



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRC NO. 81 OF 2017

FORMERLY MACHAKOS HCCRC 34 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

ONMACCUSED

JUDGMENT

1. **ONM** the accused is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on 18th August 2016 at Mavivye market, Mavivye sub-location, Malili location of Mukaa sub-county within Makueni county murdered **Gideon Mutungi Kimweli**.
2. He denied the charge and the case proceeded to full hearing with the prosecution calling nine (9) witnesses. This incident took place at Mavivye market where the deceased worked as a bicycle repairer while the accused was a cobbler.
3. Pw2 **Agnes Ndunge Mandhi** is a cousin to the deceased and she runs a hotel at Mavivye market. Her evidence was that on 18th August, 2016 9:00 am the accused had approached her and asked her to ask the deceased to return his hammer. She had no idea where the deceased was. The accused left after delivering the message. At 10:00 am she heard noises and went outside behind her hotel. She saw he accused knocking at the deceased's door with a stone as he carried two knives in one hand. He continued throwing stones.
4. When the deceased came out of the house, the accused threw the first knife at him but it went amiss. He then stabbed him with the second knife on the chest and took off. Pw2 screamed and people came. On checking on the deceased they found he had already died. Police arrived from Salama police station after being called and did their work.
5. In cross examination she said the accused was found hiding in a hole some distance from the scene. This hole had been dug by the accused who used to sleep in it. She had known the accused for five (5) years.
6. Pw5 **Eric Kyalo Muchama** worked as a Pharmacist at Mavivye market. He testified that on 18th August 2016 at 11:00 am he was at his place of work when he heard screams and saw a lot of movement within the market. He followed the screams to the back of a shop where he found a man lying down bleeding. He then saw the accused standing next to the body while holding two (2) blood stained knives in both hands. He ran to the A.P post and reported.
7. He returned with two A.P officers but found when the accused had moved away and people were throwing stones at him. The officers disarmed the accused whom they arrested and took to the station. They returned to deal with the injured person who was bleeding from the left side of the chest. This witness identified the knives which the accused had (EXB1a and b). He also knew both the deceased and accused.
8. In cross examination he said EXB1(a) and (b) had blood stains. He had known the accused who used to sleep in dug holes at the market, and appeared mentally disturbed. He had known the deceased as a hand worker even if he took alcohol.
9. Pw3 **Michael Muendo** runs a butchery at Mavivye market. On 18th August 2016 at 10:30 am he was at the market when he heard screams and went to the scene. He found the accused having left two (2) knives, and was not far from Pw2's shop. He took the knives which he gave to the Administration Police. The accused had already been arrested and the deceased's body was there bleeding through the shirt.
10. Pw1 **Julius Mutisya** a son of the deceased was home on 18th August 2016 at 10:30 am when he heard noises from the market (*about 100 metres away*). He ran there and found the deceased lying on the ground bleeding. He noticed three (3) stab wounds on the left side of his chest, and the body was lifeless. There were people present. He notified his mother, relatives and the body was taken to the mortuary. He

attended the post mortem.

11. In cross examination he said he knows the accused well. He admitted there are times the accused acts abnormally but he is not sure if its pretence. He however confirmed that the accused did not run away after the incident.

12. Pw4 **APC Francis Kamau P/No 2011344717** from Mukasa sub-county confirmed having been one of the AP officers who received a report from Pw5 and another of a person who had been stabbed at the market. They went to the scene which was behind Pw2's shop. They found people throwing stones at the accused and they rescued him and took him to their office. While there Pw3 brought them two knives. The slender knife had blood stains. Salama police officers re-arrested the accused. He also testified that the accused used to loiter at the market place.

13. In cross examination he said the accused used to sleep in a hole which had torn items at the market. He was a mental case, he said.

14. Pw6 **Eric Kyalo Muchama** was with Pw4 when Pw5 reported the incident to them. He gave similar evidence to that of Pw4 adding that the report was sent to their seniors who sent them reinforcement. The accused was re-arrested and the body of the deceased taken to Machakos county mortuary.

15. In cross examination he said he used to see the accused at the market while looking confused. He would sleep in a hole containing polythene bags like those of a madman.

16. Pw7 **Margaret Wahu Maina** is a Government analyst at the Government chemist. She testified that on 1st September 2016 the office received the following items from I.P John Makumi of Salama police station:

- Knife with a black plastic handle (a)
- Knife with a wooden handle (b)
- Green T-shirt (khaki envelop) (c)
- Blood sample in a bottle marked Gideon Kimweli (deceased) (d)
- Blood sample marked Dominic M. Mutua (e)

17. The office was requested to determine the presence or origin of any blood stains in the items which she did. The following were the findings:

- i. Item (a) was moderately blood stained T-shirt while (c) was heavily stained with human blood. Knife (b) had no blood.
- ii. DNA profile for blood on knife (a) and the T-shirt matched the DNA profile on the blood sample of Gideon M. Kimeli.
- iii. A DNA profile was generated for the accused's blood but there was no matching DNA.

She produced the report and exhibit memo as EXB3a and b.

18. In cross examination she said the DNA on the knives and T-shirt were well preserved. She swiped the knife handles but they did not have a DNA profile. She suspected that the knife may have been handled with a cloth or something. It was her evidence that they do not extract blood since they are not medics, and she only works on the exhibits brought to her.

19. Pw8 **No.237056 I.P Regina Mbaluka** testified on behalf of the investigating officer who is on interdiction. He confirmed the receipt of the murder report by Mavivye A.P camp on 18th August 2016 and all the steps taken. That the investigations revealed that the deceased had stolen the accused's hammer. He produced the knives (EXB1a and b), blood stained green T-shirt (EXB2). It was his evidence that the accused was mentioned by witnesses who were at the scene.

20. In cross examination he said the exhibit memo (EXB3b) showed the blood sample of an accused (*Dominic M. Mutua*) yet the accused is Onesmus Nthale Mutua. He however stated that using the memo, occurrence book, and file they are able to trace the original suspect. The charge sheet bears Dominic Muteti Mutua as an alias name since that is the name in the report at the station.

21. Pw9 **Dr. Alex Makau** produced the postmortem report (EXB5) on behalf of **Dr. Alechendeto** with the consent of the defence. The cause of death was chest injury secondary to a stab wound.

22. In cross examination he said it's the left lung which had blood. That the blood being on the left side gave pressure to the heart. He explained that clotting starts immediately the blood stops circulating. In this case the heart was suffocated.

23. The accused in his unsworn defence admitted committing the offence for the reason that the deceased had his hammer which he refused to return. Following the refusal, he stabbed him on the stomach and he fell down. He stated that he had taken bhang on that day and he knows that what he did was wrong. He did not call any witness.

24. Mr. Nthiwa for the accused filed written submissions asking the court to acquit him. He submitted that the prosecution is required to prove and establish two elements in a murder trial i.e. *mens rea* and *actus reus* as was highlighted in the case of **Joseph Kimani Njau –vs- Republic (2014) eKLR** where the court stated as follows:

“12. In all criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific *mens rea* required for murder had been proved by the prosecution.”

He also referred to section 206 of the Penal Code and submitted that the most important question to ponder on is whether any malice aforethought on the part of the accused was proved.

25. He has submitted that at plea stage accused was found not fit to plead. Further it is only Pw2 who said she had seen the accused stab the deceased. He describes her as having been untruthful and veracity of her testimony was wanting. The reason he gives is that she said the accused was of sound mind for the period she had known him yet Pw1, Pw3 – Pw6 admitted to knowing the accused as being of an unsound mind.

26. Counsel has argued that though charged with an alias name nobody identified him by that name. That it was only Pw8 who mentioned it as found in the investigation diary.

27. On the issue of malice aforethought counsel submitted that no single witness was able to prove the existence of *mens rea*. It's his submission going by the evidence of Pw2, Pw3 – Pw6 and the psychiatrists report that even if the court was to find that he committed the offence he did not have the intention to commit the offence.

28. He urged the court to make a finding that the essential element of *mens rea* was never proved to the required threshold, thus murder was not proved.

29. The prosecution relied on the evidence on record and so did not file any written submissions. Now, this is the case before the court for determination.

Analysis and determination

30. The charge of murder facing the accused is defined under section 203 of the Penal Code as:

(203) Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

Further, malice aforethought is defined under section 206 of the Penal Code as:

- 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.

31. From these definitions, I find the following to be the ingredients which must be proved for the charge to be established

- i. The fact and cause of death,
- ii. That the accused committed the unlawful act which caused the death of the deceased (*actus reus*)
- iii. That the accused had malice aforethought/intention in committing the act (*mens rea*)

See Anthony **Ndegwa Ngari –vs- Republic Court of Appeal Nyeri (2014) eKLR.**

The fact and cause of death

32. There is no dispute that the deceased is dead. Pw1 (*his son*), Pw2-Pw6 saw his body with injuries on it while Pw1 attended the postmortem. Pw8 produced the postmortem report (EXB5) confirming that the cause of death was chest injury secondary to stab wound/perforating injury.

Whether the accused committed the act that caused the deceased's death.

33. Pw2 testified that the incident occurred at around 10:00 am. She knew both the accused and deceased. She gave a narrative of what she saw. She said she saw the accused stab the deceased in the chest and take off. Pw5 said he saw the accused standing next to the body of a man and was holding two blood stained knives. These two knives (EXB1a and b) were handed over to the police (Pw6) by Pw3. The accused

in his own defence has admitted having stabbed the deceased for refusing to return to him his hammer.

34. The evidence of Pw2, Pw5 and Pw6 and the accused himself has placed the accused at the scene and moreso, as the person who stabbed the deceased and caused him the fatal injury. The cause of death was a result of a stab wound.

Proof of malice aforethought

35. An issue was raised by the defence counsel concerning the *alias* name in the charge sheet. It is true that no witness referred to it in connection to the accused person. However, it is Pw8's evidence that the report at the station showed Dominic Muteti Mutua *alias* Onesmus Nthale Mutua as the suspect. It all depends on who made the report.

36. Pw8 further explained that using the exhibit memo, occurrence book and file they would easily trace the original suspect. Furthermore, the mere fact that only one of the witnesses mentioned the *alias* name does not mean he is not the one. The accused has nowhere denied being known as Dominic Muteti Mutua.

37. The accused person was first arraigned in court on 8th September 2016 before the Deputy Registrar who gave the date for plea before the Judge on 26th September 2016. On the said date, plea was not taken because a medical report dated 13th September 2016 showed he was not fit to plead. The court ordered for his committal to Mathari hospital for three months when another report would be filed.

38. The accused's treatment and re-assessment took quite some time. A report by Dr. Ngugi Gatere dated 26th September 2017 was filed in court on 16th January 2018. Plea was eventually taken on 9th April 2018. This confirms that the accused was not in his right state of mind right from the time he was arraigned in court the first time on 8th September 2016.

39. Section 12 of the Penal Code provides: -

***“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 may be 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 effects above mentioned in reference to that act or omission.*”**

Pw1, Pw3 – Pw6 save for Pw2 who all knew the accused said he did not conduct himself as a man who was in his right state of mind. It was also confirmed that the accused though a cobbler used to live in a hole at the Mavivye market. The evidence of Pw1, Pw3 – Pw6 plus the psychiatrist's report dated 13/9/2016 show that the accused was not in his right state of mind at the time of commission of this offence.

40. The question this court has to ask itself is whether the accused in committing the act he did, knew what he was doing.

41. From the evidence on record it is very clear that the accused person was at the time of commission of this murder suffering from a mental illness. He was not in the right state of mind to know what he was doing or even its repercussion.

42. In the case of **Leonard Mwangemi Munayasia –vs- Republic (2015 eKLR)** it was held:

“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 ...”

43. Upon considering all this evidence on record, I find that the accused was a known mental case. He lived in a hole at the market. At the time of commission of this murder, he was suffering from a mental illness and was not in control of himself.

44. I therefore enter a special finding under section 166 of the Criminal Procedure Code that the accused is guilty but insane.

Orders accordingly.

Delivered, signed & dated this 30th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge