



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCR CASE NO. 21 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

AMM.....ACCUSED PERSON

J U D G M E N T

1. The accused person herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap 63 of the Laws of Kenya)**. The particulars of the charge are that on 28th September 2018 at [particulars withheld] village in Kaare sub-location, Magutuni location within Tharaka Nithi County, the accused murdered EMM. The accused denied the charges after being found to be fit to stand trial.

2. The prosecution called a total of seven (7) witnesses in support of its case.

Prosecution's case

3. PW1, JNK testified that on 28th September 2018 at about 5.30 a.m., the accused person went to her house and woke them up. The accused wanted to know where the deceased was. She enquired from the accused the reason why he needed to see the deceased to which the accused replied that one Kurennya wanted to see him. The deceased then stepped out and asked the accused person the reason for the early visit whereupon the accused replied that he was being called by the aforementioned Kurennya. After two minutes or thereabouts, the accused pounced on the deceased and cut him with a panga on the back of the neck, killing him instantly. During cross-examination, she informed court that the accused had prior to the killing of the deceased exhibited characters akin to one who is mentally unstable.

4. PW2, EM, testified that he is the father of both the accused person and the deceased. He went on to state that on the material day, an incident occurred at his home where the accused person killed the deceased. On the previous day, the accused person did not sleep during the day and night. Instead, the accused was walking all over the place saying that there were people chasing him. At about 5.00 a.m., the accused went round his house and after a short while, as PW2 continued to watch the accused, he heard screams coming from the direction of the deceased's house. Upon reaching there, he found the deceased lying down at the door of his house and he had bled profusely. During cross-examination, he informed the court that the accused person was not normal during the time that he inflicted the fatal injury onto the deceased.

5. PW3, RM, testified that the deceased and the accused person were her brothers and that on the material day, the accused after having killed the deceased went to her house asking for drinking water. After drinking the water, he informed her that he had killed the deceased and that Kurennya has drunk the blood. She went on to state that she told the accused to sit down and at once rang the sub area chief to inform him of the incident. She confirmed that the deceased and the accused persons were good friends and there existed no grudges between them. During cross-examination, she confirmed that the accused had appeared insane when he committed the offence.

6. PW4, Idah Nkirote, testified that she is the assistant Chief of Ntune sublocation and that on the material day, she received a call from a village elder informing her that the accused had murdered his brother. She reported the incident to the OCS and then proceeded to the scene where he found the deceased's body lying down near his house. Later, the police came and took away the body to the mortuary and the accused to the police station. During cross-examination, he informed court that from the way the accused person was talking on the material day, he appeared to be normal.

7. PW5, Dr. Nkonge Nicholas, testified that he is a medical doctor and that he had a postmortem form which was previously filled and signed by Dr. Kitili who had passed away. He informed court that the postmortem was performed on the body of the deceased and externally, there was a deep cut on the posterior aspect of the neck measuring eleven (11) centimeters, internally there was a fracture of the cervical bone and the spinal cord severed. He produced the postmortem form as P. Exhibit 2. The cause of death in the doctor's opinion was severe haemorrhage (blood loss) due to deep cut on the back of the neck inflicted with a sharp object

8. PW6, Sgt William Mwanzia testified that he received a call from PW4 who informed him of the incident. he went ahead to inform the OSC Tumu Police Station who came with a vehicle that picked the body and the accused person who had been arrested by the public and proceeded to charge. He further states that he found a panga in the compound and took possession of it. He produced it as P.Exhibit 1. On cross examination, he informed the court that he interrogated the accused and to him, he appeared normal.

9. PW7, Eick Kiprono was the investigating officer in this case. He testified that he visited the scene of the crime and met the accused who had been tied with a rope on his hands while the deceased lay outside his house. He further testified that he found a panga which had been used in the crime (P.Exhibit 1). On cross examination, he informed court that he did ask the accused person why he had killed the deceased, but he did not answer. The prosecution then closed its case and the court ruled that a prima facie case had been established against the accused who was put on his defence.

Defence case

10. It was accused gave an unsworn defence statement. It was his testimony that he could not tell what he had done. According to him, he had no plans to do anything prior to his arrest.

Issues Arising for Determination

11. **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. the death of the deceased,
- b. the cause of the death of the deceased,
- c. an unlawful act or omission on the part of the accused resulting in the death of the deceased, and
- d. malice aforethought on the part of the accused.

12. 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.

Analysis of Issues

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

13. The evidence of PW1, PW2, PW4, PW5, PW6, and PW7 all confirm that indeed the deceased person died. According to PW5, the cause of his death was established to be severe haemorrhage due to the cut around the back of the neck caused by a sharp object. To this end, it is my view that the prosecution thus proved the fact and cause of the deceased's death.

b. Whether the accused caused the death of the deceased

14. In the case of **Kiragu v Republic [1985] eKLR** the Court of Appeal held that:

“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.”

15. In the case of **Abdala bin Wendo and another -vs- R (1953) 20 EACA166** the court expressed itself as follows on the issue of a fact being proved by the testimony of a single witness.

“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 a single witness, can safely be accepted as free from the possibility of error.”

16. In this case, PW1 opened the door for the accused person and saw him armed with a panga. The accused was looking for the deceased who was his brother and also PW1's husband. Soon after the deceased appeared, they tried to persuade the accused to go to sleep but he did not heed to their call. As PW1 was about to walk away, she looked back and saw that the accused had cut the deceased on the back of his head and the deceased fell on the ground immediately.

17. According to PW2, the accused person appeared to be disturbed on the material day. He had gone to PW2's house three days prior to the incident as he was having problems. PW2, the accused's father, was hoping to take the accused person to hospital the following day but this was never to be. According to PW2, the accused person then took PW2's panga without his knowledge and proceeded to kill the deceased in cold blood. PW3, PW6, and PW7 visited the scene of the crime soon after the deceased was killed and found the accused had been arrested for his action and had been tied with a rope. In my view, while PW1 was the only eyewitness who saw the accused person inflicting the fatal injuries on the deceased person, there were other witnesses whose evidence, although circumstantial, prove that it is the accused who cut the deceased using a panga and caused his death the action was unlawful.

c. Whether the accused had the requisite men rea

18. The prosecution in this case had a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. **Section 206 of the Penal Code defines malice aforethought 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.

19. What can be deduced from **Section 206 (a) to (e)** of the **Penal Code** is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. The Court of Appeal in the case of **Bonaya Tutu Ipu & another v Republic [2015] eKLR** stated as follows:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated 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. Earlier in REX V. TUBERE S/O OCHEN (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...” ”

20. In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used in causing death, the number of injuries inflicted upon the victim, the part of the body where such injury was inflicted, the manner in which the weapon was used, and the conduct of the accused before, during and after the attack.

21. From the evidence placed before the court, the accused appeared to be mentally disturbed at the time he committed the offence. PW2, the accused's father, testified that the accused had been having problems since he came to live with him and that PW2 was hoping to take the accused to hospital the following day. On the other hand, PW1 and the deceased tried to convince the accused to go back to sleep on the material night but the accused kept on saying that there were people who were following him. Specifically, the accused kept on saying that one Kurenga was calling the deceased. In my view, the accused person was suffering from mental problems at the material time as it is evident from the testimony of the prosecution witnesses as well the defence of accused. When taken for a second medical assessment of his mental status to stand trial, the accused was found to be mentally unsound to stand trial and was escorted to Mathare Hospital for medical attention.

Defence of Insanity:

The law is trite that a person cannot be held accountable for action committed when he was not in good state of his mind. See **Leonard Mwangemi –v- Republic (2015) eKLR** where the Judge stated that-

“ 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.”

22. Upon arrest the accused was examined on 2/10/2018 by Erick Bundi- Senior Clinical Officer- Clinical Psychiatrist at Chuka District Hospital. The Clinical Psychiatrist found that the accused could follow the proceedings in a court of law.

The offence was committed on 28/9/2018. The accused was presented in court for plea on 15/10/2018 and he pleaded guilty. The accused was then convicted and the Judge called for a pre-sentencing report by the probation. This report was presented in court on 25/10/2018. According to the report, the accused is said to have developed signs of a person suffering from mental breakdown. He alleged that some people were chasing him and wanted to kill him. This got the attention of the father who took him to his house to monitor him closely. This was two days before he committed the offence. The father was advised to look for money and take him to hospital for specialized treatment. The accused however managed to sneak out of the house and committed the offence. As at the time of writing the report, the probation officer found that the accused was not in touch with reality and alleged that he was under the influence of certain unknown forces that took control of his thought process when he committed the offence. He narrated that some people were always persuading him to kill him and he had seen the image of this people when he killed his brother upon considering this report, the Judge ordered that the accused be committed to Mathare Mental Hospital for treatment. Later a report by Doctor Ngugi Gatere filed a certificate of capability to make a defence dated 13/2/2020. In the doctor's opinion the accused had become capable of making his defence.

The court had also called for a second mental status assessment report and so the accused was examined by doctor John Thuo, Consultant Psychiatrist who found that the accused had a mental retardation and was not mentally fit to stand trial. The foregoing analysis leads to the conclusion that the accused was mentally sick or unstable when he committed the offence.

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 for man intention, is immaterial so far as regards criminal responsibility.”

I find that from the testimony of PW1& PW2, it shows the state of the accused at the time of the commission of the offence.

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 McNaughten Rule – McNaughten 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 Mc’Naughten Rules, even if the effect was transient 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 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 personso 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 16TH DAY OF DECEMBER 2021.

L.W. GITARI

JUDGE

16/12/2021

THE JUDGMENT HAS BEEN READ OUT IN OPEN COURT.

L.W. GITARI

JUDGE

16/12/2021