



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 43 OF 2015**

**LESIT, J**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CMW.....ACCUSED**

**JUDGMENT**

1. The accused is charged with two counts of **murder** contrary to **Section 203** as read together with **Section 204** of the **Penal Code**. The particulars of **Count 1** are as follows:

**The accused on the 17<sup>th</sup> day of February 2015 at [particulars withheld] village within Kariobangi area of Nairobi County murdered KNI.**

2. The particulars of **Count 2** were as follows:

**The accused on the 17<sup>th</sup> day of February 2015 at [particulars withheld] village within Kariobangi area of Nairobi County murdered PKI.**

3. The accused pleaded not guilty in both counts and the hearing commenced with the prosecution calling a total of 6 witnesses. The prosecution case is that the accused caused the death of the two deceased children through blunt force trauma to the head of each child leading to cramo-cerebral injuries resulting in death.

4. In summary the prosecution case was that PW1 was an aunt to the accused and had lived with her since she was a young girl. She said that she educated her up to Primary STD 8. After some time, the accused got a man friend and eventually moved out to live with him as his wife. PW1 stated that when the accused was almost due to deliver, she took her to Pumwani Hospital where she got a baby through Caesarean Section. Seven days after giving birth the accused was discharged. She was taken to her husband's home by PW1.

5. PW1 testified that later that same night she received a call from a neighbor of the accused who informed her about the unusual behavior of the accused. The neighbor informed her that the accused kept moving in and out of the house with the child, in the wee hours of the night. The neighbor was concerned of the child's welfare due to the cold weather.

6. It was PW1's testimony that she arrived at the accused home the following day and found her together with her husband. After confirming the unusual behavior of the accused the previous night, she decided to take her to her house and care for her for a few days. PW1 narrated the events of the fateful night that the accused spent in her house. PW1 testified that after having supper and retiring to bed, the accused called her severally. The first time the accused requested for tea without milk. PW1 made her tea with milk. Shortly after the two retired to sleep, the accused woke her up twice complaining that the child had refused to suck.

7. PW1 testified that at both occasions she helped the accused by holding the breast for the child to suck after which she went back to sleep. After she went to sleep the third time PW1 said that the accused shouted loudly saying '*dunia imeisha*' meaning, '*the world has come to an end*'. That woke up PW1 from sleep. When she went to check on the accused in her bedroom, she found the accused kneeling next to the bed, swinging the child violently. When the accused did not answer to her name however loudly she called her, PW1 was concerned. PW1 stated that the accused started pressing the child all over the body necessitating her to wrestle the child from the accused hands. PW1 said that she locked the accused up in the bedroom and went out to call neighbours.

8. PW1 testified that when she returned to her house, she found the accused had broken out of the bedroom and had blocked the entrance

with sofa sets. PW1 stated that she could see the child on top of the table and that it was lifeless. The neighbours decided to leave but when the accused held her by the neck and threw her down, the neighbours returned to her rescue. It is when the neighbours rescued PW1 from the accused that the accused left the house.

9. PW3 was the mother to the two deceased children. It was to her house that the accused went to after leaving PW1's house. PW3 told the court that the accused went to her house in the morning at around 6:15 am and called her saying she had something to tell her. PW3 stated that since she knew the accused she obliged. She testified that when she opened her house and allowed her in, the accused closed the door and immediately turned against her. The accused started strangling her but that when she managed to free herself and started screaming, the accused left her. PW3 stated that she ran out of her house as the accused proceeded to the bedroom.

10. PW2 was a neighbour of PW3. He testified that he was attracted by screams which he recognized were from PW3. He said that he rushed towards the direction of the screams and met PW3 who requested him to rescue her from the accused. PW2 said that he entered PW3's house with one Mwangi. The two found the accused inside the house. He said that he saw the four-year old child lying unconscious next to the bed. The accused was holding the 14 days old child by the throat. PW2 testified that he struggled to get the young child from the accused and managed to free it but by then it was already dead. PW2 testified that the accused agreed to go to the police station when he asked her to do so. According to PW2, the accused was not herself and did not appear to be in control of her senses when he saw her that morning.

11. PW5 was the Investigating Officer in this case. He told the court that the case was reported to them by one JIK, the father of the deceased children. He said that he proceeded to the scene within [particulars withheld] area of Korogocho slums. PW5 said that he found 2 bodies lying on a chair. He summoned Crime Scene Officers who documented the scene. He then proceeded to Huruma Police Station where he collected the accused. He says the accused could not comprehend anything. It is his testimony that the accused was acting strangely, was wild and violent. PW5 said that the accused was scratching her face and also tried removing her clothes. He said that he took the accused to Mama Lucy Hospital where she was treated for the injuries on her face.

12. PW5 said that the accused was referred to Mathare Hospital for further treatment and psychiatric examination. At the Hospital PW5 received a report which indicated that the accused could not comprehend anything and recommended that she should be detained at the facility for treatment.

13. PW5 said that the accused remained in the Mathare Mental Hospital for treatment up to 20<sup>th</sup> April 2015 when she was discharged. PW5 produced a report by Dr. Gatere dated 16<sup>th</sup> April 2015 which confirmed that in the doctor's opinion the accused had become capable of making her own defence.

14. The post mortem forms on the deceased were also produced in court as evidence by the Investigating Officer, PW5, with the consent of the parties. For the older child it was P. Exh. 1. For the new born it was P. Exh. 2. They established that the cause of the death of both deceased was cramo-cerebral injuries due to head injury due to blunt force trauma. For the new born baby, the head was found to have been smashed.

15. PW6 a Psychiatric doctor at Mathare Mental Hospital testified that the accused was suffering from Post-Partum Psychosis at the time of the incident in issue in this case. PW6 stated that Post-partum psychosis was a disease of the mind. He produced three reports dated 19<sup>th</sup> Feb 2015; 23<sup>rd</sup> Feb 2015 and 23<sup>rd</sup> March 2015 as P. Exh 3. These were made by himself and his colleagues at the hospital and demonstrate the various stages of treatment and accused progress until when she was found fit to stand trial.

16. The accused gave an unsworn defence and pleaded insanity as her defence. The accused in her defence stated that she remembers having delivered a baby and being discharged from hospital. After that she does not know what happened. She said that she found herself at Mathare Hospital. She said that during the time in question she was not in her right senses and that when she did what she was accused of it was not planned.

17. Ms Onunga the learned Prosecution Counsel submitted that this case is based on direct evidence. Counsel urged that PW3 mother to the deceased, and PW2 witnessed the act of strangulation by the accused hence death was proved. She argued that death occurred due to unlawful act even though the element of malice aforethought was missing. She further told the court that from the evidence of PW6 report which corroborated evidence of PW5 the accused suffered disease of mind. She urged the court to enter a special verdict in this case.

18. The defense counsel, Mrs. Kinyori in her oral and written submissions urged that the accused had no previous mental condition until she got her baby. Counsel urged that the two reports from both Dr. Gatere and Dr. Mburu were in tandem that the accused had suffered from postpartum psychosis, a recognized mental condition which develops in some women after giving birth. She reminded the court that the accused had just given birth nine days before the incident.

19. The learned defence counsel submitted that she was not able to find any authority on murder involving Post-Partum illness. She cited **section 210** of the **Penal Code** and urged that it dealt with a situation where a woman causes the death of her child, and applies where death is caused within one year of birth. Counsel urged it only applied if it is shown that the balance of the accused mind was disturbed by reason of her not having fully recovered from the effect of giving birth to her child or by reason of the effect of lactation consequent to the birth of the child. Counsel urged that the section did not apply to the instant case for the simple reason that the deceased children in this case were not the children of the accused.

20. Learned defence counsel urged the court to reduce the charge to manslaughter or acquit the accused as she was not in control of her mind at the time of the incident. For that proposition Mrs. Kinyori cited the case of **Leonard Mwangemi Munyasia v Rep 2015 eKLR**. The court held:

*'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 offense he was not a master of his mind...'*

21. Counsel also relied on **section 9** of the **Penal Code** for the proposition that a person is not criminally responsible for an act which occurs independent of ones will. She urged the court to treat the accused with mercy and acquit or reduce the offence to manslaughter.

22. I have carefully considered the evidence adduced in this case and the arguments in submissions by both parties. The accused faces a charge of murder contrary to **section 203** of the **Penal Code**. That section defines murder as follows:

**“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder”**

23. The prosecution has to adduce evidence to establish that the accused caused the deaths of the deceased children by an unlawful act which lead to their death. The prosecution must prove that the accused action was motivated by malice. The essential ingredient for the offence of murder is malice aforethought. The circumstances which constitutes malice aforethought are described under **Section 206** of the **Penal Code** as follows:

**“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances**

–

**(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 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.”**

24. Having carefully considered the evidence adduced in this case, I find that there are facts which are not in dispute, which are:

**I. It is not in dispute that the accused had given birth to a child 9 days before the incident in this case occurred.**

**II. It is not in dispute that the accused committed an act which caused the death of the two deceased children in this case.**

**III. it is also not contested that the accused had Post-Partum Psychosis and that the condition is a disease of the mind.**

25. I find that the following are the issues for determination in this matter:

**I. Whether the disease affecting the mind that the accused was suffering from at the time of committing the act which led to the death of the deceased children in this case made her incapable of understanding what she was doing or of knowing what she was doing was wrong.**

**II. If the above is the case what finding can the court enter in this case.**

26. Regarding the accused state of mind, I’ve carefully considered the evidence of PW6, a Psychiatric doctor at Mathare Mental Hospital. It is his testimony that the accused was suffering from Post-Partum Psychosis which is a disease of the mind and which arises due to hormonal imbalance, mainly estrogen. The doctor testified that when it occurs, the patient may not know what is happening to them, they lack insight, ability to know they are sick and should seek help. The doctor testified that such a person would be suffering from severe depression, hallucinations, hearing voices and such like disturbances.

27. The evidence of witnesses who saw the accused on the material day all testify of accused strange and unusual behaviour. PW1 described in detail the traumatic experience she went through that night due to accused instability, inability to care or breastfeed her child and the eventual killing of the child inside her, PW1’s house. PW3 described accused erratic, violent and crude behaviour that night saying it was totally unlike her.

28. I find that the testimony of PW2 shows clearly the conduct of the accused as at the time of the commission of the offence. He elucidates sequence of the events he witnessed in that moment. He saw her press the new born baby who is the deceased in count two with her bare hands and by the time she released him, he was dead. The older child was unconscious at the time having been the first one to be attacked. PW2 having known the accused for long time stated that he witnessed a complete change of personality of the accused. This statement is corroborated by evidence of PW1, PW5 and PW6.

29. The Investigating Officer nailed it when he said that he personally took her to two hospitals. The first was Mama Lucy for treatment of scratches the accused inflicted on her face. The second was Mathare Hospital for mental illness.

30. I find that there is sufficient evidence to establish that the accused was suffering from Mental illness on the day this incident took place. From the eye witness account and the doctor’s findings, I am satisfied that the nature of the mental illness was such that it affected the accused mind rendering her incapable of knowing what she was doing, or of knowing what she was doing was wrong.

31. I am also satisfied from the evidence of PW2 and PW3 that it was the accused who attacked and fatally wounded the two deceased children. From the circumstances of the case, the prosecution has failed to prove that the accused had formed any malice afore thought to either cause death or grievous harm to the deceased.

32. The issue is what the court's finding should be. And to answer that question we must understand what Post-partum psychosis is. The authoritative reference book on psychiatric disorder, used in the USA as the official manual of the American Psychiatric Association, used alongside the manual for **International Classification of Diseases 10 [ICD-10]**, is known as **Diagnostic and Statistical Manual of Mental Disorders, 4<sup>th</sup> Edition, [DSMMD-4] Text Revision, 2000**. The reference manual is used by clinicians, researches, psychiatric drug regulation agencies, health insurance companies, pharmaceutical companies, the legal system and policy makers worldwide, including Kenya.

33. The **DSMMD-4** Manual elaborates that Post-Partum-onset psychological problems generally fall into three categories. The first category is **Baby blues** which affects 70% of mothers and is characterized by crying and irritability. It is the mildest form of the disorder. The second category is **Post-Partum depression** which affects 7 to 15% of mothers and is characterized by crying, self-blame, loss of control, irritability, anxiety, and sleep difficulty.

34. The third category is **Post-Partum psychosis** which is the most severe and occurs in 1-2 of 1000 births. Onset occurs within the first 3 months after childbirth, majority of cases appears within 3-14 days. The disorder is characterized by an extended period of loss contact with reality that may include auditory visual hallucinations, delusions or rapid moods swings. Auditory or visual hallucinations may focus on violence towards self or the infant.

35. PW6 **Dr. Mburu** testified that the accused had suffered the severe version of depression known as Post-partum psychosis. He said that such an illness rendered the patient incapable of knowing that they were sick and required treatment, made them psychotic and could be violent. It was a mental illness whose onset, PW6 explained was triggered by child birth from which one could recover. The accused appeared to have recovered from her illness and was calm, collected and followed proceedings throughout the trial.

36. **Section 210** of the **Penal Code** cited by Mrs Kinyori deals with infanticide. There is no law in Kenya dealing specifically with murder cases arising from Post-partum psychosis where a patient kills someone else other than her child.

37. In Nigeria, **section 28 of Lagos State Criminal Law**, which is similar to our **section 210** of our **Penal Code** goes further than our own by making it mandatory for the court to make a hospitalization order. **Section 28 of Lagos State Criminal Law** stipulates as follows:

**“28(1) A woman is not criminally responsible for any act or omission which causes death of her child who is under the age of 12 months, if at the time of the act or omission the balance of her mind was disturbed by reason of;**

**(a) depression as a result of childbirth, post-partum or puerperal psychosis; or**

**(b) previous history of depression or psychosis triggered by a re-occurrence because of childbirth or lactation/breastfeeding.**

**2. Where the trial judge after ordering a medical examination finds that the balance of her mind is still disturbed, he shall make a hospitalization order.”**

38. **Section 210** of the **Penal Code** stipulates that:

**“Where a woman by any willful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent on the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of a felony, to wit, infanticide, and may for that offence be dealt with and punished as if she had been guilty of manslaughter of the child.”**

39. I am fully aware that **section 210** of the **Penal Code** does not apply here for reason the two deceased in this case were the children of a neighbour. Accused own child whom she also killed is subject of a trial in the lower court. What applies is **section 203**, read together with **section 9** of the **Penal Code** and **section 166** of the **Criminal Procedure Code**.

40. For defense of insanity to stand, the accused must satisfy the grounds set out under the **McNaughten rule** in **McNaughten Case (1843) 10 C1 & Fin 200**. The test is purely cognitive and the defence must show whether the accused understood her actions or that her actions were wrong. The **M'Naughten Rules** require that the following three tests should be proved:

**i. That an individual suffers from a “defect of reason,**

**ii. That it was caused by a “disease of the mind”,**

**iii. That as a result, he or she does not know the “nature and quality” of the act or that it is wrong.**

41. In **Richard Kaitany Chemagong v Republic; Criminal Appeal No 150 of 1983** the Court of Appeal had sought to distinguish a malfunctioning of the mind from non-functioning of the mind due to epilepsy and held:

**“There was ample evidence that the defendant was acting unconsciously and involuntarily when he inflicted the injury, but cause of his condition was psychomotor epilepsy. Where the effect of a disease was so to impair the mental faculties of reason, memory and understanding that the sufferer did not know the nature and quality of his act or, if he did, did not know he was doing what was wrong, it was a ‘disease of the mind’ within the meaning of the Mc’Naghten Rules in *Mc’Naghten’s Case* (1843) 10 C1 & Fin 200, even if the effect was transient or intermittent. On the evidence the defendant was therefore ‘insane’ at the time of his act, and the only possible verdict was that provided for by the Act of 1883 as amended.”**

42. It’s now trite law that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing the act, the accused was laboring under such a defect of reason, from 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 what was wrong.

43. **Section 166(1)** of the **Criminal Procedure Code** 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 be responsible for the 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.**

44. The law is binding on this court and I appreciate that. However I must give a recommendation concerning cases of Post-partum psychosis. As it has been explained by PW6, the psychiatrist, this is a disease affecting the mind and is caused by hormonal imbalances especially to women after giving birth or while lactating. It is an illness. It will only be suffered by women, as they are the only ones who can suffer such imbalances. My conscience tells me that there is inherent in the treatment of women with this condition under the law a lack of parity and equality. It is discriminative. It flies in the face of Constitutional provisions on right to equal treatment before the law; right to equal enjoyment of rights under the law and general discrimination by virtue of the fact only the women gender will ever suffer from such a condition.

45. The Nigerian Law I have cited herein above has one significance. It recognizes that the woman with Post-partum psychosis is sick and needs medical care. In fact, not only does the law make it mandatory for the court to make an order for treatment; the law says it should be a hospitalization order. That tells us that the sickness is taken so seriously that their Parliament has made it mandatory for the court order to include the order to have the accused person admitted in an appropriate institution for proper medical treatment and care.

46. In Kenya today, the court has no power to order for hospitalization, leave alone hospitalization in a mental hospital. The power is left to the Minister of Interior and through him/her the President to determine what happens to such an accused person. For the fact that these two offices come into the picture much later so much harm or delay is caused.

47. This case has caused me agony. On the one hand a family lost both their children in one morning. PW3 the mother had herself just given birth to her second child. On the other hand the accused was suffering from an illness, not contributed by anything she did or took. It is however clear that we do not treat mothers who fall victim of this kind of mental illness appropriately or timeously.

48. I do find that it is appropriate then to recommend that the law touching on this gender specific and unique condition be re-examined in a view to making provision for the appropriate handling of such persons , including the treating such a person as having an illness needing special treatment and handling. It is also time Kenya built a Mental Asylum where persons with mental illness facing trial for various offences may be held, and consequently properly medically treated.

49. Having said all this I find that as the law now stands, I find that the accused caused the deceased deaths, but that at the time she was suffering from an illness of the mind. I accordingly enter a special finding under **section 166** of the **Criminal Procedure Code** that the accused is guilty for both counts as charged, but insane.

**DELIVERED AT NAIROBI THIS 27<sup>th</sup> DAY OF SEPTEMBER, 2018.**

**LESIT, J.**

**JUDGE**