



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 8 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

GKN.....ACCUSED

JUDGMENT

1. The accused herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the said offence being that on 18.05.2017 at [Particulars Withheld] village Mavuria location of Mbeere South sub-county within Embu County murdered MN.

2. Upon arraignment, he pleaded not guilty and a plea of not guilty entered. The case proceeded for trial and wherein the prosecution called a total of six (6) witnesses.

3. PW1 (Salesion Muriithi) testified that the accused was known to him as he was his neighbour and further that on the material day (18.05.2017) he left for his shop and left his father together with his wife at home and that while at the shop he heard screams coming from the direction of the home. That his wife came running towards the shop and she told him that someone was beating his father using a jembe handle. That he ran home and found the accused herein still beating his father (deceased) who lay on the ground outside his house near the door. The accused upon seeing PW1 pursued him but he was able to escape and after which he took the deceased to Kavondori Health Centre and later to Embu Level 5 hospital where he died while undergoing treatment. In cross examination, he testified that the accused was mentally unsound.

4. PW2 (Naomi Wanjiru) testified that on the material day, the accused came to their home armed with a stick and hit the deceased with it and the deceased fell down. She screamed calling for help. The deceased was taken to hospital wherein he passed on. In cross examination, she denied having known any strange behavior of the accused before the incident.

5. PW3 (Florention Ireri Njue) testified that on the material day he left home for Kiritiri market at around 3pm and while on his way back, he met his brother (PW1) who informed him that their father had been attacked by the accused and had sustained serious injuries.

6. PW4 (Dr. Phyllis Muhonja) testified that he conducted the post mortem on the body of the deceased herein and she formed an opinion that the cause of death was severe head injury. She produced the post-mortem report as PExbt 1.

7. PW 5 (Dr. Thuo) testified that the accused was brought to him on 23.05.2017 for mental assessment and that after the said assessment, he formed an opinion that the accused herein was mentally sick. In cross examination, the witness testified that the accused was not capable of giving the right response or reaction to situations and in which situation he could make wrong decisions without understanding full repercussions. Further that, the accused was paranoid of people he mentioned and which was likely to lead to him becoming violent to those people if he came across them. She produced her report as PExbt 2.

8. PW6 (Cpl. Joshua Cherotich) testified that he was the Investigating Officer in the case herein before his transfer. That he investigated the matter and further escorted the accused for mental assessment before preparing his file and submitting the same to the ODPP. He produced the wooden plank which was recovered at the scene as PExbt 3.

9. The prosecution proceeded to close its case and vide a ruling delivered on 10.03.2021, the accused herein was placed on his defence after the court found that the prosecution had established a *prima facie* case.

10. The accused testified and gave sworn evidence to the effect that he was not aware of the report dated 23.05.2017. Further that he was taken to Mathari mental hospital for treatment and stayed there for one month. In cross examination, he testified that the mental illness started in 2006 but he could not remember the month and further that he was treated at Embu Level 5 hospital and also at "Kwa Thuo". He stated that he relied on the doctor's report as to his mental illness and that he did not have a relative to testify on his mental status.

11. Andrew Nyaga testified as DW1 and he gave sworn evidence that the accused herein is his 3rd born child and that they had at one instance taken the accused herein to hospital for mental illness though he could not remember the year. In cross examination, he testified that he did not have any medical evidence to show that the accused suffers from a mental illness and that he did not know what happened to the deceased herein.
12. The defence proceeded to close its case. The court gave directions on filing of submissions. It was submitted on the part of the accused that, the prosecution failed to prove the elements of the offence of murder in that; there was no evidence linking the accused herein to the death of the deceased; that the death was caused by the accused's unlawful acts or omissions; and further that the prosecution did not prove that the accused had malice aforethought. In support of this, the defence submitted that the accused was not in control of his mental awareness at the time of the offence. Reliance was made on the **MacNaughton Rule** and it was further submitted that the accused herein was mentally unwell on 18.05.2017 and the condition persisted for almost an year. Further that, the accused herein had no obligation to produce his medical records as the same are protected under the Data Protection Act No. 24 of 2019. Lastly, the defence submitted that PW2's evidence being the only eye witness was never corroborated.
13. The prosecution elected to rely on the evidence on record in support of its case.
14. I have considered the evidence presented before this court by the prosecution and further the defense evidence. 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 was **Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373**).
15. In the instant case, the accused is facing a charge of murder contrary to Section 203 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."**
16. The elements of murder and which the prosecution ought to prove are;
- a. the death of the deceased*
 - b. the death was caused by unlawful acts;*
 - c. that the accused committed the unlawful act which caused the death of the deceased; and*
 - d. that the accused had malice aforethought.*
- (See **Anthony Ndegwa Ngari vs Republic [2014] eKLR**).
17. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
18. As for **the death of the deceased**, it is not in doubt that the deceased herein died. PW4 (Dr. Phylis Muhonja) testified that she conducted post-mortem on the body of the deceased and after which she formed an opinion that the cause of the death was severe head injuries. PW6 testified that he witnessed the said post-mortem. PW4 testified that two of the deceased's relatives identified the body of the deceased herein. In view of the foregoing, the fact of death was proved.
19. As to the **death having been 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 defense or defense to property. (See **Guzambizi Wesonga – vs- Republic [1948] 15 EACA 63**) and also **Sharm Pal Singh [1962] EA 13**). PW4 gave evidence that the deceased herein died as a result of severe head injuries. The death of the deceased herein was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful.
20. As for **the accused having committed the unlawful act which caused the death of the deceased**, PW1 testified that he was at his shop when PW2 went screaming while running towards the shop and she told him that someone was beating his father with jembe handle. That he ran home and found the accused herein still beating his father (deceased) as he lay on the ground outside his house near the door. PW2 (Naomi Wanjiru) testified that on the material day, the accused went to their home armed with a stick and hit the deceased with it and the deceased fell down. There is overwhelming evidence that the accused herein committed the said offence. That he inflicted the injuries that caused the death of the deceased.
21. The defence in their submissions submitted that the evidence by PW2 who testified having seen the accused attack the deceased was never corroborated. However, it is my view that the testimony by PW1 indeed corroborated that of PW2 in that respect.
22. As for **the malice aforethought**, for the prosecution to secure a conviction in a charge of murder, it must prove that the accused had malice aforethought. In **Roba Galma Wario –vs- Republic [2015] eKLR** the court stressed on the importance of proving malice aforethought and in so doing 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.”

23. Under **Section 206 of the Penal Code**, malice aforethought is deemed to be established by evidence when any of the following circumstances are proved by evidence adduced against any defendant: -

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.

(See **Anthony Ndegwa Ngari v Republic [2014] eKLR**)

24. The accused mounted a defence from the onset to the effect that he was suffering from a mental disease. In his written submissions, it was submitted that the prosecution did not prove the *mens rea* for the reasons of the said disease. **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.”

25. 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.”

26. It is thus clear that insanity is a defence if it is 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.

27. The Court of Appeal in the case of **Leonard Mwangemi Munyasia –vs- 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 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.”

28. 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**).

29. In **Leonard Mwangemi Munyasia vs. 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. In the instant case, the accused in his defence testified that he was taken to Mathari Hospital for treatment and stayed there for one month. When he was cross examined, he testified that his mental illness started in 2006 but he could not remember the month. He stated that he was treated at Embu Level 5 hospital and also at “Kwa Thuo”. The accused’s father testified as DW1 and wherein he testified that he had at one instance taken the accused herein to hospital for mental illness though he could not remember the year. However, he conceded that he did not have any medical evidence to show that the accused suffers from a mental illness.

31. It is my considered view that taking the above evidence by the defence and applying the above legal principles to the same, the accused herein did not prove the defence of insanity to the required standards (on a balance of probability). The accused did not produce any

treatment notes in relation to previous treatment as he alleged. If he ever visited the said hospitals over mental illness, he ought to have produced a medical report to that effect. There was no evidence that he was mentally unwell on 18.05.2017 and for how long the condition persisted.

32. I note the accused's submissions that he had no obligation to produce his medical records as the same are protected under the Data Protection Act No. 24 of 2019. I find this argument misplaced. I have perused through the said Act and in my view, there is nowhere in the said Act where evidence to be tendered in court can be said to be protected by the Act. In the instant case, by the accused submitting that his medical records are protected, it can only be to his prejudice as the same would have assisted his case.

33. I note that the medical report produced by PW5 indicated that the accused herein was not fit to stand trial. However, in his evidence before court, he testified that the accused was brought to him on 23.05.2017 for mental assessment and that after the said assessment, he formed an opinion that the accused herein was mentally sick. It is my considered view that this report cannot be said to be sufficient in that respect as it did not indicate as to what was the state of the accused's mind as at the time of committing the offence and which was on 18.05.2017. This was particularly in view of a later mental assessment report from Mathari Hospital dated 8/01/2018 which declared the accused person mentally fit and capable of making his defence.

34. The court cannot assume that on the date the offence was committed, the accused was not in the right state of mind. More was required in the form of medical evidence than just statements by witnesses which were not substantiated. I find that the report is not conclusive evidence in that respect.

35. In view of the foregoing, I find that the defence failed to prove the defence of insanity to the required standards and as such the said defence fails. The offence herein can only be said to have been committed with malice aforethought.

36. The Court of Appeal in **Bonaya Tutu Ipu & Another -vs- Republic [2015] eKLR** while quoting with approval the decision by the Court of Appeal of Uganda in **Chesakit -vs- Uganda, CR. APP. NO. 95 OF 2004**, held that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.

37. In the instant case, the evidence by PW1 and PW2 was to the effect that the accused herein attacked the deceased with a wooden stick and after the deceased fell on the ground, the accused continued beating him. PW1's evidence is to the effect that when he arrived at the scene, he met the accused still beating the deceased. The nature of the injuries suffered were described by PW4 in the report she produced as evidence in this case. The said report was never disputed or controverted. It is clear that from the nature of the injuries described in the report, the accused herein had intentions to either cause death or to cause grievous bodily harm to the deceased herein. As such, malice aforethought was proved.

38. Taking into account all the above, it is my considered view that the prosecution tendered sufficient evidence to prove the charge of murder against the accused person.

39. Accordingly, I convict him for the offence as charged.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF JULY, 2021.

L. NJUGUNA

JUDGE

.....for the Accused

.....for the State