REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER CASE NO. 1 OF 2015

DIRECTOR OF PUBLIC PROSECUTION .....REPUBLIC

-Vs-

MESHACK KARANJA MUCHIRI.....ACCUSED

JUDGMENT

1. The accused person is charged with murder contrary to **Section 203 as read with 204 of the Penal Code** vide information dated 19/1/2015.

2. The particulars of the offence are that on the 1st day of January 2015 at about 1600 hrs at Mukangu Village in Kirinyaga West District within Kirinyaga County, he murdered John Muchiri Wangui.

3. He denied the charge. The prosecution summoned a total of four witnesses in support of its case while the defence called the accused person only.

4. The brief facts of the case are that the accused is the Uncle of the deceased in this case (a son and his sister). The two used to live in the same compound. The accused had his own house where he used to live with his wife and four children. The deceased had his house in the same compound. On 1/1/2015 which was the new year day and therefore a Public holiday, the deceased was at home with his Aunt (PW-2-), a son of the accused and a man called Muraguri who had gone to assist (PW-2-) to pick coffee. The three were sitting outside the house where they were enjoying their lunch. The accused started quarrelling with his son, one John Muchiri and demanding the keys to his house. The son told him that he did not have the keys to the kitchen which he was demanding.

5. The accused insisted that his son was keeping the keys in his house. The accused insisted that he would go to the house and look for the keys. The accused took the big stick which he wanted to break into the house of his son. The accused started hitting the window. The deceased told the accused not to break into the house. Without uttering a word, the accused hit the deceased on the head using the big stick. The deceased was knocked down instantly. The accused did not relent, he continued hitting the deceased with the stick while he was still on the ground. PW-2- managed to grab the stick from the accused and raised an alarm. The accused started chasing PW-2- and Muraguri. Members of the public heard the screams which PW-2- was making and went to the scene. The accused ran away. The deceased was unconscious. He was escorted to Karatina Hospital where he passed away while undergoing treatment. Later a postmortem was conducted on the body and the Doctor formed the opinion that the cause of death was severe brain injury secondary to blunt trauma to the head.

6. A report was made at Baricho Police Station. The accused was arrested by administration policemen from Mukangu Police Post where he surrendered and handed over to police at Baricho Police Station. He was then charged with this offence. The murder weapon, a stick was recovered by C.I.P Tonui (PW-4-) when he visited the scene and was produced in court as **Exhibit 2.**

7. Before the accused could take plea, he was examined by Doctor Thuo, Consultant Psychiatrist who formed the opinion that the accused had a mental illness which required in patient treatment. He was not mentally fit to plead. An order was made on 19/1/15 for the accused to be treated at Mathari Mental Hospital.

8. The appellant was treated and a report by Dr. Muigai, Medical Superintendent in charge Mathari Hospital Nairobi was filed in court on 23/9/15 and dated 1/9/2015 certifying that the accused was treated and had the capability to plead. The accused was produced in court and he was formerly charged. He pleaded not guilty.

Prosecution Case

The prosecution called four witnesses.

9. **PW1** was **Dr. Karue Njue**, attached to Karatina Hospital, where he practiced as a medical officer. He adduced evidence on behalf of Dr.

Wahome, who left government employment. PW-1- was familiar with his handwriting and signature. He produced the postmoterm form for the deceased signed by Dr. Wahome. The body was identified by John Muchiri Maina and Margaret Gathoni and accompanied by Police Inspector Tonui. The date and time of death was indicated as 1/1/2015 at 8:15 p.m. The postmortem was done on 7/1/2015 at 4:00p.m. The cause of death was severe head injury secondary to blunt trauma on the head. Death Certificate No.[xxxx] was issued.

10. **PW2 was Margaret Muthoni Rukanga**, She testified that she knew the deceased as he was a son to her younger sister, Wangui and therefore her nephew. He died at age 23 years, he was a farmer. The accused is her younger brother, he is married and has 4 children. She recalled that on the fateful day it was a public holiday she was at home with Muraguri who had come to help pick coffee. They were having lunch outside the house when the accused started quarrelling with his son John Muchiri demanding keys. The son said he had no keys to the kitchen. The accused took a huge stick to go and break the house of his son. When he reached next to the house which was next to the kitchen where the deceased used to sleep, the accused went and started cutting the window, the deceased told the accused not to break into the house. The accused used the big stick to hit the deceased on the side of the head, and he fell down. The accused continued to hit him while he was on the ground using the stick. She and Muraguri snatched the stick from him and the accused started chasing them. She screamed and people came to answer her. They took the deceased to Karatina hospital while he was unconscious and bleeding from the mouth, nose and eyes. The deceased passed away while undergoing treatment. She reported the incident to the police at Baricho Police station. The stick which was used to hit the deceased was recovered and she identified it in court, MFI-1.

11. **PW3 was Muraguri Maina** from Kairini, testified that he does odd jobs , he knows the deceased because he used to go to their home to do casual jobs. He testified that on 1/1/2015 he had gone to the home of the mother of Kariuki to do casual jobs PW2 had called him for casual jobs. At about 4:00pm mama Kariuki called him and told that someone had fallen down. They took him to the hospital. He heard that the accused person had hit him and ran away. The deceased passed away at the hospital.

12. **PW4 C.I.P Tanui Barnabas No. [xxxx],** was formerly the officer in charge of crime at Baricho Police Station. He testified that on 2/1/2015 he was at the police station, when he was given a case by the OCS where the suspect was brought in by the administration policemen from Mukangu APpost . The AP officer was accompanied by PW2. He booked the report in the OB and recorded a statement from PW2. On 4/1/2015 he proceeded to the scene. He was informed that the deceased and the accused had an argument over loss of house keys. The house belonged to the son of the accused and the accused had wanted to break into the house. That the accused picked the stick and hit the deceased severally on the head. He recovered the stick which he produced as exhibit 2, being the murder weapon.

The Defence Case

At the close of the Prosecution case, the Court ruled that the accused person had a case to answer and was put on his Defence.

13. **DW1 Meshack Karanja Muchiri** testified that on the fateful day he had come from safari to the home f his in laws where he found the house locked and that his nephew the deceased refused to open the door for him, for he had a grudge against him. He testified that the nephew had attacked him the previous year and was admitted to hospital from 27/7/2014 for three months, he did not however report the incident. That on 1/1/2015 he confronted his nephew who came at him with a hoe stick, he had crutches, he hit the hoe stick which hit him on the head and he fell down. He testified that he informed PW2 who started crying and neighbours came, he testified that he went to the road, he told neighbours that the deceased had died. He went back home at 7:30, ate supper and slept, He was awakened by a violent bang and beaten and tied to a tree. He stated he escaped, the next day he went to the police station, he pleaded self-defence.

The defence filed their submission dated 5/6/2020.

ANALYSIS AND DETERMINATION.

The accused person is charged with the offence of murder.

It is cardinal principle of law that the burden to prove the guilt of an accused person lies on the prosecution. A person charged with a criminal offence assumes no burden to prove his innocence. The threshold of proof placed on the prosecution is to prove the guilt of an accused person beyond any reasonable doubts. The prosecution has the burden to proof that it is the accused who committed the unlawful act with malice aforethought that is the actus reus and the mensrea.

14. The Court of Appeal in the case of **Anthony Ndegwa Ngari –v- R (2014) eKLR** laid down three elements which the prosecution has to prove. The court stated:-

> ***"For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction.***
>
> ***They are:-***
>
> ***a) The death of the deceased and the cause of that death.***
>
> ***b) That the accused committed the unlawful act that caused the death of the deceased, and***
>
> ***c) That the accused had the malice aforethought."***

15. The prosecution relied on the evidence of PW-2- Margaret Muthoni Rukanga that the accused is the one who hit the deceased on the head using a big stick. This is corroborated by the medical evidence adduced by PW-1- that the cause of death was severe head injury secondary to blunt trauma on the head. The murder weapon was recovered at the scene by PW-4-. The issue which arises for determination is whether

the accused had malice aforethought when he hit the deceased on the head. The instances where malice aforethought is established is provided under **Section 206 of the Penal Code.** It provides:-

> ***"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."***

In view of the above provision, there has to be an intention to cause harm or death or knowledge that an act can cause death or injury on the part of the accused person.

16. The uncontroverted evidence adduced by the prosecution is that the accused is the one who hit the deceased on the head using a stick which was produced in court as exhibit 2. The accused admitted that he hit the deceased in self defence. However this offence was committed in broad daylight and was witnessed by PW-2- who knew the accused and the deceased as they were her relatives. Her testimony rules out the defence of the accused that he acted in self defence. Though she was the only eye witness, her testimony is reliable.

17. When the accused first appeared in court a medical report indicated that he was not fit to plead. The accused has however not raised the defence of insanity.

In ***Jevan Mwanjau & another v Republic [2015] Eklr*** The Court of Appeal in Malindi held the view that

> *'Under* **Section 143 of the Evidence Act**, *in the absence of any provision of law to the contrary, no particular number of witnesses is required to prove a fact. It follows that there is no legal impediment in convicting on the sole testimony of a single witness. The time-honored principle is that evidence has to be weighed and not counted, that is, whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise as opposed to whether there is a multiplicity or plurality of witnesses. It is therefore open to a competent court to fully rely on the evidence of a solitary witness and record a conviction. Conversely, it is equally true that the court may acquit a suspect in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. The court must, however, where the evidence of a solitary witness relates to identification of a suspect in a criminal case, exercise extreme caution.'*

18. The Court set out some of the considerations in weighing the evidence of a single witness, relevant to the matter they include;

> ***a. The lighting conditions under which the witness made his or her observation.***
>
> ***b. The distance between the witness and the suspect.***
>
> ***c. Whether the witness had an unobstructed view of the suspect.***
>
> ***d. Whether the witness had opportunity to see and remember the facial features and clothing of the suspect.***
>
> ***e. How long did the witness observe the suspect and which direction was the latter facing?***
>
> ***f. Whether the witness gave a description of the suspect and whether it matched the suspect.***
>
> ***g. The mental, physical and emotional state of the witness before, during and after the observation, and***
>
> ***h. Whether the witness ever saw the suspect prior to the occasion in question.***

In this case the evidence by PW-2- shows that the accused is the one who inflicted the fatal brow on the deceased.

(c) Proof that accused persons had malice afterthought

The court must determine whether accused person had the mens rea or malice aforethought while harming the deceased. Whether he had the intention to kill or cause grievous harm as set out in **Section 206 of the Penal Code**. ***NZUKI VS REPUBLIC [1993] KLR 171*** the Court of Appeal held that:-

> ***'Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following***

intentions, the test of which is always subjective to the actual accused:

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts.'

19. The accused person has invoked the defence of self-defense. According to PW2 the accused person hit the deceased even after he fell on the ground, until they snatched his stick from him. As per the postmortem report the multiple injuries on the deceased were in his head and caused his death. This can be described as a vulnerable part of his body.

In the case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63:*** malice aforethought was inferred based on the following factors:

(a) The nature of the weapon used.

(b) The part of the body targeted

(c) The manner of killing or in which the weapon is used

(d) The conduct of the accused before, during and after the attack

20. The accused person had the intention to cause grievous harm, as he openly challenged the deceased to come and face him. It is therefore evident that the accused person had malice aforethought and had the intention to cause grievous harm to the deceased. The accused felled the deceased with one blow to the head using a big stick. The deceased was un armed and offered no resistance.

21. The prosecution's evidence has effectively dislodged the defence offered by the accused person. The element of malice aforethought has been established in terms of Section 206(b) of the Penal Code.

22. The M'Naughten Rule provides as follows: ***"Every man is to be presumed to be sane, and … that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, and 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."***

Section 11 of the Penal Code provides for the presumption of sanity.

"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

Section 12 of the Penal Code absolves from criminal responsibility any person suffering from a disease affecting his mind and who, for that reason, is incapable of understanding what he is doing, or that he does not know that he ought not to do the act or make the omission which, in ordinary circumstances, would attract criminal liability.

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."

23. The section has two limbs -

1. The person doing the act or committing the omission does not know what he is doing due to mental disease.

2. The person doing the act or committing the omission does not know that he ought not to do the act or commit the omission due to mental disease.

In Leonard Mwangemi Munyasia v. Republic Criminal Appeal No. 112 of 2014 [2015] eKLR. as quoted in Republic v HMM [2016] eKLR it was held that;

"Both section 12 aforesaid and the McNaughten Rules recognize 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. Yet it would be virtually impossible to lead direct evidence of the exact mental condition of the accused person at the time of the commission of the crime……

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."

24. In the case of **Lucy Awuor Odhiambo v Republic [2016] eKLR** the Court of Appeal ordered a mistrial where the High Court had presumed sanity of the accused person on the basis that there was no medical report to prove insanity. The Court of appeal ruled that:

"it is apparent that the issue of the appellant's mental status arose variously before and during the trial. Yet, the learned judge came to the conclusion that there was no evidence to show that the appellant suffered from mental illness. This was despite the existence of two court orders requiring that the appellant be mentally assessed to enable the court ascertain her ability to conduct her defence, which reports were never produced in court, and the learned judge's own observation of the appellant's apparent limitations in advancing her defence.

On the basis of these manifestations, the learned judge ought to have directed his mind to the question of the appellant's sanity at the time. But, he failed to appreciate that there was indeed a case made out for the conduct of an inquiry into her mental status."

25. In this case Dr. Thuo had issued a mental assessment report on the accused person as one suffering from mental illness, the same was not adduced into evidence as the state failed to call the Doctor as a witness. The accused person also chose to plead the defence of self defence, but later in his submissions he requested the court to put into consideration that he was deemed mentally ill. This was not controverted by the prosecution.

26. However the accused in his final submissions filed by learned counsel Ms. Wanjiru Waweru urged the court to find the accused not guilty of murder of John Muchiri Wangui since he never acted with malice aforethought and that the court should put into consideration the fact that the accused had a mental illness at the time he is alleged to have committed the offence.

27. In this trial the prosecution did not call the Psychiatrist as a witness. However before plea was taken the accused was subjected to a mental examination on orders of this court. This is a requirement which is meant to inform the court as to whether the accused is fit to stand trial. This is done because the law presumes that every person is of sound mind and was of sound mind at the material time when the offence was committed unless the contrary is proved. It is also based on the fact that under the law, that is section 12 of the Penal Code and the Mac Naughten Rules, insanity is a defence if it is shown that at the time the accused committed the offence he was laboring under unsound mind and was therefore incapable of knowing that his actions were contrary to the law or that he was committing a criminal offence.

The accused was examined and a report was filed. He was not fit to stand trial. The accused has admitted that he had a mental illness.

28. The fact that the accused was detained in Mathare Hospital until declared fit to stand trial with no contrary secondary medical report on record is prima facie evidence that he was suffering from mental illness.

29. The court should bear in mind the possibility of lack of criminal responsibility for the accused person as at the time of commission of the offence. Applying the factors to consider as set out in **Leonard Mwangemi Munyasia (supra)**. There is no evidence adduced as to the accused person's previous medical history and from the witness testimony of PW2, as regards the preceding or immediate succeeding or contemporaneous conduct of the accused person, he seems to have been acting from provocation after quarrelling with the deceased.

30. From the defence of the accused he seems to be aware of the act he did but was not aware that he ought not to have done the act. He testified that when the deceased fell he called PW2, when asked by neighbors he told them that the deceased had died, he went about his day as if nothing had happened. These are indications that he was not aware what he did was wrong. My view is that the accused was suffering from a disease of the mind at the time of committing the offence.

31. The accused testified that he acted in self defence. **Section 17 of the Penal Code** provides:-

"Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."

32. In this case the defence of self defence is not tenable. The defence is totally disapproved by the testimony of PW-2- who disclosed the motive of the attack. The postmortem form shows that the injury inflicted was severe with multiple external injuries on the head. These could not have been inflicted in the manner stated by the accused. The severity of the injury shows the blow was intentional aimed at causing grievous harm or death. The deceased was unarmed and did not threaten to attack the accused. The allegations made by the accused in his defence that he had a grudge with PW-2- and the deceased and that they had attacked him in 2014 cannot possibly be true. PW-2- testified that she had no grudge with the accused. Secondly there allegations were not put to PW-2- when she testified. The allegations are an afterthought which cannot possibly be true. I find that the defence of the accused is not true. I reject the defence. On the testimony of PW-3- he was not candid. He was working with PW-2- and he could have been present as this happened when they were all having lunch after the days work. He confirmed that the deceased was at the scene and PW-2- said it is deceased who hit him and ran away. The evidence of PW-2- though the only eye witness is reliable. She had no reason to frame the accused.

33. In conclusion I find that the prosecution has proved beyond any reasonable doubts that it is the accused who unlawfully caused the death of the deceased. The accused was at that material time mentally unstable. I therefore find him guilty as charged but insane. He will be dealt with as provided under **Section 166 of the Criminal Procedure Code.**

Dated at Kerugoya this 15th day of September 2020.

L. W. GITARI

JUDGE