



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE NO 5 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

HHG alias DACCUSED

JUDGMENT

The accused is charged with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code. The particulars of the offence are that the accused on the 29th day of July 2016 within Marsabit County murdered HHG.

The prosecution case is based on the evidence of six witnesses. The deceased is the accused's mother. The matter took sometime to be finalized as the accused was hospitalized at Mathare hospital as he was found unfit to plead to the charge. This period covers 16th August, 2016 when the accused was to take the plea until 8.10.2018 when the plea was taken. A medical report dated 29th May, 2018 indicated that the accused had fully recovered and was fit to plead to the charges.

PW1, DIDO ARABU GUYO used to work for the deceased. On 29.7.2016 at about 8.00pm he was at the deceased's house. The deceased left for a ceremony and told him not to close the gate. PW1 was inside the house with the deceased's children. One of the children called A was chewing miraa. He went to sleep on a sofa set. While resting on the sofa he heard some sound. He went out and saw two people. One of them was the accused who had something like a stick. There is electricity light in the compound. PW1 saw the deceased lying down while bleeding. A, the accused's brother, who was initially in the house chewing miraa was also outside. The accused hit A on the head. He went to call a neighbour and told him that the accused had kill their mother. Neighbours went to the scene. He had worked for the deceased for six (6) months and had not witnessed any grudge between the accused and the deceased. The accused has his own home and is married but on that day his wife was not at home. The gate to the deceased's home could not be opened by someone outside the gate if it was closed from inside. The deceased was lying about three metres from where PW1 was standing. Police were called to the scene.

PW2 HW is the accused's wife. The deceased was her mother in law. On 29.7.2016 she was not at home as she had disagreed with the accused. She heard that the deceased had been killed. She had stayed out of the homestead for about one week. The accused had threatened to kill her and the deceased. She had lived with the accused for about twenty (20) years and they have four children.

PW3 ISACK SOMO is a Kenya Police Reservist. On 29.7.2016 at about 9.00pm he was at his place of work at a madrasa when he was called by the chief and informed that the accused had killed his mother and had ran away. At about 4.00am he saw the accused at the madrasa and he told him that he had gone for prayers. The accused entered the Mosque and started praying. PW3 had a rifle. He notified neighbours who mobilized some youths. PW3 shot on the air and fellow KPR officers went to the mosque. Police were called and went to the scene. The accused was arrested and taken to the Police station. PW3 had known the accused for a long time.

PW4 MOHAMED NOOR HUKA is also a Kenya Police Reservist (KPR). On 29.7.2016 he was at his home. He saw Madrasa students surrounding a mosque and someone was seated at the middle of the mosque. He was informed that the person in the Mosque had killed his mother. People were afraid to arrest him. PW4 had a rifle. He entered the Mosque and realized it was someone he knew. The accused was reading a book. PW4 searched the accused and called the OCS Marsabit police station to send a vehicle. The Police went to the Mosque and arrested the accused. The accused had no weapon and was just holding the Koran. PW4 knew the accused and his mother as they were taken care of by PW4's father after the death of the accused's father. On 30.7.2016 at mid-day PW4 went to the Marsabit hospital mortuary and identified the deceased's body. The deceased had been pierced with an iron rode on the head.

PW5 DUB HALAKE DIDO is a medial doctor and was based at the Marsabit referral hospital. He produced a post mortem report conducted by his colleague, Dr. Steve Sereti on 20.7.2016. The deceased had laceration behind the left ear with fracture on the same side and a fracture on the left side of the head and on the centre of the head. The body was not opened and the cause of death was severe head injury caused by a sharp object.

PW6 PC RICHARD TUWEI was based at the Marsabit Police station. He investigated the case. The accused quarreled with his mother over harvesting of miraa. The accused wanted to harvest miraa but his mother refused. The situation calmed down. PW1 and the accused's late brother A were in the house and heard people quarrelling outside. It was the accused and the deceased quarrelling again. They saw the accused hitting the deceased with an iron rod. The accused threw away the iron rod and ran away. Police visited the scene and took photographs. The iron rod was recovered. The iron rod was taken for analysis by the Government analyst. A report dated 8.2.2018 by the analyst indicate that the blood stains were not sufficient to produce results. A post mortem was done and it shows the deceased died of injuries caused by a sharp object. The accused was arrested at a mosque which is about five (5) kilometres from the scene. The accused was taken for mental assessment but was found unfit to plead. There is security light inside and outside the deceased's home.

The accused tendered sworn defence. On 29.7.2016 he was at home. He did not disagree with this mother. He was with this mother during the day. He has his own half acre plot planted with miraa while his late mother had her own land. On that day he left at 7.30 pm for the Mosque. He did not return home. He was at the Mosque reading the Koran. He was arrested at the mosque by the KPR on allegations that he had killed his mother. He was shocked. While in Prison his brother was killed. When he was arrested he had no weapon. The iron rod produced in court is not his. He never threatened his wife. The two KPR witnesses told the Court the truth as it is true he was arrested inside the Mosque. He was previously arrested once for threatening his mother. He was charged in court but his late mother withdrew the charge. He had good relationship with his mother and siblings.

The Court is called upon to determine whether the prosecution has proved its case beyond reasonable doubt. It is clear from the evidence that none of the witnesses saw the accused killing the deceased. PW1 was resting inside the deceased's house. By the time PW1 went out of the house the deceased had already been assaulted and was lying on the ground.

The prosecution produced the witness statement of AH who is now deceased. He is a brother to the accused. Section 33 of the Evidence Act permits the production of such statements. The accused testified that his brother was killed while he was in custody. It is the statement of AH which indicate that the accused had disagreed with his mother on 29.07.2016 at around 3.00pm as per the evidence of PW6. The statement indicate that the quarrelling was over the harvesting of miraa. The initial quarrelling occurred at 3.00pm and had calmed down.

The ingredients of murder are clearly stated in section 203 of the Penal Code. Section 203 states as follows:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

Section 206 defines malice aforethought as follows:-

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

a) An intention to cause 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.

According to PW1 the deceased left at about 8.00pm for a ceremony and he closed the gate. It is his evidence that one cannot open the gate from outside if it is closed from inside. There is no evidence that the accused was inside the house. PW1 did not testify that the accused was at home. When PW1 went out he saw the late A was already outside. The statement of A is to the effect that he heard some commotion outside his room. When he checked he saw the accused hitting the deceased. I am aware that the Court has to treat such statements with caution as the information in the statement was not subjected to cross examination.

PW1 did not witness the accused assaulting the deceased. However, he saw the accused at the scene. The late A also fought with the accused before the accused ran away. The accused's defence is that he was at the Mosque. The evidence of the two KPR officers suggest that the accused went to the Mosque at about 4.00am. The deceased left home at 8.00pm. The statement of A indicate that he heard something outside at around 10.00pm. PW1 and the late A saw the accused at the scene. The accused's evidence that he was at the Mosque cannot be true. He was seen by PW1. The deceased's body was in the compound. He is the one who killed the deceased. The deceased was not killed elsewhere and thrown into her compound. She was killed outside her home but within the compound.

The circumstantial evidence points to the accused's guilt. I do find that it is the accused who killed the deceased. He was the last person seen with the deceased while the deceased's body was lying on the ground.

In the case of **WARUI –V- REPUBLIC (2002), KLR 750** the Court held inter alia:-

The fact of the appellant having been the last person seen with the deceased while he was alive coupled with the finding of incriminating evidence was sufficient to support conviction.

From the evidence on record, I do find that the deceased left her home at 8.00pm and went out for a ceremony. She returned home and met her death just outside her house. The accused was outside the house with the deceased. It is the accused who killed the deceased. The evidence points at the accused and no any other person. It was not coincidence that PW1 went outside the house and saw the deceased's

body on the ground bleeding while the late A was fighting with the accused.

In the case of **KIMEU –V- REPUBLIC (2003) KLR, 756** it was held by the Court of Appeal that:-

The Court can only act on circumstantial evidence to support the conviction of an accused person if the evidence points irresistibly at the accused's guilty to the exclusion of anybody else and before drawing the inference of the accused's guilt from circumstantial evidence the Court must be sure that there are no other co-existing circumstances which would weaken or destroy or weaken the inference of guilt of the accused.

I do find that all circumstances point at the accused. There is no any other explanation than that it is the accused who killed the deceased.

The next issue is whether the accused had malice aforethought. It is the evidence of the investigation officer PW6 that the deceased and the appellant had quarreled over harvesting of miraa during the day. This information must have been given to PW6 by the late A. The accused testified that he has his own half acre miraa farm while the deceased had her own farm. According to PW1 he had not experienced any disagreement between the accused and the deceased. On her part, PW2 testified that the accused had threatened to kill her and the deceased.

The prosecution evidence does not clearly establish that the accused, with malice aforethought, went to kill the deceased. I can draw from the evidence that the accused and the deceased must have been together and they disagreed. The late A heard a commotion. It is not clear whether the deceased provoked the accused or the accused just waylaid his mother with the iron rod and attacked her. The miraa issue had cooled down. It could be possible that the accused was still not happy. However, that is just but a possibility.

In the case of **OKETHI OKALE & OTHERS –V- REPUBLIC (1965) E.A, 555** the Court held:

“(1) in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial judge to put forward a theory not canvassed in evidence or in counsel's speeches”.

What could have provoked the accused to the extent to killing his mother? That is the big question. I am satisfied that the prosecution has not proved malice aforethought on the part of the accused. There is also the mental assessment report which indicated that the accused was not fit to take plea when he was charged immediately after the murder. Section 12 of the Penal Code, Cap 63 states as follows:-

A person is not criminally responsible for 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 understand 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.

The mental assessment report dated 11.8.2016 from Meru teaching and referral hospital partly reads as follows:-

RE: REPUBLIC THROUGH KNEYA POLICE MARSABIT VS HASSAN HALKANO GODANA MURDER CASE NO.12 O 2016

The above named was examined at our facility on above date accompanied by police from Marsabit Police station. He is a 38 years old male class 8 leaver. He is a khat farmer. He lives with his wife and 4 children 10 years (male), 8 years(F), 6years(M) and 3 years(M). He understands the charges he is facing of murder. He denies the allegations of having killed his mum. He claims he has been having misunderstanding with the mum over land and he sometimes hits him. He has been treated for a mental disorder at Mathari Hospital Section B in 2014 was admitted for 11 months. He was on Haloperidol and other unknown medications. He has not been on medications since parole. He chews khat occasionally.

Forensic history – Has a case on malicious damage was jailed for 12 months. On Examination - in good condition.

Conclusion

Patient suffers from a mental disorder called schizophrenia. Treatment initiated. Requires admission to a mental hospital. He is of unsound mind and not currently fit to plead.

The accused was admitted at the Mathari Mental hospital for about two years and a report dated 29th May, 2018 by **Dr. Ngugi Gatere** cleared him as fit to stand trial. Indeed the accused attended all the Court sessions and attentively followed the proceedings.

The accused did not claim to tender the defence of insanity. His defence is that he was in the Mosque when the deceased was killed. Even while in custody his brother was killed. However, the Court cannot ignore the accused's mental status at the time the crime was committed.

In the case of **MARII V REPUBLIC [1985] KLR at 710**, the Court of Appeal held as follows on a more related issue:-

- 1. Where an accused person raised defence of insanity, the burden of proving insanity rests with the accused, because a man is presumed to be sane and accountable for his actions until the contrary is shown.**
- 2. The burden on the accused to prove insanity is not as heavy as the one of the prosecutions. The burden is discharged by proving on a balance of probabilities that it seemed more likely that due to mental disease, the accused did not know what he**

was doing at the material time, or that what he was doing was wrong, and so he could not have formed the intent to kill the deceased. *(emphasis added)*

3. Whether the defence has proved the case of insanity is a matter of fact for the judge and assessors. Where it is found that the accused was insane, a special finding may be entered; if he is found to have been sane, the finding may be murder or manslaughter, and in the case of manslaughter, that would be due to the fact that although sane, by reason of illness, the accused did not appreciate the full consequence of his act. *(emphasis added)*

There was no eye witness to the incident. PW1 and the late A were inside the deceased's house at night. A went out first after hearing commotion but passed on before he testified. PW1 did not see the appellant hitting the deceased. It is not clear where the iron rod came from. The source or cause of the commotion is not known. I do find that the accused is entitled to the benefit of doubt that he had no intention of killing the deceased. However, the evidence on record places him right at the scene. His defence that he was in the Mosque is replaced by the evidence of PW1 and the statement of the late A. I am satisfied that it is the accused who killed the deceased. Although PW2 testified that the accused had threatened to kill her and the deceased, there is no evidence that the accused was fulfilling his threat. I do find that although it is the accused who killed the deceased, he had no malice aforethought in committing the offence. The initial dispute over miraa had been settled. Therefore, although the accused was sane at the time of the offence, the mental illness that was detected on the 11th August, 2016, less than two weeks after the offence made him not to appreciate the full consequences of his actions. He had no intention of killing his mother.

The upshot is that the accused is not found guilty of the offence of murder as charged. However, the accused is found guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and is accordingly convicted of that offence.

DATED, SIGNED AND DELIVERED AT MARSABIT THIS 26TH DAY OF SEPTEMBER, 2019

S. CHITEMBWE

JUDGE