



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 57 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

I M M.....ACCUSED

JUDGMENT

INTRODUCTION

1. The accused **I M M** 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 21st day of May, 2013 at in Nairobi within Nairobi County murdered **JULIUS MWANGI MAINA**.
2. He first appeared in court on 4/6/2013 and was thereafter referred to Mathari National Teaching and Referral Hospital for psychiatric treatment and was admitted thereat until 21/11/2013 when he was certified fit to take plea before Justice R. Korir and a plea of not guilty was entered for the same. On 2/7/2014 the court (Korir J) ordered that the accused be escorted to Mathari Hospital for review and treatment.
3. On 7/5/15 Lesiit J ordered for the accused to be assessed at Mathari hospital and on 8/6/2015 a medical report was produced in court confirming that the accused was then fit to stand trial and the matter fixed for hearing.

PROSECUTION CASE

4. On 14/12/2015 the trial of the accused commenced before me wherein **PW1 J G N** a sister of the accused testified on oath that on 21/7/2013 she received a call from the accused who was staying with her in the deceased rental flat at about 3.30 p.m. and informed her that she was going to die in a road traffic accident which information he had received from an angel and asked her before she did so to kneel down and pray and further to notify their mother and a brother called Rodgers. She then inquired from him whether the house help was in the house which he confirmed. She asked him to hand over the mobile phone to the said house help who confirmed that the accused had told her together with the witnesses four (4) year old child to kneel down and offer a prayer.
5. It was her further evidence that at that stage she decided to call the wife of the deceased PW4 and asked her to go to her house on the 1st floor and rescue her son and the house help. She left her work station and upon arrival at the flat PW4 told her that the accused was sick and needed medical attention. At that stage, the accused came out of her house and told her that she had only six minutes to live. She then saw the accused peeping through the door while talking to the deceased who suddenly stepped backward as if in great pain. She then sought the help of the deceased's two sons who went for him. The Accused was later on seen lying down in an abandoned construction injured and was taken to the hospital together with the deceased. The accused was thereafter referred to Mathare mental hospital but escaped from PW1's house at night and was later on found in Kisii town asleep.
6. In cross examination she stated that the accused was in the children bedroom while the deceased was in the corridor between the sitting room and the bedrooms. It was her evidence that she did not see what happened between the accused and the deceased who had earlier been together in the house of the deceased before he followed PW1 to her house. She stated that the murder weapon was her kitchen knife which was later found with blood stains.
7. **PW2 P N** the father of the accused testified that he received a cell phone call from PW1 who informed him that the accused was unwell and talking as if he was of unsound mind. She later informed him that he had stabbed the deceased with a knife. He travelled overnight to Nairobi but found the accused missing. He decided to go back home to Kisii where the accused was found at the stage in Kisii Town. He took the accused home and later to a traditional Doctor since he had in 2003 and 2009 been treated through traditional medicine. When he was later informed of the death of the deceased he took the accused to Keroka police station where he was arrested and taken to Nairobi.

8. PW3 ELIZABETH WAITHIRA OYIENGO a Government Analyst did a DNA analyst on the knife and the shirt of the deceased and came to conclusion that the DNA on the knife and the shirt matched that of the deceased.

9. PW4 MARY ALICE WANJERA MAINA corroborated the evidence of PW1 and stated that together with the deceased upon receipt of cell phone call from PW1 rushed to her house and invited the accused to their house to wait for his sister. At this time the accused was talking to the deceased whom he told he wanted to get saved and as she waited for PW1 so as to take the accused to hospital she heard a scream from PW1 that the deceased had been stabbed. Together with her two sons they took the deceased to MAMA LUCY hospital. In the meantime the accused who had jumped from the 2nd floor injuring himself was also taken to the same hospital. The deceased was later on transferred to Kenyatta National hospital from where he died. She stated that the accused was not violent at all.

10. PW5 SHEM KIMONDO MWANGI while in their house heard PW1 scream that the deceased had been stabbed. He confirmed that the accused fell down from the second floor. He went to the scene and found the deceased in the corridor inside the house of **PW1. PW6 SAMSON MAINA MWANGI** heard noise from the upper floor of their plot that the deceased had been stabbed, then rushed to the house of PW1 and found the deceased lying down in the corridor of PW1's house. They carried the deceased downstairs to their room and was subsequently taken to Mama Lucy Kibaki hospital before being transferred to Kenyatta from where he died.

11. PW7 CORP MILLICENT OUMA received a report from PW4 that her husband had been stabbed by the accused. She went to the hospital with the reportee and found the deceased waiting to be taken to the theatre while the accused was undergoing treatment. The following day she received information of the death of the deceased. **PW8 DR MARY MUGANIA** performed post mortem examination on the body of the deceased who had been stabbed by a person known to him. He had a stabbed wound on the lower chest with fracture of the 8th rib. She formed an opinion that the cause of death was penetrating injuries to the left chest secondary to the stabbed wound.

12. PW9 PC PHILLIP CHIVOLI rearrested the accused from Kisii, **PW10 PC CLEMENT MUTHOKA** received the report from the wife of the deceased PW4 to the effect that he had been stabbed by the accused who was then at Mama Lucy Hospital. He then proceeded to the scene and recovered the murder knife and the shirt the deceased was wearing. **PW11 DR. GEORGINA KAMUNGE** a consultant psychiatrist at Mathare National Hospital examined the accused who was then admitted from 22nd July, 2013 and was discharged on 10th October 2013 when he was found fit to stand trial. It was her evidence that on 6/6/2013 the accused was not fit to plead. His condition stabilized but required lifelong treatment.

13. PW12 SGT ABDI RASHID received the accused at Keroka police station from his father PW2 while **PW13 SGT MICHAEL G. MWANGI** produced P3 form issued on the accused person dated 28th May, 2013 confirming that he was not fit to stand trial and a further report dated 18th May, 2015 confirming that he was then fit to stand trial. **PW14 DR JOHN NGUGI GATERE** a consultant psychiatrist testified that he saw the accused on 18th May, 2015 having been seen by other doctors from 30/5/2013 when he was found mute so no assessment was done but an admission was ordered from 22/7/2013 and that at one time he attempted to commit suicide. He was put on treatment but on 3/11/2013 he had relapsed. On 18/5/2014 he found him to be of normal mental status he formed an opinion that the accused had suffered from major depression disorder at the time of the offence and was likely to have committed the offence because of the mental illness.

14. Under cross examination he confirmed that at the time of the commission of the offence the accused was not in his normal senses because of the telephone communication to PW1 that he had instructions from angels.

DEFENCE CASE

15. When put on his defence the accused stated that on the material day he was doing research on a project in procurement at KIMs where he was studying. He went to National library and then returned home to where he was staying and cannot recall what happened thereafter and only recall when the doctor told him that he had stabbed his landlord. He stated that he had some complications in 2003 but was treated traditionally and he stabilized. He stated that he was not under any drugs at the time of the commission of the offence. He stated that he had been undergoing psychiatric treatment in 2014 and 2015. He testified in cross examination that he had been hearing voices in 2003 and 2009.

SUBMISSION

16. On behalf of the accused it was submitted that the evidence before the court did not point directly at the accused as the person who stabbed the deceased as none of the witnesses saw him stab the deceased. It was submitted that there were many people at the scene. It was submitted that all the prosecution witnesses agreed that the accused was mentally sick on the day of the incident. It was submitted that the prosecution had not proved the ingredients of murder as there was no evidence tendered to prove that the accused was sane at the time neither was there any intention to kill the deceased with malice aforethought. Reliance was placed on the doctors evidence that the accused had a disease of the mind in support of which the case of **RICHARD KAITANY CHEMAGOR v REPUBLIC CRIMINAL APPEAL NO. 15 of 1983 [1983] eKLR** was submitted.

17. On behalf of the State it was submitted that the kitchen knife recovered from the house of PW1 had human blood that matched the deceased. It was submitted that the accused committed the offence when his mental state was questionable and therefore the court was urged to proceed under Section 166 of Criminal Procedure Code in support of which the following authorities were submitted.

a) **GRACE NYOROKA v REPUBLIC CRIMINAL APPEAL NO.246/2006 NYERI [2007]eKLR**

b) **LEONARD MWANGANGI MUNYASIA v REPUBLIC [2015] eKLR.**

c) **JULIUS WARIUMBA GITHUA v REPUBLIC**

DETERMINATION AND ANALYSIS

18. For the prosecution to sustain a conviction on a charge of murder the following ingredients must be proved beyond any reasonable doubt:-

- 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 the said death was caused with malice aforethought.

19. The fact and the cause of the death of the deceased is not in dispute. That the deceased died as a result of stabbed injuries inflicted upon him on the material day was confirmed by almost all the prosecution witnesses including **PW7 DR MARY MUGANIA** who performed post mortem examination thereon and concluded that the cause of death was penetrating injuries to the chest secondary to stabbed wounds. It therefore follows that the fact and cause of death of the deceased was proved beyond any reasonable doubt.

20. On whether the said death was caused by unlawful act on the part of the accused person:- the evidence tendered placed the accused person at the scene. He moved with the deceased from his house into the house of his sister PW1 who saw him peeing from the children bedroom door before the deceased raised an alarm and fell down. The accused was known by all the prosecution witnesses who placed him at the scene and therefore find that there was no mistaken identity save for the accused. The only other persons in the house of PW1 were the house help and her four (4) year old son who were positively accounted for. The murder weapon – the kitchen knife which PW1 confirmed was hers and was found in her house had blood stains whose DNA matched the blood of the deceased as per the evidence of **PW3 ELIZABETH WAITHIRA ONYIEGO** an analyst at the Government Laboratory.

21. The accused person was subsequently arrested at the scene having jumped from the second floor of the flat there by injuring himself and was admitted to Mama Lucy Kibaki hospital where both himself and the deceased was rushed to. This was confirmed by the evidence of **PW5 SHEM KIMONDO MWANGI, PW6 SAMSON MAINA MWANGI and PW7 CORP MILICENT OUMA.**

22. The only issue in dispute in this cause is whet her the accused person had the necessary malice aforethought at the time of the commission of the offence. Whereas the accused was eventually found fit to stand trial, there is evidence of **DR. GEORGINA KAMUNGE** who first examined the accused person upon his admission at Mathari Referral and Teaching hospital and formed an opinion that the same was not fit to stand trial and recommend inpatient treatment for the same which was done on 22/7/2013. She formed an opinion that the condition of the accused could be made stable after treatment but it will recur in his lifetime.

23. **PW14 DR JOHN NGUGI GATERE** testified and his evidence stands unchallenged that at the time of the commission of the offence the accused was suffering from a mental illness which was confirmed through the telephone call to his sister that he had been instructed by an angel for her not to travel and further because he was mute at the time of admission and had attempted to commit suicide during the period when he was admitted all indications of mental illness. Both the father and the sister of the accused testified and confirmed that the same had earlier suffered from a mental illness.

24. The accused in his defence stated that he cannot remember what happened on the material day and the wife of the deceased confirmed that there was no issue or bad blood between the accused and the deceased who walked together towards the house of PW1 while holding hands and that at some stage while he was in their house he had indicated his need for salvation. I would therefore agree with the submissions by both the prosecution and the defence that at the time of the commission of the offence the accused based on two medical reports herein was suffering from a mental sickness and therefore find that the same was insane at the time of the commission of the offence and would therefore return a special finding of guilty but insane and order for a report to the President as provided for under Section 166(1) and (2) of the Criminal Procedure Code.

25. My finding herein is guided by the holding in **GRACE NYOROKA v REPUBLIC [2007] KLR** and **LEONARD MWANGEMI MUNYASIA v REPUBLIC [2015] EKLR** where the Court of Appeal held that where the trial court finds that the accused person was legally insane when he committed the crime, it has to report the case for the Directions of the president and **RICHARD KAITANY CHEMOGONG V REPUBLIC [1984] eKLR** where the court found that it has been established on a balance of probability that the appellant was legally insane when he did not act charged.

26. Whereas this might not be the best action for the accused in view of the evidence tendered and taking into account the circumstances of the commission of the offence herein the court shall leave it to His Excellency the President to determine the best course of action in respect of the accused herein and it is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 8th day of March, 2018

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J. WAKIAGA

JUDGE

In the presence of:-

Miss Wegulu for the State

Mrs. Gulenywa for the accused

Accused present

Court clerk Tabitha