REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 109 OF 2013

REPUBLIC.....RESPONDENT

VERSUS

DAVID MUGAMBI PIUS .....ACCUSED

JUDGEMENT

1. The Accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code,** the particulars of which were that on the 10th day of November 2013, at Eighth Street in Eastleigh within Nairobi County murdered **PATRICK KAYONGI JULIUS.**

2. On 13/11/2013 he appeared before Muchemi J. and was remanded for seven (7) days to enable them prosecute complete investigations. On 20/11/2013 he appeared Before Korir J. when it was noted that he was not in a position to take plea and an order was made that he be escorted to Mathari National Referral for mental evaluation. After several adjournments with orders for referral to Mathari, on 11/6/2014 a new medical report was placed before Korir J. indicating that the accused was fit to stand trial, upon which he took plea and a plea of not guilty duly recorded in his favour.

3. After several false start at hearing, on 22nd day of June 2016 his trial commenced before me and to prove its case the prosecution called and examined a total of seven (7) witnesses and when put on his defence the accused on 1/11/2018 opted not to testify on his behalf.

PROSECUTION CASE

4. At the start of the prosecution case and the issue of the accused mental status to stand trial having been in issue, the prosecution called **PW1 DR. WAMUKOMA VICTORIA** a Consultant Psychiatrist who testified on behalf of two consultant psychiatrists – **Dr. Karanja Kibet** and **Dr. Kisivuli AJ** who had jointly examined the accused and concluded that as at 5/6/2014 his mental illness was in remission and was fit to stand trial as he continued with his medication. She produced the said medical report as prosecution exhibits.

5. PW2 JOHN MUNGATHIA MARIMBA's evidence was that on 10/11/2013 he saw the accused fighting with the deceased and saw the accused stab the deceased before running away into the shop holding something which he thought was a knife. He went to where the deceased had fallen down and saw him bleeding from the right chest. He called for a taxi which took him to Medina Hospital where he was pronounced dead on arrival. On 14/11/2013 he witnessed post-mortem examination on the body of the deceased. It was his evidence that he had known the accused from 2012. The accused was rescued by the police who arrested him from members of the public who wanted to lynch him.

6. PW3 PETER MURURU GITIYE stated that on the material day he heard the accused challenging the deceased to fight which the same declined. As he was leaving the scene the accused stopped him. He then heard the deceased say that the accused had stabbed him before falling down. It was his evidence that he did not see the accused stab the deceased but heard the deceased say that he had stabbed him, then saw the accused holding a kitchen knife going to his shop. He stated that the accused was his friend and there was no grudge between them. He stated further that the deceased mentioned the accused by name and did not talk thereafter. The accused was later arrested by the police from this shop.

7. PW4 VICTOR KAUME JULIUS a brother of the deceased was informed by one **Francis Ndile** that his brother had been stabbed. He went to the scene and took him to Medina Clinic. At the scene he found the deceased not talking. When he went back to the scene from the Clinic he found the accused being attacked by members of the public. He had known the accused for a period of one year and had earlier found him fighting with the deceased before he separated them and the accused left the scene of the fight saying that he will kill the deceased since to him killing the deceased was just like killing a chicken.

8. PW6 PAUL MULILYA was outside the shop of the accused where he met the deceased arguing with him over an alleged debt owed to

the accused by the deceased who used to abuse him yet he had not repaid the debt. He tried to mediate telling the deceased to repay the debt and the accused to stop threatening the deceased. He then left to the shop of one **Jacob** and shortly saw the accused challenging the deceased to a fight while holding a *masaai* club. People intervened and the accused left for his shop. After two hours the deceased went to the place where the accused's shop was and as he was leaving, the accused left his shop and followed him for a talk and drew a knife from his behind pocket and stabbed him before running away to his shop, from where the mob attacked him after the report of the death of the deceased was received.

9. PW5 PC STANELY CHEBII re-arrested the accused and took the body of the deceased to city mortury. **PW7 DR. PETER NDEGWA** conducted post-mortem examination on the body of the deceased who had a penetrating stab wound left Praecordium below the left nipple measuring 2 x 1 cm caused by a double edged weapon. As a result of this examination he formed an opinion that the cause of death was exsanguination due to severe chest injury due to penetrating stab wound and produced a post-mortem report in support thereof. **PW8 PC BONIFACE MBAI** produced mental assessment report on the accused confirming that he was fit to stand trial.

SUBMISSIONS

10. At the close of the prosecution case and the defence having offered no evidence it was submitted by Mr. Okeyo that the accused and the deceased were known to each other and were put together at the scene by **PW2**. It was submitted that the accused was at the time of the incidence of sound mind. On behalf of the defence they filed written submissions and submitted that the prosecution had failed to prove that the accused had formed the necessary motive or malice aforethought to cause the death or grievous harm to the deceased and that after allegedly stabbing the deceased he went back to his shop and did not attempt to escape.

11. It was submitted that there was sufficient evidence that the accused suffered from a mental illness at the time the deceased was stabbed through various mental assessments that were performed on him on different occasions. It was submitted that although the prosecution shoulders the burden of proving the offence of murder beyond any reasonable doubt, the accused bears the evidentiary burden of showing that he suffers from a mental incapacity that would negate *mens rea* or malice aforethought. It was submitted further that such a defence of insanity may be affirmative or may emerge from the evidence and the court has a duty to consider the defence as per **Section 12** of the **Penal Code**.

12. It was submitted that the accused need only prove the defence of insanity on a balance of probabilities as per the cases of **REPUBLIC v S.O.M. [2017] eKLR**, **LEONARD MWANGEMI MUNYASIA v REPUBLIC [2015] eKLR**, where the court 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."***

13. It was further submitted that the prosecution failed to produce the weapon which was allegedly used to grievously harm the deceased and that failure to recover the murder weapon shows that the prosecution failed to conclusively prove that the accused used the weapon or caused grievous harm on the deceased. It was finally submitted that although the prosecution witnesses testified that they knew the accused, the evidence of identification by recognition must be proved beyond reasonable doubt. It was submitted that should the court find the accused to had been insane in line with the case of **REPUBLIC v S.O.M. [2017] eKLR** (*supra*) where the court found that **Section 166** of the **Criminal Procedure Code** unconstitutional, the accused should be acquitted.

ANALYSIS AND DETERMINATION

14. To prove the charge of murder contrary to **Section 203** of the **Penal Code**, the prosecution is under legal and evidential burden to prove beyond any reasonable doubt the following ingredients of the offence:-

a) The fact and the cause of death.

b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.

c) That accused acted with malice aforethought.

15. The fact and cause of death of the deceased is not disputed and was proved beyond reasonable doubt through the evidence of the following witnesses:- **PW2 JOHN MUNGATHIA MARIMBA** who took him to the hospital. **PW3 PETER MURURU GITIYE, PW4 VICTOR KAUME JULIUS** his brother and **PW6 PAUL MULILYA** both who confirmed the death of the deceased. **PW5 PC STANLEY CHEBII** took the body of the deceased to city mortury from Medina Clinic where **PW7 DR. PETER NDEGWA** conducted post-mortem examination and confirmed cause of death as exsanguinations due to severe chest injury due to penetrating stab wound.

16. That the said death was caused by the accused person was proved through the evidence of the prosecution witnesses who put him at the scene of the offence together with the deceased. **PW2 JOHN MUNGATHIA MARIMBA** saw the deceased fall down bleeding from the right chest and the accused running away from the scene holding something which he thought was a knife. **PW3 PETER MURURU GITIYE** heard the accused challenging the deceased to a fight and later on heard the deceased say that he had been stabbed by the accused whom he saw holding a kitchen knife. **PW6 PAUL MULILYA** witnessed the fight between the accused and the deceased over some debt and after people intervened and as the deceased was leaving the area, he saw the accused drawing knife from his behind pocket, stabbed the deceased before running away.

17. The accused was known to prosecution witnesses and was their friend. **PW6** had earlier mediated upon the dispute between the accused and the deceased. It is therefore clear to me that the accused identification was that of recognition which as was stated in the case of **WAMUNGA v REPUBLIC [1989] KLR 428**, the court is expected to look at the circumstances of identification as follows:-

"It is trite law that where the only evidence against a Defendant is evidence of identification or recognition, a trial Court is

enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

18. In **REPUBLIC v TURNBULL [1976] 3ALLER 551** Lord Widgery, CJ observed that the quality of identification evidence is critical, if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened but the poorer the quality, the greater the danger as stated as follows:-

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

19. From the evidence on record the accused was personally known to **PW2** who put him at the scene fighting with the deceased. He was identified as being in the same trade with the deceased packaging *miraa* from exports. He was also working with him. The accused was arrested at the scene. **PW3 PETER MURURU GITIYE** knew the accused very well including his kiosk which he went into having stabbed the deceased. He was also in the same trade and they were all friends. He heard the deceased say that the accused David had stabbed him with a knife. The deceased was stabbed at 6.00 p.m. and the accused was arrested at his shop by the police at 7.00 p.m. He confirmed in cross-examination that the accused had dreadlocks. **PW4 VICTOR KAUME JULIUS** a brother of the deceased found the accused at the scene being attacked by a mob. The accused was also known by **PW6 PAUL MULILYA** who described the accused's shop and its entrance through the hotel. It was his evidence that the same was arrested by the police on patrol away from the crowd that wanted to lynch him.

20. The accused was further placed at the scene through the dying declaration made by the deceased to **PW3** as provided for under **Section 33 (1)** of the **Evidence Act** which states as follows:-

"Statements, written or oral, of admissible facts made by a person who is dead are themselves admissible in the following cases —

(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question."

21. The said dying declaration was corroborated by the evidence of the other prosecution witness who placed the accused person at the scene of the offence thereby satisfying the standard set in the case of **KIHARA v REPUBLIC [1986] KLR** where the Court of Appeal had this to say:-

"Though there is no rule that dying declaration must be corroborated, the court needs to caution itself that in order to obtain conviction on a dying declaration, it must be satisfactorily corroborated, REPUBLIC v SAID ABDULLA [1945] 12 EACA 67, REPUBLIC v MGUNDULWA S/O JALU & OTHERS [1946] 13 EACA 167 at 171. Particular caution must be exercised as to when and where the attack took place and also about the identification of the assailant and the weapon used. It may be that the dying person could not remember all that and may not be telling the truth."

22. I am therefore satisfied and hold that the accused was properly identified and positively put at the scene beyond reasonable doubt and further find that failure to recover the murder weapon did not weaken the prosecution case.

23. The only issue in dispute is whether the accused had the necessary *mens rea* or malice aforethought at the time of the commission of the offence. The accused through his Advocate on record has submitted that the accused was suffering from mental illness at the time as supported by various mental assessment performed on the same and therefore contended that the defence of insanity was available to the same.

24. The following facts are undisputed at the close of the case herein on 20/11/2013 the court Korir J. stated that the accused was not in position to take plea and ordered that his next of kin avail themselves for examination.

25. The law on insanity in Kenya is statutorily governed by the following provisions of the **Penal Code** and **Criminal Procedure Code**:-

Section 11 of the **Penal Code** provides: -

"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** 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."

26. Section 12 of the **Penal Code** confirms the McNaghten rules as stipulated in the Scottish case of **McNaghten [1843] 10 ct. & Fin, 200** in the following words:-

> ***"... to establish a defence on the grounds of insanity, it must be clearly proved at the time of committing the act, the party accused was labouring under such a defect of reason from a 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."***

27. Justice Emukule in the case of **REPUBLIC v PHILEMON CHEMAS [2014] eKLR** had this to say on the defence:-

> ***"36. The above Section 12 should I think be read together with the preceding Sections, and in particular, Section 9 which says:-***
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> ***"9(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. … the result intended to be caused by an act or omission is immaterial.***
>
> ***3. … 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."***
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> ***37. In his admirably well argued Judgment in the case of REPUBLIC v GACHANJA [2001] KLR 428, Etyang J. stated quite clearly the cardinal principle of law that the burden of proof of guilt of accused person lies on the prosecution, and that an accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities.***
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> ***38. Whereas indeed an accused person assumes no responsibility to prove his innocence, where however an accused person assumes one of the statutory defences of provocation, insanity or other similar defence such as intoxication, the burden does not shift upon the accused, but the court must consider whether there is cogent evidence, the existence or otherwise of any of those defences. To establish the defence of insanity, the court must clearly be satisfied that when the accused committed the act of which he is indicted, he was (i) suffering from a disease which affected his mind, and by reason thereof (ii) he was incapable of understanding what he is doing or knowing that he ought not to do the act or make the omission of the intention to do so S. 9. To prove these two ingredients it is necessary to examine the accused's defence."***

28. I fully associate myself with the approach stated herein above save that it is in the interest of justice for the court to reinstate the procedure of dealing with issues of mental illness during the course of a criminal trial as provided for in **Section 162** of the **Criminal Procedure Code** which provides as follows:-

> ***"162(1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.***
>
> ***(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case."***

29. In compliance with the above statutory provisions the court deferred the taking of plea and ordered the accused to be examined and by medical report dated 5/6/2014 signed by two Consultant Psychiatrists – Dr. Karanja Kibet and Dr. Kisivuli AJ, the accused was found fit to stand trial and as stated herein above took his plea in which he denied committing the offence. Thereafter the trial proceeded without the accused raising the issue of his insanity and or the same coming into question until at the close of the defence case, when it was raised by way of written submissions and as I stated in the case of **REPUBLIC v PHILIP ONDARA ONYANCHA [2017] eKLR,** the defence of insanity can be raised by the accused or the same can become apparent in the course of the trial as provided for under **Section 166 (1)** of the **Criminal Procedure Code** which provides as follows:-

> ***"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."***

30. The Court of Appeal in **LEONARD MWANGEMI MUNYASIA v REPUBLIC [2015] eKLR** had this to say on the issue:-

> ***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.***
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> ***What must be avoided and what this court has warned against in the two decisions relied on by the Appellant's Advocate in this***

appeal, is the likelihood of sentencing to death a person with a mental disorder. Therefore, it is the duty of trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person's history or antecedent, to inquire specifically into the question."

31. With that in mind and having stated that the accused did not raise the defence of insanity at the trial and opted to remain silent, I now turn to the evidence on record as I make inquiry as to whether the accused was insane at the time of the commission of the offence:- The accused was known to the deceased, according to the evidence of **PW6**, there was an earlier disagreement between the accused and the deceased as regards some outstanding debt. The accused challenged the deceased to a fight and was clear in his mind that he had the capacity and propensity of killing the deceased like "a chicken". The accused went to his shop from where he came out with a knife which he used to stab the deceased. Having stabbed the deceased the accused went into his shop and locked himself up.

32. The question which the court has to answer is whether at the time of the commission of the offence, the accused was suffering from any disease of mind that affected him to the extent that he did not know what he was doing or that he did not know that he ought not to do the act or commit the omission due to mental disease? The evidence on record shows that the accused did not stab the deceased on the spur of the moment. He had earlier on challenged the deceased to fight, he later on went to his shop and came back with a knife which he used to stab the deceased. He then left the scene and locked himself up in his shop showing that he knew what he was doing and that it was wrong. He thereafter hid the murder weapon which was never found and as was stated in the case of **KARANI V REPUBLIC [2010] 1KLR 73,** the offence charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases.

33. Based on the evidence before me and having found that the act of commission causing the death of the accused was committed by the accused, I am not persuaded that the accused was not in control of his action and having found that the accused stabbed the deceased for reason of some outstanding debt which constitutes the motive of the offence therefore proving malice aforethought, I am satisfied and find that the prosecution has proved beyond any reasonable doubt that the accused with malice aforethought caused the unlawful death of the deceased and accordingly find the same guilty of murder contrary to **Section 203** of the **Penal Code** and convict him of the offence charged and it is so ordered.

Dated, signed and delivered at Nairobi this 25th day of June, 2019.

……..

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Hassan for Wakaba for the accused

Accused present

Court assistant- Karwitha