



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER CASE NO. 17 OF 2014

DIRECTOR OF PUBLIC PROSECUTION.....REPUBLIC

– VS –

SWW.....ACCUSED

JUDGEMENT

1. The accused person was charged with murder contrary to **Section 203 as read with 204 of the Penal Code.**
2. The particulars of the offence were that on the 2nd day of August 2014 in Kirinyaga West District within Kirinyaga County, he unlawfully murdered FKW his 7 month old son.
3. He denied the charges and the prosecution summoned a total of ten witnesses in support of its case while the defence called only the accused person.
4. The facts of this case are that the accused in this case was the father of the deceased in this case who at the time of his death was a minor aged under One year old, that is Seven months old. On the material day the mother of the deceased (PW-2-), left the child lying outside the house. The accused was outside ferrying manure in sacks just outside the house. On her return, PW-2- found the deceased lying down on one side with deep cuts on the neck and head. She raised an alarm. The accused stood nearby staring at her. The accused had shown hostility to her and the child during her pregnancy. The matter was reported to the police who visited the scene and removed the body to Karatina Mortuary. A postmortem was conducted by Dr. Benson Muchiri, PW-9-. In his opinion, the cause of death was hemorrhagic shock secondary to a cut wound on the neck with a sharp object. He produced the postmortem form as exhibit -3-.
5. The accused was rescued from his home by members of community policing as there was a mob that was baying for his blood. He was later on 7/8/14 escorted to Embu Level -5- hospital where he was examined by Doctor Thuo (PW-1-) a consultant Psychiatrist who found that the accused had a mental illness which required in-patient treatment in a maximum security hospital (Mathari). The Doctor concluded that the accused was not mentally fit to stand trial.
6. Upon being arraigned in court, the Judge ordered that he be escorted to Mathari Mental Hospital for treatment. Later on 16/10/2014, Doctor Ngugi Gatere, consultant Psychiatrist based at Mathari National and Teaching Hospital sent a report confirming that the accused was fit to plead and face his trial.
7. Thereafter the accused was produced in court on 13/11/2014 and he was formally charged. He pleaded not guilty. The trial proceeded and the prosecution called witness.

The Evidence

8. PW1 Dr. Joseph Thuo a psychiatrist at Embu level 5 Hospital, testified that on 7.8.2014 the three accused person was brought to the hospital by police officers through the OCS Kirinyaga, for mental assessment, he testified that the accused person had signs of mental illness. He submitted the report as PEXH 1.
9. PW2 was the wife of the accused person, MN who testified that on the fateful day she had left the accused in the compound and the deceased child who was lying outside the house. The accused person was engaged in ferrying manure sacks with his brother just nearby the house. She testified that when she returned home with the other children she found her son's body lying down on one side with deep cuts on the neck and head. She screamed for help and neighbours came by including the brother of the accused. She testified that the accused was standing by staring at her. She testified that the accused had shown hostility to her during her pregnancy and towards the child.
10. PW3 JMW was the brother to the accused person who was present with the accused ferrying manure sacks near his home on the fateful day. He testified that the accused person had at some point left him and gone towards his home. Upon returning he noticed he had blood

stained hands. Just as he was inquiring on what had happened to him, he heard the scream from PW2. He rushed to her and found the deceased child slaughtered by the neck. He then rushed back to the accused person fearing that he might harm himself or flee. He also testified that they searched the accused household with the police and found a wet panga. He also witnessed the postmortem of the deceased child.

11. PW4 PMM testified that he had been told to rush home as there was a fight. He found the accused person being beaten by a mob for killing his son. He restrained them and accompanied the accused person to the police station at Baricho.

12. PW5 EPM, testified that about 10:30 am while at home he heard screams at the accused persons boma, he found a mob beating him, he called the community policing officer Maina Muriuki and rescued the accused person. He witnessed the deceased body with a neck injury half way cut.

13. PW6 Stephen Maina Muriuki the community policing officer testified that upon receiving the call from PW5 he with Nahashon Maina went to the home of the accused person's home and rescued him from the mob facilitated his transportation to the police station.

14. PW7 CPL No.[xxxx] Richard Mutai testified that the accused person was brought to the station at around 13:40hrs by PW6 and PW4. He was placed in the cell and later taken for treatment. He testified that he visited the scene where he saw the body of the deceased lying on a sack outside the home. The baby had a deep cut on one side of the neck and had bled profusely, he also found a panga about 2 metres from the body. The scenes of crimes personnel failed to come as they had no means of transport from Embu. He therefore took a rough sketch pan of the scene. He produced it as exhibit 3. They moved the body to Karatina Mortuary.

15. PW8 Dr. Stephen Wangombe Nderitu adduced the postmortem report conducted by Dr. Stanley Wahome as the doctor was transferred to Nairobi and he was familiar with his handwriting and signature. The cause of death was hemorrhagic shock secondary to the wound on the neck. The report was submitted as exhibit 3.

16. PW9 Dr. Benson Muchiri, the medical superintendent at the Nyeri Sub county office. He adduced the postmortem report conducted by Dr. Stanley Wahome on 7.8.14.

17. PW10- CIP No.[xxxx] Linus Shimo , the OCS Baricho Police station. He testified that on 2.8.14 the community policing officer arrived at the station with the accused person. He then visited the scene, the scene was photographed, the body viewed, and sent to Karatina mortuary. He later escorted the accused person for mental assessment, where it was determined he was not fit to stand trial.

18. PW11 JMK testified that he identified the body of the deceased, his nephew. He was also present during the postmortem.

The Defence Case

19. DW1 SW testified he also heard screams from the home and that it was his wife who was with the deceased child. He testified he headed back home to find out, a large crowd then came towards him and started beating him for killing his child. He lost consciousness and was then rescued by the community policing officer, he was placed at the station for three days. He denied killing his son. He denied the testimony of PW3 and claimed he had an interest in his land.

ANALYSIS AND DETERMINATION

20. The charge of murder is proved by three elements of the offence as stated in the Court of Appeal case of **Anthony Ndegwa Ngari -V- Republic [2014] eKLR**, they include: -

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

(a) The death of the deceased

The death of the deceased has been proved by the PW8 Dr. Stephen Wangombe Nderitu and PW9 Dr. Benson Muchiri who produced the postmortem form **PEXH. 3** that was conducted by Dr. Stanley Wahome.

The cause of death was confirmed to be as a result of *hemorrhagic shock secondary to the wound on the neck*.

(b) Proof that accused persons committed the unlawful act which caused the death of the deceased (actus reus)

There is no eye witness to the actus reus. The evidence on record is circumstantial evidence from the testimony of PW2 and PW3 that were in close proximity as at the time of death. PW3 witnessed the accused with blood stains shortly before the body of the deceased was discovered, while PW2 testified she left the minor with his father/accused person. The murder weapon was presumed to be a wet panga that was found in the homestead, however it had no blood stains and there was no forensic evidence to ascertain it was the murder weapon.

21. The accused person denies the allegation that he caused the unlawful death of FKW The defence of the accused person was a mere denial.

22. Circumstantial evidence has been held to be as sufficient as direct evidence see Mombasa Criminal Appeal No. 84 of 2012 Erick Odhiambo Okumu vs Republic (2015) eKLR it was held that

“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence.”

In the Court of Appeal MUSILI TULO V. REPUBLIC (2014) eKLR it was held that *“Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”* The court of appeal set out the threshold for circumstantial evidence as follows:

i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

23. It also considered a further principle set out in the case of Musoke v. R [1958] EA 715 citing with approval Teper v. R [1952] AL 480:

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

24. The defence gave reference to the case of SAWE –V- REP [2003] KLR 364 the Court of Appeal held:

In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

25. The circumstantial evidence as regards the physical state of the deceased freshly killed and trembling, the scene of the crime, the unaccounted moments of which the accused was away from his brother PW3 just before the body of the deceased was discovered on the fateful day unerringly point to the guilt of the accused person. This cannot be deemed as mere suspicion as there is no other co-existing circumstances which would weaken or destroy the inference of guilt of the accused person.

26. From the foregoing, I find that the Prosecution has proved beyond reasonable doubt as regards the identification of the accused person as the perpetrator of the offence, that he did indeed commit the unlawful act which caused the death of the deceased which constitutes the ‘actus reus’ of the offence.

(c) Proof that accused persons had malice afterthought

PW1 testified that the accused person suffered from mental illness, as per his report PEXH 1 dated 7.8.2014. However, a subsequent report from Dr. Ngugi Gatere, a consultant psychiatrist, dated 16.10.2014, deemed the accused person as having normal mental status, and fit to stand trial.

The issue of mens rea therefore comes up as the accused was examined soon after he committed the offence.

The prosecution relied on the Court of Appeal case of Nzuki vs Republic [1993] KLR 171 and the case of Republic v Tubere S/O Ochen [1945] 12 EACA 63: That inferred malice aforethought 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

27. PW3 testified that the accused had previously mentioned he intended to kill someone a few months before the incident that led to this charge. Nothing indicates that the accused person had the intention to kill or cause grievous harm to his son. According to the postmortem report the deceased was cut on the neck and as a result of the excessive bleeding he suffered hemorrhagic shock.

28. From the testimony of PW2 and PW3 when the body of the deceased was discovered the accused just stood there indifferent to the incident, his conduct and demeanor do not seem to be that of a caring father who just lost his son. The manner in which the child was killed was also inhumane hacked/slaughtered to death.

29. The accused did not in his defence and in his submissions raise a defence of insanity. The law presumes that every person to be of sound mind until the contrary is proved **Section 11 of the Penal Code** provides:-

“Every person is presumed to be of sound mind and to have been of sound mind at anytime which comes in question until the contrary is proved.”

30. The law affords an accused person a defence of insanity. **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. The Court of Appeal in the case of **Leonard Mwangemi Munyasia –v- Republic Criminal Appeal No. (12/2014 (2015) eKLR** stated as follows with regard to the defence of insanity.

“Both Sections 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 virtually be 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 the 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 in the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also the medical history of the accused person to be considered as the backdrop”.

31. The Court of Appeal has held a mistrial where the High Court presumed sanity of the accused on the basis that there was no medical report. In **Lucy Awour Odhiambo –v- Republic (2016) eKLR** the court stated:-

“---it is apparent that the issue of appellants 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 to ascertain her ability to conduct her defence, which reports were never produced in court and the learned Judge’s own observation of the appellants apparent limitations in advancing her defence.

On the basis if these manifestations the learned Judge ought to have directed his mind to the question of the appellants sanity at the time. But he failed to appreciate that there was indeed a case made out of the conduct of an inquiry into her mental status.”

32. The emphasis is on the mental status of the accused at the time he committed the offence to determine whether or not criminal responsibility attaches to the accused person at the time of committing the offence. In this case the accused is alleged to have committed the offence on 2/8/2014.

33. He was examined by Doctor Thuo Consultant Psychiatrist on 7/8/2014. He concluded that the accused had a mental illness which required in patient treatment in a maximum security (Mathari) hospital. He was not mentally fit to stand trial. The accused was committed to the hospital for treatment and a subsequent report by Doctor Gatere Consultant Psychiatrist found that he is fit to face trial.

34. In line with the Court of Appeal decision in **Leonard Mwangeni (supra)–v- Republic**, the accused had a mental illness immediately preceding or immediately succeeding the time he committed this offence. The accused was therefore suffering from a disease which affected his mind and made him incapable of understanding or knowing that what he was doing was wrong. He could not be held criminally responsible of the deceased under **Section 9 as read with Section 12 (supra) of the Penal Code.**

Section 9 of the Penal Code 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 form an intention, is immaterial so far as regards criminal responsibility.”

35. Insanity is a defence when it is proved that at the time of the commission of the offence the accused was by reason of unsound mind incapable of knowing what he was doing was wrong or contrary to the law. My view is that the accused was suffering from paranoid and bizarre delusions and Auditory Hallucinations at the time he committed the offence. This demonstrated by his behavior as he stood motionless next to the deceased child with bloodstains on his body. This was not normal behavior. **Section 166(1) 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

act or omission charged but was insane when he did the act or made the omission.”

36. The prosecution's evidence has effectively proved that it is the accused who caused the death of the deceased. The accused was at the time laboring under a mental illness.

Conclusion:

I find the accused person guilty of the offence 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