



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL CASE NO 1 OF 2016

BETWEEN:

THE REPUBLIC

AND

GABRIEL NZUVU JOHN

J U D G M E N T

1. The Accused now before the Court is charged with Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code Cap 63, Laws of Kenya**. The particulars of the offence are that he, Gabriel Nzuvu John on the 24th day of February 2016 at Ngutini Village in Taveta Sub-County within Taita Taveta County murdered Fatuma Nzivili Chengo.

2. The Information was laid before the Court first on 10th March 2016 when the Accused was sent to Coast General Hospital for psychiatric evaluation. The Report is dated 30th March 2016 and was filed on 4th April 2016. The proceedings show that there was some confusion in relation to the Lawyers obtaining copies of the Report and the production of the Accused resulting in delay. The Report signed by Dr. C.M. Mwangome M.Med, Consultant Psychiatrist is that the Accused was observed by the prison authorities. He (the Accused) has denied any history of mental illness and on examination, his appearance, behaviour, mood, speech and cognition were normal. He was therefore declared fit to plead. On 28th July 2016 when he was brought to Court, it seems there was an incident which resulted in Prosecution Counsel asking for a second assessment of the Accused. The Accused is recorded as having agreed to that by saying "*I can go to hospital even without my advocate being here*". The record states "Court: The last time the Accused person was in court, on 25/7/16, he was extremely violent. He was not behaving in a proper manner. The P.O. was issued so that he can be evaluated afresh before we can take his plea, if at all. I note that his advocate is not present in court but it is in his interests that he is evaluated by a psychiatric medical officer and receives treatment as he was clearly unwell the last time. Today he is aware of his surrounding and even said he could go to hospital. I therefore direct that the Accused person be escorted to Moi Referral Hospital Voi for a Psychiatric Evaluation and treatment, if necessary, forthwith. Orders accordingly Kamau J 28/7/16". That report was never produced. On 19th September 2018 the Accused and his Advocate resolved to take the plea and the Court was so informed. The substance of the Charge and every element thereof was read to the Accused in Swahili and he denied them. A plea of not guilty was entered.

3. This Judgment is written the by Judge now in station. The evidence of all the witnesses was heard by the previous incumbent and therefore the Judgment is written from the proceedings as recorded.

4. The Prosecutor had intended to call the following 7 witnesses:

- (1) PW 1: Christine Chengo the daughter of the Deceased and Aunt of the Accused
- (2) Dr Kagona Gitau, from Moi Referral Hospital who introduced the post mortem into evidence
- (3) PW 3: Anastacia Mbuvi, a neighbour
- (4) PW 4: PC Kitptoo
- (5) PW 5: PC Shem Asher No 93081 Forensic Crime Scene investigator
- (6) PW...: Mwadime Mwakesi (who eventually did not appear)
- (7) PW 6:
- (8) PW 8: Corporal Robert Kariuki DCIO Taveta

One did not attend notwithstanding a summons being issued. Suggestions of intimidation were hinted at but not investigated further.

5. The first witness was PW 1 the daughter of the Deceased and paternal aunt of the Accused. She gave evidence that she lived with the Deceased and the Accused in Ngutini Village, Kimorigo Location. She said the Deceased was her biological mother. She said the Deceased had brought up the Accused after his father passed away. She said that on the day in question at about 8 am she was at home with her mother an old man called Sanani who lives there but is not a family member. She said she has a sister called Marinda who lives nearby. On the day in question her mother had gone to Marinda's house to get some sugar. PW 1 was making tea for them. When she returned the Deceased called to the Accused to come and have some tea. She (PW 1) said she saw the Accused walking towards the Deceased with a club in his hand. She described it as a "rungu" or a stick resembling the handle of an axe. She said that when she saw him running away from the house she did not see him holding the club. She says that he hit the Deceased three times on her head. She said that the Accused then ran away towards the forest. She identified the Accused by pointing at him. She said that before he death the Deceased had a good relationship with the Accused but that she has seen them exchange words but that the Accused would also get very annoyed with her. She considered the Accused a calm person. However, under cross-examination she elaborated that during an argument, one of the things she heard the Accused say to the Deceased was, "what are you doing here?". She also explained that the scars on the Accused's face were caused by him falling into a charcoal fire when he was a child. She denied that he exhibited strange behaviour. She also denied that he had epilepsy. She said that her other sisters refused to stay with the Accused because he "disturbed them". Also under cross-examination she elaborated that the Deceased went to call the Accused while she was waiting for her tea to cool. She never came back to drink the tea. She said that she was in the house so did not see the Accused hit the Deceased but she heard three (3) thuds and ran outside to find her mother on the ground. By the time she came out the Accused was standing by the roadside but when she started screaming he ran to the forest. He was later found at the home of his sister Lydia and that is where he was arrested. In sharp contrast to what she had said earlier, under cross-examination PW 1 gave further insight into the behaviour of the Accused. She said that none of his other Aunts wanted to live with him because of his bad behaviour. He disturbed her once and if it had not been for a neighbour called Paula he would have killed her. He beat her and the neighbour. She said she wanted him jailed because if he was not jailed he would kill me. She said she had not reported his behaviour to the Police because she thought it was a passing thing but at times he would lose his mind. It was like he was insane. He did not want to go back to the hospital. She also said he did not have any contact with his siblings because they were afraid of him. Under re-examination she says she saw the Accused holding the stick when he ran away. The stick was not recovered by the police. In response to a question from the Court PW 1 said that the Accused had never been physically violent to the Deceased although he had shouted at her before.

6. In relation to the injuries the Deceased suffered, PW 1 said the Accused hit her mother on the head three times and it burst open. She said her mother was conscious but unable to talk. She said it was her sister Marinda who called the Police.

7. PW 2 Dr Kangona Gitau introduced the Post-Mortem into evidence. He was neither the treating physician nor the physician who conducted the post-mortem examination. That was a Dr Chai who was away for further studies. He said that the Deceased was attacked by her grandson on 24th February 2016 and succumbed to her injuries the same day. The Post-Mortem that appears on the Court file was dated by a Police Officer on 1st March 2016. It states that the Post-Mortem was conducted at Taveta Sub-County Hospital. The date and time of death were recorded as 24th February 2016 at 1800. The circumstances surrounding the death are recorded as "The Deceased was assaulted by her grandson on 24th February 2016 with an axe handle (wooden) on the forehead, She succumbed to death on the same day on 24th February 2016 at around 18.00 at Sub-County Hospital Taveta. It was signed by Corporal Robert Kariuki. The body was identified by Christine Chengo and Anastacia Mumbua.

8. The General observations of the body was that the body belonged to an African Female 70 years of age who was in general good health before her demise. Her clothes were dirty and soaked in blood. The body was cold and the joints stiff. The pathologist recorded the following in relation to the external appearance; "Body examined externally found to have an obvious cut on the scalp with palpable skull fracture of the occipito-parietal bone. There's evidence of bleeding through the nose mouth and ears. No other marks of physical injuries noted on other parts of the body.". That is further explained in relation to the Head as "Massive epidural and sub-dural haemorrhage with brain compression. There's a compression fracture of the occipito-parietal skull bone brain compression. The resulting cause of death is given as "Intra-cranial haemorrhage 2nd degree severe head injury". In simple language what is said there is that the Deceased suffered an injury to her head with such force that it caused a compression fracture of the skull bone and resulted in the brain being compressed leading to massive bleeding. Dr Gitau explained the report as meaning that there was a fracture that was evident to the touch. It was on the joint area between the back and side bones of the skull. PW-2 explained that the internal examination showed massive epidural and sub-dural haemorrhage with bone compression and a compression fracture on the occipital-parietal bone. This meant that the top most layer of the brain had blood above and below it. He explained that a skull fracture can be caused by any blunt object causing trauma. A fall can cause such a compression fracture but it depends from where the fall occurs. It is possible for one to get a compression fracture if he falls on a flat surface but it is unlikely. A trauma can also cause a cut without the use of a sharp object. Under cross-examination PW 2 confirmed that the occipital bone is at the back of the skull and the parietal is on the side so therefore the occipital-parietal area is on the side towards the back of the head. He said that such an injury could only be caused from a fall if the fall was "from a high height or landing on a ledge or a stone so as to give concentrated impact". He also discounted Ebola as the cause of the blood on the clothing. He said the clothes were "soaked" which indicates that there was a massive blood loss from the scalp which has many vessels. The post-mortem did not indicate where the cut wound was.

9. PW 3 Anastacia Mumbua Mbuvi gave her evidence in Kiswahili from 28th February 2017. She says she knew the Deceased and was a neighbour. Their homes were not adjacent but separated by a few homes. She says that on 24th February 2016 at about 8.00 am she heard screams coming from the direction of Fatuma Nzivili Chengo (the Deceased)'s home. She ran towards the scream. When she got there she discovered the Deceased being held by a neighbour who is married to Paul. The Deceased was not speaking and not responsive, but she took the witness' hand and put it over her head. Christine was crying when the witness arrived. She told the witness that the Deceased had been beaten by the Accused. She said that from her observation there was no bleeding from the head wound but "on the way to the hospital her head had started swelling". She said that Malinda took the Deceased to hospital and she followed later. When she arrived she found that Fatuma's head had swollen and her face had turned dark. A short while later she heard that Fatuma had sadly passed away.

10. In relation to the Accused, PW 3 identified him as the person sitting in the dock. She said she knew him well and described him as "always looking sickly and as if he was not aware of himself (hajielewi ama alikuwa amechanganyikiwa). A year before the incident he was well but he started changing. He was also described as having a good relationship with his grandmother, the Deceased. Under cross-examination by Defence Counsel PW 3 elaborated her evidence to say that she was not aware of any bad thing between PW 1 and the

Accused. She said that when she came to Taveta the Parents of the Accused were alive but were no longer so. She said that the only person who could then inherit the land was the Accused. She said when she arrived Christine was screaming and the Accused was not there. She said that she felt Fatuma's head it was swollen on the right side. She said she did not see any bleeding. She related what she had been told by Christine namely that the Accused had hit Fatuma with a club (rungu). The rungungu was short, about the size of an axe handle. She said that Malinda took Fatuma to hospital because there was only one motorcycle available and Christine followed.

11. PW 4 Police Constable Erickson Kiptoo No 86053 gave his evidence in Kiswahili too. He said he was the initial investigating officer but the matter was then taken over by the CID on 24th February 2016. He was instructed by the Officer in Charge of Taveta Police Station, Inspector Duncan Njau to arrest the Accused. The Accused had in fact already been arrested by members of the public at Lesisia Village Taveta. He said that at the time he apprehended (and perhaps saved) the Accused (about 1.00 pm) there had been no complaint or report to the Police in Taveta, however during the course of the interrogation a person called Khadija Issa came and reported that the Accused (her brother) had assaulted their grandmother by hitting her on the head. She seems to be the same person as Lydia. She recorded a statement and said that the grandmother had been admitted to Taveta Hospital. PW 4 says he saw the Deceased in the hospital bed. She did not say anything and the people surrounding her said that she was unconscious. A doctor told him her condition was critical. In relation to the Accused, his evidence of what he observed was that "The Accused person appeared mental." The mob had not tied him. He was just walking on the road. Under cross-examination PW 4 stated that when he arrested the Accused at Lesisia, he looked confused. He was in the hands of members of the public near the Tanzanian border. The witness did not go to the house of Mwadime Mwakesi.

12. PW 5 - PC Shem Asher No 93081, the Scenes of crime officer. He said, "I took a close shot showing a black patch on the head of Deceased. I did not note any external injury except that part. It was nearly in the middle of the front part of the face second was a close up shot that was taken during the postmortem". He also introduced into evidence a report and 7 photographs.

13. The evidence of the eye witnesses after the incident, is that the Accused's behaviour indicated that he was not "right in the head" or he did not seem like a sane person. The Accused himself in his evidence gives evidence that suggests that he suffers from hallucinations. Whether those are due to an illness of the mind or self-induced is not evidence that was placed before this Court. In fact Defence Counsel even went so far as to make an application for him to be assessed but she abandoned that argument and consequently her client in mid-stream. What is the Court to make of that? The Accused has not run the Defence of temporary insanity. His defence is that the Deceased fell off the stool on which she was sitting and he was shocked when he saw her. His Aunt then started screaming. He does not respond to the allegation that he was seen with a "rungu". He says he went to his sister's house and told her what had happened. Is that the same sister who immediately thereafter went to the Police to report an assault on her grandmother?

14. It is correct that before the Accused was required to take the plea he was sent to Coast General Hospital for assessment. The Report of the Consultant Psychiatrist was filed on 5th September 2016. It reads as follows:

"I interviewed the above named accused on 30.3.16 in the presence of PC.ISAAC MOGOKA who said the accused was of normal behaviour while in remand.

The accused denied any history of mental illness.

on examination his appearance, behaviour, mood speech and cognition were normal

OPINION: FIT TO PLEAD"

15. In his oral testimony the Accused also refers to an injury he received for which he attributes the blame on his Grandmother, the Deceased and his Aunt Christine (PW 1). He also blames his father for abandoning him and his mother. The other witnesses state that his Father had passed away. He says that he had a girlfriend called Regina but they separated after he got "mental problems". He blames his Aunt Christina for coming to their home and make his life difficult and then blame him for killing his Grandmother. He also says that Christina came to assist his Grandmother. Having first called her a witchdoctor, he then states "*Christina never used to disturb me. We had no problems because I used to go out often and she also used to go and check her children. She never chased me away from the homestead*". He says that following her injury his Grandmother gave him "*air in his head*". He says that "*Before then I had no problems and I had good mental status. She is the one who caused me confusion. I am not happy because there were needles on my face and jaw*". He also says there was a man called Miraji who visited the homestead and did some magic.

16. The evidence before the Court is that the Deceased suffered an injury to the head. The injury turned out to be life threatening. The oral medical evidence and the post-mortem were clear and consistent. The Deceased suffered blunt instrument injury to the head that was so severe that it cause part of her skull to cave in and cause damage and haemorrhage to the brain resulting in her death. The medical evidence and the oral evidence of PW 2 were consistent as to the position of the injury. The confusion arises from the evidence and annotations of DCI Karanja who says it was on the forehead. The witnesses who saw her consistently gave evidence that she complained of an injury to her head. The fracture could be felt and the bleeding manifested itself as swelling and a black spot on the head and discolouration of the face. That corroborates the medical evidence.

17. The doctor introducing the post-mortem was clear that it was not possible for such injury to be caused by a fall unless said fall was from a great height onto an uneven surface. That disproves the part of the Accused's Defence that suggests that the Deceased fell from her stool.

18. The eye witness evidence places the Accused at the scene immediately before and immediately after the injury was suffered. However, it is correct that there was no eye witness to the actual assault. The evidence before the Court is that the accused was seen with a club or an article that resembled the handle for an axe or hoe. That is a wooden pole that we are all conversant with from normal everyday life. The Accused had it when he was approaching the kitchen, according to PW 1. He also had it immediately after discovery that his grandmother had been assaulted. In his own words, his hand felt heavy. In the circumstances the evidence of the assault is circumstantial. However, the circumstances are such that the Accused is the only person who could have caused the injury (***Sawe v R***).

19. The likelihood of another perpetrator are remote. The only other members of the household were PW-1 who even the Accused admits was in the kitchen at the time and an elderly gentleman called Sanani who is blind and frail, therefore not fit enough to muster the force required for the injury suffered. By contrast the Accused was young and armed. In the circumstances the Accused was much more likely than anyone else to be able to administer such an assault and that assault in particular.

20. The Accused has said that he did not have a problem with the Accused or PW 1 until recently. It was under cross-examination of PW-3 by Defence Counsel that introduced a motive. Namely, that the Accused was getting to the age when he wanted to have a family life of his own and therefore a home of his own. The presence of his grandmother and his aunt meant that he was forced to share the home he considered to be his, through his father.

21. The Defence presented is inconsistent and contradictory. The Accused had the presence of mind to flee the scene when the assault was discovered. He also had the presence of mind to take his weapon with him. It is informative that the sister to whom he went for refuge, upon hearing his version, reported the matter to the Police.

22. As to the state of mind of the Accused, he has been assessed and considered sane. It is true that he has demonstrated temper tantrums and erratic behaviour. Can that be attributed only to mental health issues? In the view of this Court it cannot. The behaviour of the Accused is also consistent with a young man who is so used to having his own way that he lashes out when he is challenged whether by the legal process or his own family. It is also apparent that when he is on remand he was not showing any hallucinatory signs but when he is left to his own devices his behaviour deteriorates. Again that suggested it is self induced. The inconsistencies in the Accused's own evidence point not to a disease of the mind, but a manipulative approach attempting to evade responsibility using any excuse that he can muster.

23. It is also instructive to consider the Accused's attitude to women. At the same time as saying she (PW 1) looked after his grandmother - because he did not cook - and there was no problem, he felt able to describe her as a witch/witchdoctor with all the negative connotations that carries. Given such a dismissive attitude to the female members of his family, he demonstrates a frame of mind where he could justify his treatment of them.

24. Though the evidence before this Court is circumstantial, this Court is of the view that the offence and the particulars of the offence are proved beyond reasonable doubt.

25. For those reasons, this Court must pronounce the Accused, guilty as charged.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Signed Dated and Delivered in Voi on this the 31st day of October 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Accused: In Person (Mrs Isika did not attend)

Respondent: Ms Anyumba