the criminality of the Accused.

34. In the present case, the evidence of PW1 is that of an eyewitness to the commission of the offence. She narrated that on the material day, they had gone to the forest with her mother, who is the Accused, and her younger sister, the deceased. While in the forest, the Accused sharpened the panga they had carried and then began to attack her and her sister, slashing them with a panga. PW1, who was also a victim of this vicious attack, managed to escape, but her younger sister was unfortunate as she ended up dead. It was PW1's testimony that she saw the Accused cut the child before she ran for her life. That she saw the Accused slaughtering the other child, and she was cut on the neck up to the back of the neck.

35. PW8 also testified that she identified the deceased and stated that her neck had been cut, an account which was corroborated by PW2, who was also present during the post-mortem. He stated that the deceased was cut in the whole neck.

36. PW10 testified that when they rearrested the Accused from the villagers, she had a child strapped on her back who had a slit cut on her throat. PW11 also testified that he went to the mortuary, where he photographed the deceased's body, and then he proceeded to the scene of the incident, where he found a panga and pieces of clothing, and blood on the ground.

37. Further, the direct evidence of PW1 corroborated by PW2, PW8, PW10, and PW11 was further corroborated by the evidence of PW9, who testified that when he examined the deceased body, he found that there was an anterior neck incision neck all around anterior together with the neck up to 2nd cervical collar bone the major blood vessels were all severed and determined that the cause of death severe hemorrhage secondary due to deep incisive wounds and respiratory depression.

38. Additionally, upon cross-examination, he indicated that there was an incise wound caused by a sharp object. It was on the front side and the thorax. It was a incise core wound. The weapon was very sharp, and it was a slaughtering wound.

39. From the critical perspective of the facts and the evidence of PW1, which is direct and reliable evidence, it is evident that the cause of the deceased's death was unlawful. She was savagely attacked by a sharp object in this case a panga leading to her neck being slit and her consequential unjustified death.

40. The next important ingredient is to establish whether the Accused occasioned the unlawful act that led to the death of the deceased. There is no reasonable doubt in my mind that the Accused is responsible for the deceased's demise. There was clear and overwhelming evidence led by the prosecution witnesses to affirm the same. The evidence of PW1, which was an eyewitness account of what led up to the deceased's death, was cogent, consistent, and credible. It is also clear that she could identify the Accused as it was her own mother. Her identification of the Accused was based on prior knowledge of the Accused. It also goes without saying that PW1 could have also lost her life on that fateful day. I find that the cause of the deceased's death, as discussed earlier, is directly associated with the Accused's attack on her with the panga, which was produced as the murder weapon.

41. Further, after attacking PW1 and the deceased, the Accused carried the latter on her back and started heading to town from the forest, where PW3 identified her, PW4, PW2, and PW6. The testimony of these witnesses was consistent with the fact that the Accused was carrying the child on her back, and most of them observed blood on her body and back. PW10 then rearrested the Accused with the baby strapped on her back. All these witnesses gave reliant testimony on the admissibility of the recognition evidence of the Accused by the aforementioned witnesses as the person who attacked the deceased and ended up killing her. I find that there is cogent and credible evidence that the Accused was properly identified as the one responsible for the deceased's death.

42. Having said that, it is clear that the guilty act, in this case, has been proven beyond a reasonable doubt; in combination with this, the element of men's rea, in other terms, guilty mind or malice aforethought also has to be proven to properly constitute criminal liability on the Accused. As a general rule, someone who acted without men's rea or mental fault is not liable for murder in Criminal Law thus the Latin phrase 'actus reus non facit reum nisi mens sit rea', 'the act is not culpable unless the mind is guilty.' I reiterate that there must be both actus reus and mens rea for the Accused to the guilty of the crime.

43. The existence of the element of malice aforethought is very fundamental as its presence or absence determines whether liability for murder is present on the Accused part. The prosecution, therefore, bears the burden to prove the existence of an express or implied malice aforethought beyond a reasonable doubt.

44. The element of malice aforethought as manifested 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-
>
> 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;
>
> the 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; ..."

45. In the case of Nzuki v Republic [1993] KLR 171, the Court of Appeal set out principles of determining whether one has committed murder by establishing the presence of mens rea proved as follows: -

> " Malice aforethought is a term of art. It is either an express intention to kill or implied voluntary act by a person intending to cause grievous bodily harm to his victim, and the victim died as the result. Before an act can be murder, it must be aimed at someone and must be an act committed with intention of the following intentions: -To cause death;causes grievous bodily harm; andWhere the Accused knows that there is a serious risk that death or grievous bodily harm will ensure from his acts and commits these acts deliberately.Without and intentan of one of these three types, the mere fact that the Accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself to convert a homicide into the crime of murder.....

46. Notably, the substance of malice aforethought does not connote hatred or ill will towards the victim of the offence. The greater part of it is a state of mind that an Accused person forms before the unlawful act that causes death or grievous harm. The court Nzuki v R [supra] went on to state that: -

> " Malice aforethought" is a term of art and is either an expressed intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 on page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in he lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237."

47. The Irish Court of Criminal Appeal in the case of People v Douglas [1985] 1l-R.M 25 stated as follows with regard to malice aforethought: -

> " Evidence of the fact that a reasonable man would have foreseen that the natural and probable consequence of the acts of an Accused was to cause death and evidence of the fact that the Accused was reckless as to whether his acts would cause death or not is evidence from an inference of intent to cause death may or should be drawn, but the court must consider whether either or both of these facts do establish beyond a reasonable doubt an actual intention to cause death."

48. Further, in Santon v Queen [2003] 77 Aljr 1151, the Australian Court of Appeal discussed how intention may be inferred from the actions of the Accused and stated thus: -

> " In the circumstances of the present case, bearing in mind the nature of the weapon involved and the range from which it was discharged, if the appellant intended to shoot the victim, then his intent was obviously to kill rather than merely to cause grievous bodily harm. Furthermore, although the defense counsel at trial put an argument to the effect that the shooting was accidental, in the sense that it was not a willed act, the argument had nothing to comment it. The appellant's best hope was that the jury might regard the case as one of manslaughter based upon the view that he was menacing his wife with a loaded shotgun but did not actually intend to shoot her."

49. Similarly, in Republic v Tubere s/o Ochen [1945] 12 EACA 63, the court stated as follows: -

> " That it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it was used and the part of the body injured, and the conduct of the Accused before, during, and after the attack".

50. Considering the evidence in its entirety, the nature and gravity of the attack as narrated by PW1 establishing that the Accused acted with no disregard for the deceased's life; the weapon involved, i.e., a panga which the Accused sharpened before the attack and the injuries meted out against the deceased indicate malice aforethought. It would appear the Accused had the intention to cause death or grievous harm, which was a direct and probable consequence of her attack, and the death would not have occurred without it. See the case of John Mutuma Gatobu vs. Republic [2015] eKLR, where it was stated that the law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, and can rely on the nature of the injuries sustained by the deceased as proof of malice aforethought.

51. Accordingly, without much ado, the court would have no difficulty in holding that the elements of malice aforethought would appear to have been proved to the required standard beyond a reasonable doubt.

52. However, although I did not have the benefit of hearing her talk in court, the issue of her mental state at the time of the attack was skirted around all through the murder proceedings. It would be irresponsible for me to ignore the same. Based on the evidence of how the murder was committed, I question whether the Accused was of sane mind and whether she understood the nature of her actions and the natural consequences that emanated from them at that particular time.

53. From PW1's testimony, the attack seems to have been aimed at both her and the deceased. Her intention on that day was to kill both of her children. If PW1'S account is to be believed, of which I find no reason to doubt her account, she also drank their blood, and after killing the deceased, she proceeded to carry her on her back towards town from the forest. When PW1 escaped, the Accused would have opted to also run away, but she decided to carry the bloody baby on her back; these do not seem like the actions of a sane and reasonable person to me. This chain of events puts doubts in my mind about whether she understood the nature of her actions.

54. There were no reports from her family that the Accused had been abusing the children or that she had a reason and/or motive to kill them. PW2, in his police statement, indicated that in August 2018, the Accused had begun being silent and isolating herself from people. She did not want to talk much, and he realized that her mind is not well, but he did not act and decided to monitor her. This was about 2 months before the murder.

55. The first psychiatric report dated 13 November 2018, which was a month after the murder, indicated that the Accused took very long to answer questions and that she couldn't answer questions about her family. She was disoriented in time and place, and the Consultant Psychiatrist recommended that he speak to a close relative in order to make a comprehensive report. Consequently, on 20th May 2019, the psychiatrist found her mentally stable and fit to stand trial. PW9 also alluded to the Accused's state of mind, although, of course, it was his opinion as he did not examine the Accused and is also not a psychiatrist. He opined that the Accused could be suffering from severe depression and also alluded to postpartum depression.

56. The court is inclined of convicting her of murder due to the overwhelming evidence from the narration of evidence. However, she seems to have been in a state of lunacy, perhaps post-partum psychosis, when she killed her baby.

57. Experts estimate that fifty to eighty percent of all women experience some form of depression after childbirth, 5 but only one to two per 1000 women experience its most severe form, puerperal psychosis. This latter form is the most dangerous, both to the mother and the child, because both suicidal' and infanticidal thoughts are present, making the woman dissociated, delusional, and confused." The overall effect is to cause a woman to lose her "sense of reality." Despite its severe and traumatic effects on women after childbirth, puerperal psychosis is not recognized in California as a psychosis sufficient to fall within the insanity defense. As such, women who suffer from this debilitating mental impairment are tried as if no mental impairment existed, subjecting these disturbed women to the possibility of life in prison or even death. See Debora K. Dimino: Postpartum Depression: A Defense for Mothers Who Kill Their Infants, Santa Clara Law Review, Vol 30: No. 1, Article 5, pg. 233 https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1748&context=lawreview[1]

FOOTNOTE 1

58. I am persuaded that as much she committed the offense, she must have been under a delusion as not to be capable to appreciate what she was doing or the nature and quality of her acts because of the underlying mental instability that affected her judgment. The defence is apparently being tilted towards a case founded on the defence propounded on insanity as provided in section 12 of the Penal Code. It was enunciated in the case of Leonard Mwangemi Munyasia v R [2015] eKLR, a Court of Appeal decision that;

> " Under the rule, insanity is a defence if, at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal. Still, under section 167 (1) (b) of the Criminal Procedure Code, he would be convicted and ordered to be detained during the President's pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people, when so detained, are considered patients and not prisoners.

59. Pursuant to section 12 of the Penal Code, it is trite that insanity will only be a defence if it is proved that at the time of the commission of the offence, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act that he is charged with or was incapable of knowing that it was wrong or contrary to law. The test is strictly on the time when the offence was committed and no other. See Leonard Mwangemi case supra.

60. The evidence that will best disclose the state of mind of the accused at the time of the commission of the offence is evidence of his mind frame leading to the occurrence of the act; what the accused actually did at the material time, and what those around the accused observed contemporaneously with the occurrence of the act.

61. The next question that arises is whether, as suggested by defence counsel, the accused had suffered temporary insanity at around the time of the killing. From the defence advocate's view,

[1] (content missing)

the accused is saying that she was briefly insane at the time the crime was committed and was, therefore, incapable of knowing the nature of his alleged criminal act. Temporary insanity is often claimed as a defense whether or not the accused is mentally stable at the time of trial, which in this case, she was. Nevertheless, it is up to the defense to show that the accused could not have premeditated the illegal act and that he or she was not in his or her right mind.

62. In Roba Galma Wario v Republic [2015] eKLR, the Court of Appeal at Nairobi had this to say concerning a situation where malice aforethought is unclear:

> " 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 malic7e aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional".

63. I am of the considered view there is no proof beyond reasonable doubt that the accused did have the necessary intent to murder the victim. There is no evidence of what would have motivated such an act. There is no evidence of her having planned the killing.

64. I, therefore, find that there is no evidential basis for me to conclude that the accused had the mens rea necessary for a finding of a guilty verdict for the offence of murder. Conversely, I do not find that the accused was guilty but insane, for the defence has also not availed clear and cogent evidence to persuade me that the accused was insane at the time of the killing. The absence of that element of murder leads to the verdict of manslaughter.

I. Accordingly, I find the accused guilty of killing Lorno Emejen without the motive that amounts to malice aforethought, resulting in murder. I thus convict the accused of the unlawful act of causing the death of the deceased under the offence of manslaughter under section 202 of the CPC.

II. The accused shall appear for a hearing on sentencing on a date to be agreed with counsels.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 24TH DAY OF NOVEMBER 2022

.....

CHARLES KARIUKI

JUDGE