REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 78 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

R M M.....ACCUSED

JUDGEMENT

1. The accused faced the charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars therein were that the accused on 29th November, 2010 at Kathangathini village, Matuu Location, Yatta District within Masaku County murdered Ndunge Ivongo.

2. The facts on record are that Joseph Kioko (PW1) on the material day at about 7:00 pm heard his mother Kithui cry at her home which was about 100 meters away from his. Upon inquiring from her what the issue was, Kithui informed him that someone had entered into a kiosk which was nearby. PW1 checked using torch light and saw the accused who took off but was arrested by members of the public. PW1 found a child with a wound on the forehead lying down at the kiosk. The child was given first aid treatment and taken away by his father, Lule.

3. Florence Ndululu (PW2) on the same date at about 6.45 pm heard corrugated roof being hit. She went out to check and found the accused who is her nephew hitting the roof and chicken which were by the door. She then ran to safety for the fear that the accused's mental illness had recurred. From the bush where she had hidden, she heard noises at her neighbour's home and went to check. There, she found the accused tied up. She was asked whether her mother-in-law, Anna Ndunge alias Ndunge Ivongo had come back from hospital. Upon checking her mother-in-law it was found that she was not at her house. At around 9.00 pm, she and the crowd proceeded to the accused's home where they found a goat whose eyes had been gouged out at the gate and Anna Ndunge fallen at the accused's door. They identified her using a torch light. It emerged from PW2's cross examination that the accused suffers mental lapses and hit things during the lunacy period including goats and chicken and that he had at the material time hit a child.

4. The deceased's step-son Kiso Muili (PW3) and son John Musau Nguki (PW5) witnessed the post-mortem conducted. Dr. Muli Simon Kioko (PW4) confirmed that the post-mortem revealed that the deceased suffered cut wound on temporal head measuring 4 × 1cm, blood clot of left ear, cut wound on left ear lobe 2 × ½ cm, bruised wound on forehead 7 × 5 cm and occipital region swollen (haematoma) 8 × 3 cm. On opening the head there was fragmented bone on left temporal bone and blood in the brain. The cause of death was opined to be severe brain contusion as a result of blunt head trauma. The post-mortem report was produced as P. Exhibit 1.

5. Police Constable Micah Busienei (PW6) who was the investigating officer visited the scene after the removal of the deceased's body but found a pool of blood. He recorded witness statements and collected evidence. The scene was photographed in his presence. He produced the photographs as P. Exhibit 2 (1-14) which he said showed a house with damaged door, bare ground with blood stains, carcass of a she goat, interior room with damaged lamp and stool, damaged window panes and body of deceased with injuries. He further produced a certificate for the photographs as (P. Exhibit 3) and a piece of wood as P. Exhibit 4. On cross examination of PW6, it emerged that he saw the accused who did not appear normal as he was restless at the time.

6. Put on his defence, the accused stated that he was on the material day at home alone as the deceased had gone to the market. That he had been suffering from malaria and was on medication. He denied being a lunatic but stated that he had been at some point taken to Mathare for treatment for six (6) months. The accused also produced a letter dated 21st November, 2012 by Dr. Syengo Mutisya revealing that he was treated for Schizophrenia on or about 4th July, 2011 as D. Exhibit 1.

7. It was the prosecutor's submission that the elements of murder were proved beyond reasonable doubt. It was submitted that PW3 and 4 identified the deceased's body which on autopsy by PW4 was confirmed to have suffered the injuries earlier mentioned in this judgement which injuries were said to have occasioned her death. On whether the accused caused the said death and had an intention to do so, the prosecutor cited section 206 of the Penal Code which provides:

> ***" (a) An intention to cause the 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 be caused."***

And submitted that once the prosecution proves one or a combination of the above circumstances, malice afore-thought, will be deemed to have been established. It was submitted that although there was no eyewitness to the ordeal, since the accused and the deceased were alone in the home, circumstantial evidence links the death of the deceased to the accused. That what is in question is whether or not the accused had malice aforethought bearing in mind the report dated 21st November, 2012 (D. Exhibit 1). It was submitted that from the severity of the injuries sustained by the deceased, an inference can be made that there was intention of inflicting injuries or grievous harm leading to death. It was further submitted that under section 11 of the Penal Code, every person is presumed to be sane and responsible for their actions including where an offence has been committed due to insanity since sanity is the usual condition of mankind. That it follows therefore that the presumption of sanity is rebuttable. It was submitted that insanity will only be a defence if it is proved that at the time of the offence, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to the law. That according to the report, it was clear that the accused was mentally ill at the material time and the prosecutor urged the court to find him guilty but insane and invoke section 166 of the Criminal Procedure Code and direct that he be held at a mental institution for treatment and be released at the president's pleasure. On this point the prosecutor cited **Leonard Mwangemi Munyasia v. Republic [2015] eKLR**.

8. It was on the other hand submitted on behalf of the accused person that his state of mind at the material time had been proved to be unstable by the letter dated 21st November, 2012. Section 12 of the Penal Code and the case of **Republic v. Philemos Chemas [2016] eKLR** was cited in reliance and submitted that the accused was of unsound mind and incapable of understanding what he was doing at the time.

9. It was further submitted that the prosecution had failed to adduce evidence that directly linked the accused to the offence since he was apprehended at the shop and that none of the prosecution witnesses witnessed the alleged murder. The case of **Republic v. Boniface Isawa Makodi [2006] eKLR** was cited. The court in that case found that the prosecutor in that case failed to produce evidence linking the accused directly to the murder and further that the chain of causation must be complete in circumstantial evidence. **Republic v. Kipkering Arap Koskei & Another [1949] 16 EACA 135** was also cited. In that case, the court held that circumstantial evidence can form a basis of a conviction if it points irresistibly to guilt of the accused having excluded any other reasonable hypothesis than that of guilt as well as coexisting circumstances which would be found to weaken or destroy such an inference or presumption. It was further submitted that the prosecution failed to adduce evidence showing the accused formed an intention to cause death of the deceased.

10. It is not in dispute that the deceased's death was occasioned by the injuries he sustained. What is therefore left to be determined is whether or not the accused occasioned the said injuries and if so whether he so did so with malice aforethought.

11. The Court of Appeal in **Sawe v. Republic [2003] KLR 364** had this to say on circumstantial evidence:

> ***"1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.***
>
> ***2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***
>
> ***3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused…***
>
> ***7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."***

12. While it is contended that none of the prosecution witnesses witnessed the killing of the deceased, it is clear from the record that the accused had gone berserk and injured a child, hit a corrugated roof and chicken. This was said to be a common occurrence when he was in his lunatic moments. Although it is contended that he was not found at the scene where the body was found, it was rather clear from the evidence that he was not at a stationery place. Bearing in mind also that he was the only one alone with the deceased, the circumstances pointed toward him as none other than the culprit.

13. On the second issue however and considering the report dated 21st November, 2012, the accused cannot be said to have had malice aforethought. He was said to have attacked chicken, hit a roof and injured a child. It can therefore not be said that he had the intention to cause the injuries that led to the death of the deceased. The accused thereby falls under the provision of section 166 as correctly submitted by the prosecutor. The said section 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 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."***

14. The Accused was therefore legally insane at the time of the incident and I hereby make a special finding of guilty but insane. I direct that the accused be kept in custody at Kamiti Maximum security Prison at the President's pleasure.

Orders accordingly.

Dated and delivered at Machakos this 19th day of April, 2018.

D. K. KEMEI

JUDGE.

In the presence of:-

Machogu - for the State

Ngewere for Muema for the Accused

Kituva - Court Assistant