REPUPLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 93 OF 2014

LESIIT J

REPUBLIC.....PROSECUTION

VERSUS

MAUREEN WANJIRU GAKURO.....ACCUSED

JUDGMENT

1. The accused **MARGARET WANJIRU GAKURO** is charged with murder contrary to **section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are;

> **"On the day of 2nd October 2014 along Ronald Ngara Avenue within Nairobi County murdered ESTHER WANJIRU MURUNGU."**

2. The prosecution called a total of 9 witnesses. The prosecution relies on the evidence of eye witness account that the accused walked behind the deceased, stabbed her on the left neck and left the knife in site. The eye witness PW6 pulled out the knife and in company of PW7 delivered both the accused and the knife, P.Exh.3 to Kamukunji Police Station. PW9 the Investigating Officer received the accused, then nude and beaten, at the Police Station. She also received the knife.

3. PW2 and 3 escorted the deceased with another lady to Kenyatta National Hospital where she was treated and discharged. She was asked to go back for review next day. PW3 who took deceased to town left her in the hands of her friend PW8. It is the prosecution case that the deceased condition deteriorated that night. PW8 who had kept her company at her home that night hired a vehicle and took her to Thika Level 5 hospital where she was pronounced dead.

4. The cause of death according to the Pathologist, PW5 Dr. Muthami, was stab wound through the left check, through left carotid which was severed and left lung all consistent with a single stab wound. The Report was P.Exht. 2.

5. The defence called two witnesses, the accused who gave a sworn statement and a Doctor. The accused defence was that the deceased stole money from her purse which she had taken from her purse, and gave it to a man who was demonstrating a "pata potea" street Gaming. That when she demanded her money back, they declined. The accused said she reported at Central Police Station where she was given a Police Officer. The Police Officer went back to the scene with her, was bribed and he walked away.

6. The accused stated that she conversed with a second victim and her father who were in tears and agreed she should buy a knife to threaten the deceased and her company with it. The accused said she got 100/= from the lady victim which she used to travel 15 kms away, took a knife from her house, returned to town and used it to stab the deceased. The accused said she merely scratched her on the shoulder then dropped the knife. She was arrested by the public and taken to Kamukunji Police Station.

7. The second witness was Dr. Njau who produced accused out -patient card which contained dates of appointment between September and November 2007. He then produced treatment notes. They were D. Exh. 1. Dr. Njau testified that he first saw accused with her mother and treated her for depression and attempted suicide and epilepsy. He put her on medication for both. She saw him twice after that then did not return until 2009 when she was 7 months pregnant. He did not see her thereafter.

8. Dr. Njau's evidence was that the accused two conditions could, inter alia be characterized by low mood, feelings of hopelessness and worthlessness, affect the quality of decision she made and that she could be a danger to self and others. He said that epileptic patients were irritable and could also be disoriented in place, time and person.

9. I have considered the evidence adduced by both the prosecution and the defence, together with the filed and oral submissions made by both sides.

10. I will begin with the definition of murder under **section 203** of the **Penal Code.** In order to sustain a conviction for the offence charged, the prosecution must prove beyond reasonable doubt the following ingredients of the offence:

i. That the deceased died.

ii. That the cause of the deceased death was an unlawful act or omission by the accused.

iii. That at the time the unlawful act or omission was committed by the accused he was motivated by malice aforethought.

11. What constitutes malice aforethought is set out under section 206 of the Penal Code as follows:

"206 (a) An intention to cause the death of another.

(b) An intention to cause grievous harm to another.

(c) Knowledge that the act of omission causing death will probably cause death or grievous harm to some person, whether that person is the one killed or not, accompanied by indifference whether death or grievous harm occurs or not or by a wish that it may not be caused.

(d) An intent to commit a felony;

(e) Intention to facilitate the escape from custody of a person who has committed a felony."

12. On the first issue of whether the deceased death was occasioned by unlawful act or omission on the part of the accused. In the case of **Nzuki vs Rep 1993 KLR 171,** the learned judges of Appeal set out the principles of determining whether intention to commit murder is proved as follows:

"1. Malice aforethought is a term of art and is either an express intention to kill or implied where by a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as the result.

2. Before an act can be murder, it must be aimed at someone and must be an act committed with one of the following intentions:

(a) To cause death;

(b) Cause grievous bodily harm; and

(c) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from his acts, and commits these acts deliberately.

3. Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder.

4. …

5. ..."

13. The burden of proof is upon the prosecution to prove the case against the accused beyond any reasonable doubt and the accused bears no responsibility to prove his innocence.

14. In this case certain facts are not in dispute in this case. The accused admits that she stabbed the deceased but claims it was a bare scratch. She contends she dropped the knife after stabbing the deceased and that the knife was picked from down. The accused therefore admits she was at the scene of incident and was involved in the attack on the deceased. The accused also admits that the knife she used, which was the one in court, belonged to her and that she had travelled all the way to her home in Kikuyu to get it for the attack.

15. The Counsel for the defence, Ms. Gesare and the Learned Prosecution Counsel, Ms. Everlyn Onunga each raised issues for determination. I will consider each of them.

16. Ms. Gesare for the defence urged that the prosecution did not prove that the accused caused the death of the deceased. Counsel urged that PW6 admitted he pulled out the knife P. Exh.3, from the deceased neck, which fact was corroborated by PW2, 3, 7 and 8. Learned Defence Counsel urged further that the deceased did not die of neck injury but of chest injury. She relied on Pathologist's report P.Exh.2.

17. Ms. Gesare relied on the case of **Rep. vs. George Anyang & Another [2016] eKLR** where the conviction for manslaughter was quashed due to inconsistences in the evidence as to what action led to the deceased death in the case. The court found:

> **"I have examined the testimony of PW3, PW8 and PW10 and I am satisfied that there are fundamental inconsistences and contradictions that dent the prosecution's case. The evidence on record supports the Appellants Counsel that the Post Mortem Report did not support the alleged beatings of the deceased by the 2 teachers… I therefore find that the second ingredient of the offence of manslaughter that the accused committed the unlawful act which caused the death of the deceased, was not proved beyond reasonable doubt as required in a criminal case."**

18. Ms. Onunga Learned Prosecution Counsel urged that the prosecution had proved that death occurred supported in evidence by the Post Mortem Form P. Exh.2 filled by PW5. Counsel urged that the cause of death was trachea and left lung haematoma from cut carotid consistent with a single stab wound. Counsel urged that the prosecution had proved that the cause of death was due to an unlawful act.

19. Ms. Onunga urged that the accused targeted a sensitive and vulnerable part of the deceased body, that her attack on her was in the very nature severe as laid bare in PW6's evidence who witnessed the attack. Counsel urged that the weapon used was not only positively identified by prosecution witnesses, but by the accused as well who said in her defence that the knife belonged to her, which she said she went home to collect for the purpose of inflicting injury on the deceased.

20.The issue is whether there are contradictions and inconsistence in the prosecution case as to who caused injury to the deceased and as to the cause of death. There was one eye witness of the attack which is PW6. PW6 said he witnessed the accused holding a bag strapped over her shoulder walk behind the deceased, remove the knife P.exh.3, stab deceased on the neck and left it in situ.

21. PW2 who was at the scene but did not see who stabbed the deceased requested PW6 to pull out the knife from the deceased which he did. PW7, a friend to PW6 was walking behind PW6 and did not witness the stabbing. He however witnessed PW6 pull out the knife from the deceased neck.

22. The evidence of PW6 that it was the accused who stabbed the deceased is not contradicted in the prosecution evidence. It is not corroborated strictly speaking, however two facts support his testimony. One was the evidence of PW7 who was in his company walking behind him to go and purchase stock for their businesses. PW7 shows clearly that PW6 was present at the scene of crime for purposes of re-stocking his business. He did not get into any confrontation that could have led to an attack on the deceased or anyone else.

23. The greatest corroboration is in the accused own admission under oath that she stabbed the deceased. Secondly that she had travelled all the way home to get the weapon P.Exh.3 and thirdly that she walked behind the deceased just before she attacked her.

24. I find that there were no inconsistencies or contradictions in the prosecution case as to who attacked and stabbed the deceased on the material day.

25. The defence urged that there was inconsistency on the cause of death, or rather, as to where the injury was inflicted. PW2, 6, 7 and 9 all say that the deceased was injured on the neck. PW9 the Investigating Officer creates another angle by claiming the injury was to the right side as opposed to the left as all other witnesses testified.

26. The Pathologist doctor's evidence, PW5, confirms that the injury suffered by the deceased was on the left side of the body. That corroborates the evidence of PW2, 6 and 7. PW9 contradicted the rest of the witnesses. In regard to inconsistencies and contradictions in evidence, the court of appeal in the case of **Philip NzakaWatu vs. Rep. [2016] eKLR** held:

"In evaluating discrepancies contradictions, omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

27. I have considered the inconsistency and contradictions In this case, I find that the same is minor and does not go to the root of the case. The witness creating the contradiction was the investigating officer. She was not at the scene of the attack. She saw the deceased at Kenyatta National Hospital receiving treatment. The contradiction is in my view not significant.

28. PW5, the Pathologist testified that externally the deceased had a 6 cm long stab injury on the left cheek and which injury had a track through the left carotid and trachea. That when she opened up the deceased, she saw that the stab on the left cheek had gone through the left carotid (main blood vessel at the neck) severing it and went deep into the left lung. It is therefore correct for the witnesses to say that they saw an injury on the left neck since the stab wound went through the cheek into the neck and also into the chest region.

29. I am satisfied that the prosecution was clear and successfully proved that the deceased suffered external injury to the left cheek and left neck and internally a severed left carotid and left lung. There is no doubt as to the area or region of the body where the deceased was injured.

30. Ms. Gesara urged that the case depended on circumstantial evidence and went ahead to quote cases on the test to be applied to circumstantial evidence to determine whether the prosecution had established facts defended upon for the inference of guilt.

31. The prosecution was not relying on circumstantial evidence. There was eye witness account of the incident and not only was the accused seen stabbing the deceased, she was arrested at the scene soon after the incident and walked to the Police Station where she was re-arrested and locked up. Nothing turns on this point.

32. Ms. Gesare, Learned Defence Counsel raised issue with the identification of the body of the deceased urging that the body was not identified by the family.

33. PW1, the father of the deceased, Daniel Murungu Kago told the court that he was unable to witness the post mortem on the deceased body. He said he saw the body when he collected it for burial about 7 days after death. PW1 was in tears during his testimony and it was clear he had suffered emotional stress after his daughter's loss.

34. The postmortem form shows Daniel Murungu and Edward Gichuru identified the body to the doctor for post-mortem. PW5 the pathologist said the body was identified by the father of the deceased, one Edward Gichuru and PC Japheth Mulumo.

35. There is contradiction whether PW1 identified his daughter's body for post mortem. There is no contradiction on the other two identifying persons. There was other evidence. PW9 the Investigating Officer was clear she saw the deceased at Kenyatta National Hospital as she received treatment. She testified that she saw her next day at Thika Level 5 Hospital mortuary and was able to recognize her as the same one whose death she investigated.

36. PW1 was also clear in his evidence that before he removed the body for burial at the Thika Hospital Mortuary, he saw the body and was satisfied it was that of his daughter the deceased in this case.

37. I have no doubt in my mind that the prosecution have proved that the person injured by the accused along Ronald Ngala Street in Nairobi was the same whose body was examined for postmortem by PW5.

38. The prosecution raised two other issues for determination. One is malice aforethought and the other provocation.

39. On malice aforethought the prosecution urged that the accused made well calculated moves, choosing sensitive and vulnerable area of the neck to inflict stab wound on the deceased. Counsel urged that even from the accused defence she was acting in revenge and in retaliation for her stolen money.

40. Ms. Onunga discounted the applicability of the defence of provocation to the case on the grounds that the accused having travelled 30 kms from Nairobi to Kikuyu and back in order to arm herself for the attack, she had time to cool off any provocation she may have been laboring from.

41. Counsel urged that furthermore at the time of this attack the accused was under no imminent danger; neither had there been a fight between her and the deceased.

42. Ms. Onunga urged the court to find that provocation does not apply. For that preposition she relied on the case of **YAVAN VS. REPUBLIC [1970] EA 405** where the court held that provocation can only apply if it is proved that the attack or killing was done in the heat of passion. Counsel urged that in the circumstances of this case, provocation was missing.

43. The defence did not directly respond to these two issues but raised a further issue through the evidence of DW2 Dr. Njau. Dr. Njau gave elaborate detail of how he had treated the accused for depression and epilepsy in September to November 2007 and adjusted her drugs in 2009. Dr. Njau testified that the accused suffered from depression and epilepsy. He said treatment for both conditions was by anti-depressants and anti-epilepsy drugs. His testimony was that a person suffering from both conditions, among other characteristics, were irritable, had chronic neurological disorder, were a danger to self and others. In addition, Dr. Njau testified that persons suffering from both conditions had impaired quality of decision. The sum total of accused defence through this witness is that she was suffering from a depression and epilepsy whose course of treatment causes condition which affects the mind and the quality of the decision she makes.

44. I will consider the last three issues of malice aforethought, provocation and illness of the mind simultaneously because they are connected. If the court finds there was provocation and or illness of the mind, that finding will have an impact on the issue of malice aforethought.

45. **Section 11** of the **Penal Code** provides thus:

> **"11. 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."**

46. **Section 12** of the **Penal Code** deals with insanity and prescribes as follows:

> **"12. 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."**

47. For defense of insanity to stand, the accused must satisfy the grounds set out under the McNaughten rule in **McNaughten Case (1843) 10 C1 & Fin 200.** The test is purely cognitive and the defence must show whether the accused understood her actions or that her actions were wrong. The M'Naughten Rules require that the following three tests should be proved:

> **a). That an individual suffers from a "defect of reason,**

b). That it was caused by a "disease of the mind",

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

48. In **Richard Kaitany Chemagong v Republic; Criminal Appeal No 150 of 1983** the Court of Appeal had sought to distinguish a malfunctioning of the mind from non-functioning of the mind due to epilepsy and held:

> **"There was ample evidence that the defendant was acting unconsciously and involuntarily when he inflicted the injury, but cause of his condition was psychomotor epilepsy. Where the effect of a disease was so to impair the mental faculties of reason, memory and understanding that the sufferer did not know the nature and quality of his act or, if he did, did not know he was doing what was wrong, it was a 'disease of the mind' within the meaning of the Mc'Naghten Rules in *Mc'Naghten's* Case (1843) 10 C1 & Fin 200, 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."**

49. It is now trite law that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.

50. **Section 166(1)** of the **Criminal Procedure Code** provides:

> **"166(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 be responsible for the 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."**

51. **Section 166(1)** of the **Criminal Procedure Code** makes it clear that where the court finds that the accused was insane at the time he/she committed the act or omission leading to death, the court must enter a special finding of guilty but insane.

52. I considered the evidence adduced in this case. Dr. Njau testified to the characteristics a person suffering from epilepsy and depression was likely to have. Dr. Njau did not have the opportunity to examine the accused, either at the time of the incident or soon thereafter. His evidence does not purport to be based on diagnosis of the accused at the time of the offence. Neither did he attempt to suggest that he was aware of the actual facts of the case. He was quite candid, admitting that the last time he saw the accused was in 2009, five years before the incident in question. He however testified that the accused condition could not be cured, but could only be managed.

53. Put it in a simpler way, there must be evidence to show that an individual suffers from a defect of reason, that it was caused by a disease of the mind, and that as a result, he or she does not know the nature and quality of the act or that it is wrong.

54. That is not to say that his evidence was worthless. What it means is that the evidence of Dr. Njau will be considered alongside the facts of this case to determine whether at the time of the incident, it can be said that the accused was suffering from the disease of the mind as not to know the nature and quality of the act she was doing; or, if she did know it, that she did not know what she was doing was wrong.

55. The evidence adduced shows that the accused armed herself with a knife which she hid in her bag until she had walked right behind the deceased. She then removed it and stabbed the deceased on the cheek and neck area leaving the knife stuck inside the deceased. The fact the accused hid the knife until she walked right behind the deceased before flashing out the knife and stabbing her is proof her action was neither involuntary nor was she unconscious at the time.

56. As to whether the accused knew the nature and quality of the act she was doing; or, if she did know it, that she did not know what she was doing what was wrong. The accused explained what had happened prior to committing this act. She said her entire sum of money was stolen. Her attempt to get help from the police did not materialize. She therefore decided to take a ride all the way home on borrowed money, to get a knife to threaten the deceased and her cronies. That shows that the accused was aware of her actions, however there is the issue of impairment and the quality of the decision she made, as the doctor stated, which I find the court cannot ignore. I will get back to this.

57. As to provocation, I find that the accused was provoked, both from being robbed by the deceased and secondly by the police officer who took a bribe from those who wronged her, and walked away without taking any action. For a normal person without illnesses that affect the mind like those the accused suffered, the anger should have abated by the time the trip to collect the knife was made. Can that be said of one under accused condition, and one who was under medication which caused symptoms as the defence doctor explained?

58. I find that on a balance of probabilities, the facts of this case establish that at the time the accused inflicted the injury on the deceased she was suffering from disease of the mind that caused impairment affecting the quality of the decision she made.

59. I find that the accused was conscious but her mind was impaired due to illness as not to know the nature and quality of her action. The accused was also provoked which further added to the impairment of the quality of the decision she made. That impairment in my view negates malice aforethought. The accused, as a result of the impairment of her mind cannot be found to have had the capacity to form an intention to cause death or grievous harm or put differently to have malice aforethought.

60. As a result of that finding, the evidence adduced inn this case cannot support a conviction for murder under **section 203** of the **Penal Code** for the same reason. In the result I find that the prosecution did not prove beyond any reasonable doubt the offence of murder contrary to **section 203** of the **Penal Code** as charged. The prosecution has proved the lesser charge of manslaughter contrary to **section 202** of the

Penal Code, on the required standard of proof of beyond any reasonable doubt. Accordingly, I substitute the offence of murder under **section 203** of the **Penal Code** with that of manslaughter contrary to **section 202** of the **Penal Code**, with powers prescribed under **section 179** of **Criminal Procedure Code**. I find the accused guilty of the substituted charge under **section 322** of the **Criminal Procedure Code,** and convict her accordingly.

DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2019.

LESIIT J

JUDGE