



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: D.S. MAJANJA J.)

CRIMINAL CASE NO. 7 OF 2017

BETWEEN

REPUBLIC.....PROSECUTOR

AND

MCP.....ACCUSED

JUDGMENT

1. On 9th May 2017, this court was informed that **MCP** (“the accused”) had committed the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It is alleged that she murdered **NL** (“the deceased”) on 7th May 2017 at Naronyo Village, in Transmara West District within Narok County.
2. It was not in dispute that the deceased, who was aged 4 years old, was the son of her step son, Danson Kitunga Pamingo (PW 2) and his wife, Cecelia Pamingo (PW 1). The prosecution led evidence to show that accused stabbed the deceased in the abdomen. When put on her defence, the accused elected to remain silent.
3. PW 1 testified that on 6th May 2017 at about 10.00am, the deceased came to the river where she had gone to do some washing and informed her that the accused had locked herself in their house. She did not make much of her behaviour and during the day she was provided her with lunch. Later in the day, as PW 1 escorted her back to her home, the accused ran back to PW 1’s house and locked herself inside while screaming. Since PW 1 could not get access to the house, she called her brother in law and her husband, PW 2, who broke into the house and found that she had smeared faeces on all over the walls in the house and disarranged the furniture.
4. PW 2 recalled that when he arrived home he found the accused had locked herself in the house and when he broke in, the accused had smeared faeces all over the walls. He asked PW 1 to clean up the house. PW 2 called his father and they agreed that the accused could sleep in his house as she refused to go home with her husband. PW 2 and his father agreed that he she would sleep at PW 2’s house and his father would pick her up in the morning.
5. PW 2 further testified that the accused slept in his house that night. When she woke up at about 6.00am, he followed her as she went to relieve herself. She went back to the house and locked the door. PW 1 testified that when she came back into the house, she picked a knife and went to stab the deceased. PW 1 recalled that the accused stabbed the deceased three times and then ran away.
6. PW 2 recalled that he was still outside when he heard screaming from the house. He ran back and saw the accused running away. When he reached the house, he saw the deceased, who had been injured in the abdomen, coming out of the house. He called his brother, Stephen Lemaiyan (PW 3), to assist him take the deceased to hospital.
7. PW 3 testified that he was outside on the material morning when he saw the accused leave the house followed by PW 2. After a while, he heard PW 1 screaming that the accused had stabbed the deceased. PW 2 told him to get a motorbike to take the deceased to hospital. PW 2 and PW 3 took the deceased to Kilgoris District Hospital but they were referred to Kisii Level 5 Hospital where the child died.
8. The Investigating Officer, Corporal Pascal Omondi (PW 4), confirmed that he was instructed to investigate the matter after the incident. Although he did not visit the scene, he interviewed the accused after she had been arrested. He told the court that when he interrogated the accused, she could not answer his questions and told him that she could not recall what had happened. He also concluded that she was mentally disturbed so he took her to a psychiatrist for mental examination. It was indeed confirmed that she was suffering from a mental illness. PW 4 organised for the post mortem to be carried out by Dr Benjamin Ndibile on 8th May 2017 at the Kisii Level 5 Hospital.

9. The offence of murder is defined in **section 203** of the **Penal Code** as follows, “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” The prosecution is therefore required to prove first, the fact of death of the deceased and the cause of that death; second, that the accused committed the unlawful act or omission that led to that death; and third, that the accused committed the unlawful act or omission with malice aforethought.

10. The fact of death was not in dispute as the post mortem form was produced by PW 4 without any objection. According to Dr Ndibile, the deceased had a laceration on the abdomen and a stab wound on the right lumbar region measuring 2 cm in diameter with the intestines protruding. Internal examination revealed blood clots in the abdomen and laceration on the large intestine. He concluded that the deceased died as a result of bleeding due to a stab wound to the abdomen. This evidence was consistent with what PW 1 observed that the deceased had been stabbed in the stomach and the testimony by PW 2 and PW 3 who saw the deceased’s injuries.

11. The next issue is whether the accused stabbed the deceased. The prosecution case was both direct and circumstantial. PW 1 witnessed the accused stab the deceased with a knife. Since the accused was familiar to her and the stabbing took place at daybreak, the issue of mistaken identity is ruled out. After stabbing the deceased, PW 2 and PW 3 saw her running away from the house leaving no doubt that she is the one who inflicted the injuries that led to the death of the deceased.

12. The main issue in this case is whether the prosecution proved malice aforethought. There is evidence that the accused suffered from mental illness. PW 1, PW 2 and PW 3 all testified that a day prior to the incident, the accused had behaved in a strange manner. She had locked herself in PW 1’s house and smeared faeces all over the walls. This behavior is evidence of mental instability. PW 4 recalled that when he interviewed the accused, she told him she could not recall what happened. He also stated that she appeared mentally disturbed.

13. The evidence of the accused’s mental incapacity is further supported by the mental assessment conducted by Dr N. Mutinda, a consultant psychiatrist, who concluded in her report dated 16th August 2018 that, “Patient is suffering from a mental disorder and was probably not in the right state of mind at the time of committing the offence. I recommend that she is started on treatment in a hospital setting.” Following the report, I committed the accused to Mathare Psychiatric Hospital. She was discharged from the facility in June 2019 and brought back to court for the trial to continue.

14. Although the prosecution shoulders the burden of proving the offence beyond reasonable doubt, the accused bears the evidential burden of showing that she suffers from a mental incapacity that would negate *mens rea* or malice aforethought. Such a defence of insanity may be affirmative or may emerge from the evidence. In the latter case, the court has a duty to consider it. The defence of insanity is governed by **section 12** of the **Penal Code** which states 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 more of the effects above mentioned in reference to the act or omission.

15. The accused need only prove the defence of insanity on the balance of probabilities (see **Tadeo Oyee s/o Duru v R [1959]EA 407**). Where such a defence is raised by the defence or emerges in the evidence, the prosecution is required to disprove it beyond reasonable doubt. **In that case**, the East Africa Court of Appeal held that the word “disease” is **section 12** of the **Penal Code** is not necessarily a disease of the mind in the narrow sense. It held that a high grade *mental deficiency may be a disease affecting the mind* and in that case the trial court took too restricted a view of the word “disease”. Further, in **Leonard Mwangemi Munyasia v Republic MLD CA Criminal Appeal No. 112 of 2014 [2015]JeKLR**, the Court of Appeal held that in considering the mental status of the accused, the trial court ought to take into account all the circumstances including medical opinion. It observed that:

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.

16. From the totality of the evidence, I find that there is sufficient evidence that the accused suffered from a mental illness. I therefore hold that on the balance of probabilities that the accused was suffering from a disease of the mind at the time she committed the felonious act. As I have found that the accused committed the act that led to the death of the deceased, I make a special finding under **section 166(1)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** (“the **CPC**”) to the effect that the accused committed the act of killing but was insane at the time.

17. I am by law required to direct that the accused be kept in custody at Kisumu Maximum Security Prison pending the President’s order in accordance with **section 166(2)** of the **CPC** which provides that:

When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.

18. However, I have held in **Republic v SOM KSM HCCRC No. 6 of 2011 [2018] eKLR** that the provision aforesaid is unconstitutional in light of the Supreme Court decision in **Francis Karioko Muruatetu and Another v Republic SCK Petition No. 15 and 16 of the 2015 [2017]eKLR** where the court held that it is the judicial duty to impose a sentence that meets the facts and circumstances of the case. Having made a special finding, I adjourn the proceedings for the purpose of determining the appropriate orders to be made.

SIGNED AT NAIROBI BY

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISII this 25th day of JULY 2019.

R. E. OUGO

JUDGE

Mr Nyangwencha, Advocate for the accused.

Mr O. M. Otieno, Advocate for the deceased's family.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.