REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL CASE NO. 16 OF 2014

GGW...ACCUSED

-VERSUS-

REPUBLIC.. RESPONDENT

J U D G M E N T

1. The accused person was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**.

2. The particulars of the charge are that on 2nd July 2014 in Thiba location within Kirinyaga County, the accused person murdered one DN.

The accused person denied the charge.

3. The prosecution called a total of five (5) witnesses in support of its case.

Prosecution's case

4. PW1 was BMN, the father of the deceased minor. He recalled that he was at work on the material day when he received a call from one Wainaina informing him that there was a problem at home. He hurriedly left his work and rushed home. Upon arrival, he was informed that his child had been badly assaulted by his brother, the accused person herein, and that he had been taken to a dispensary. He then rushed to the hospital where he was informed that his son had succumbed to the injuries.

5. PW2 was PK, the uncle to both the accused person and PW1. He was a witness of the post-mortem examination that was conducted on the deceased's body on 8th July 2014.

6. PW3 was LM, the mother of the deceased minor. She recalled that on the material day at 6 a.m. in the morning, she was washing clothes when she saw the accused, who is her brother-in-law approaching her while armed with a stone. The accused then hit the deceased on the head with the stone. According to PW3, the deceased also stabbed the deceased with a knife. PW3 then started screaming for help but before people came to her rescue, the accused took the child and hit him on the ground several times. The neighbours responded to PW3's cry, caught up with the accused and started beating him up. The accused was then rescued by police officers from Wanguru Police Station.

7. PW4 was Dr. Douglas Chira who performed the postmortem examination on the body of the deceased. he concluded that cause was due to brain confusion and intermorainal bleeding/skull fractures.

8. PW5 was Dr. Joseph Thuo. He conducted a mental examination on the accused person. He found that his mood was irritable. His thought process was loosely associated as he gave answers that were unrelated to the questions asked. PW5 also noted that the accused was not oriented in time and he had hallucinations that people were against him. He also had poor concentration. From these abnormalities, PW5 formed the opinion that the accused was mentally ill and required to be committed at Mathare Mental Hospital for treatment. He concluded that he was not fit to stand trial at the time and prepared his report which he produced in evidence.

9. By consent of the parties, the report from Mathari Hospital that was prepared by one Dr. Mucheru Wangombe after the accused received treatment was produced as P. Exhibit 3. It was the opinion of the said doctor that the accused was now capable of making his defence.

10. The prosecution then closed its case and by a ruling of this court that was delivered on 8th June 2021, the accused was placed on his defence.

Defence case

11. At the close of the prosecution's case, this court ruled that the accused person had a case to answer and he was put on his defence. The accused person gave a sworn statement relying on his statement dated 11th June 2021 which was adopted as his defence. His defence was that he did not know how he killed the deceased and only heard people saying that he used a stone.

Issues for determination

12. This Court is called upon to decide whether the accused is guilty of the offence of murder. **Section 203** of the **Penal Code (Chapter 63 of the Laws of Kenya)** defines the offence of murder and requires proof of the following if the offence of murder is to be established:

a) death of the deceased,

b) the cause of the death and an unlawful act or omission on the part of the accused resulting in the death of the deceased,

c) malice aforethought on the part of the accused.

13. It is my view that the following are the main issues for determination by this court:

a) Whether there is proof of the fact and cause of death of the deceased.

b) Whether the accused caused the death of the deceased. And if so,

c) Whether the acts of the accused, resulting in the deceased's death, qualify as murder (intentional killing)

Analysis

a. **Proof of the fact and the cause of death of the deceased**

14. The testimonies of PW1, PW2, PW3 and PW4 prove the fact that the deceased actually died as they all witnessed the lifeless body of the deceased.

15. The cause of the deceased's death was confirmed by the evidence of PW4. He examined the external body of the deceased and noted bruises on the skull and cuts on the right temporal region. There were also two stab wounds – one on the right side upper jaw and the other on the left side. Internally, the respiratory system and the genital urinary system were intact. The deceased's mandible was however fractured and his teeth were loose. PW4 also noted fractures in the deceased's skull and compression in the brain. He concluded that the cause of his death was brain contusion and intra-cranial bleeding secondary to injuries suffered on the head. He then filed and signed the post-mortem form which he produced as P. Exhibit 1.

b. Proof that the accused committed the unlawful act that led to death of the deceased

16. PW3 was the only eyewitness who saw the accused person inflicting fatal injuries on the deceased. In the case of **Kiragu v. Republic [1985] eKLR**, the court stated follows:

> **"It is trite law that subject to certain well known exceptions a fact may be proved by the testimony of a single witness however in exercise of its duty this Court has to satisfy itself that in all the circumstances of the case, it is safe to act upon it."**

17. In **Abdala bin Wendo and another -vs- R (1953) 20 EACA166** the court expressed itself as hereunder on the issue of considering the evidence of a single eyewitness:

> **"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of single witness, can safety be accepted as free from the possibility of error."**

The counsel for the accused has submitted that the evidence of the only eye witness that is PW3 – is shaky and is not corroborated. The State has urged the court to find that PW3 gave direct evidence and that it is not in doubt that the deceased was assaulted in plain eye sight of PW3.

18. Despite the shock on PW3 at witnessing the killing of her child she gave candid evidence on how the accused attacked the deceased. It is trite that criminal cases can be decided on the basis either of direct evidence or circumstantial evidence. When a witness asserts actual knowledge of fact, that witness' testimony is termed direct evidence. The evidence tendered by PW3 is that it was at 600 am she was outside washing clothes when he saw the accused coming while armed with a stone. The accused used the stone to hit the deceased on the head. The accused then stabbed the deceased with a knife. The accused then took the child and hit him against the ground several times. She screamed for help and neighbours who heard went and caught up with the accused who they started beating before police came and rescue him. The accused confirmed this in his defence, and stated that he could not remember how he killed the deceased.

The direct evidence adduced by PW3 was not dislodged. It placed the accused at the scene of the murder which he himself admitted. The manner in which the deceased was attacked as testified by PW3 was corroborated by the evidence of the doctor. The injuries observed by the doctor who conducted the postmortem were in line with the testimony of PW3. The Court of Appeal in ***Anulpchad Meghji Rupa & Another –v- Republic (1984) eKLR*** stated that, ***"the correct definition of corroboration is that it is some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence."***

In this case, apart from PW3, the prosecution adduced independent evidence by PW4 which corroborates her testimony.

19. In this case, the accused was well known to PW3 as he was his brother-in-law by reason that the accused is the elder brother to PW3's husband. Given that the incident occurred in the morning, it follows that it is believable that PW3 recognized the accused as the perpetrator of the subject offence.

The prosecution had the burden to prove that the deceased died as a result of unlawful act or omission and that the accused was responsible. The prosecution relied on ***Republic –v- Aboud Rogo Mohamed & 3 Others Criminal Case No.91/2003.*** Where the court stated that it is a principle criminal law that a person may not be convicted of a crime unless the prosecution has proved beyond any reasonable doubt that accused had caused a certain event or that the responsibility is attributed to him for existence of certain state of affair which is forbidden by criminal law and that he had definite state of mind of relation to causing the event or existent of the State of affairs which conduct had a particular result.

The evidence on record and considering the circumstances of this case it is my view that the prosecution has proved beyond any reasonable doubts that it is the accused who brutally assaulted the deceased and inflicted injuries which resulted in his death.

Was there malice aforethought?

20. The offence of murder is complete when, *"malice aforethought"* is established if, pursuant to **Section 206** of the **Penal Code** evidence proves 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."**

21. According to PW1 and PW3, the accused had a good relationship with them and there was no grudge between them. On cross examination, the accused while denying that he killed the deceased, he however admitted recording a statement with the police stating that he was annoyed with his sister and wanted to hurt her.

22. I have considered the injuries suffered by the deceased. It was PW4's testimony on cross-examination that the bruises were caused by a blunt object while the penetrating wounds were caused by a sharp object. The accused tried to insinuate that he was mentally ill on the material day.

The accused was examined by Doctor Thuo (PW5) a Consultant Psychiatrist at Embu Level 5 Hospital on 23/7/2014. According to Doctor Thuo the accused was suffering from a mental illness and required to be committed to Mathare Mental Hospital for treatment; see exhibit 2. As a result of this report this court issued an order that the accused be committed to Mathare Mental Hospital for treatment. Later on 2/2/2015, Dr. Mucheru Wangombe issued a certificate under **Section 163(1) of** the **Criminal Procedure Code (Cap 75 Laws of Kenya)** confirming that he had become capable of making his defence, see **exhibit 3.**

The accused was examined soon after he committed the offence. In his defence the accused stated that he could not remember how he killed the deceased and thought Black Magic was used. He informed the court at the time he committed the offence, he was sick and he had previously suffered a mental illness. The manner in which the accused assaulted the deceased tends to demonstrate that indeed the accused was suffering from some mental illness at the time. The defence of insanity applies. There is scanty evidence on the nature of the mental illness other than what appears on the report by Doctor Thuo. There was no indication other than what accused stated that he had suffered a mental illness before. The report by doctor Thuo confirms that the accused was suffering from a mental illness. In the case of ***Leonard Mwangemi Munyasia –v- Republic 2015 eKLR;*** it was stated;

> ***"It is a rule of universal application and of criminal responsibility that a man cannot be condemned if it is proved that at the time of the offence he was not a master of his mind."***

This proposition is captured at **Section 9 of the Penal Code** which provides:

> ***"(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible***

for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to foreman intention, is immaterial so far as regards criminal responsibility."

I find that from the testimony of PW3 shows the state of the accused at the time of the commission of the offence. He hit the deceased with a stone, stabbed him and hit his head against the ground. It is the testimony of PW3, and PW1 that the accused had not acted like that before.

I am satisfied that there is sufficient evidence to establish that the accused was suffering from a mental illness on the day he committed this offence. The illness affected the accused person's mind rendering him incapable of knowing what he was doing or knowing that what he was doing was wrong. It is well established that for the defence insanity to stand the accused must satisfy the grounds laid down in ***McNaghten Rule – McNaghten case (1843) 10 C1 & Fin 200.*** The tests which must be proved are;

" 1) That an individual suffers from a "defect of reason.

2) That it was caused by a disease of the mind.

3) That as a result he or she does not know the nature and quality of the act or that it is wrong."

The Court of Appeal in the case of ***Richard Kaitany Chemagong –v- Republic Criminal Appeal No.150/1983 UR-*** stated that-

" where the effect of a disease was to impair his mental faculties of reason, memory and understanding that the sufferer did not know the nature and quality of his act or, if he did, he did not know what he was doing was wrong it was a disease of the mind within the meaning of the McNaghten's Rules, even if the effect was transcient or intermittent. On the evidence the defendant was therefore 'insane' at the time of his act and the only possible verdict was that provided for by the Act of 1883 as amended."

The law requires that it must be proved that the time of committing the Act, he was labouring under the defect of reason or a disease of the mind rendering him not to know the nature and quality of the act he was doing. **Section 166 of the Criminal Procedure Code** Provides;

"(1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the actor omission charged but was insane when he did the act or made the omission.(2) When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.(3) The President may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.

(4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report.(5) On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.(6) Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection(3),make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the persons detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.(7) The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital."

It is clear from the evidence tendered before me that the accused caused the death of the deceased while he was suffering from an illness of the mind. In line with the above provision, ***Section 166 of Criminal Procedure Code,*** I enter findings that the accused is found guilty but insane.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF DECEMBER 2021.

L.W. GITARI

JUDGE