



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 70 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

J N.....ACCUSED

JUDGMENT

The accused **J N** had been charged with two counts of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charges were as follows

Count No. 1

“On the 27th day of June, 2010 in Laikipia West District within Rift Valley Province murdered G W”

Count No. 2

“On the 27th day of June 2010 in Laikipia West District within Rift Valley Province murdered B N”

The accused entered a plea of ‘**Not Guilty**’ to both counts. His trial commenced before **Hon. Justice William Ouko** (as he then was) on 7/11/2011. The Hon Judge heard the first four (4) prosecution witnesses after which he left Nakuru upon his elevation to the Court of Appeal. I then took over the case on 20/7/2016 and heard the remaining two (2) witnesses. A total of six (6) witnesses testified in the case.

The brief facts of the case were that the accused was a husband to the deceased in the 1st Count ‘**G W**’ and a father to the deceased in the 2nd Count ‘**B N**’. **PW5 V M** was also a son to the 1st deceased and the accused whilst **PW6 J W** was a niece to the 1st deceased.

Both **PW5** and **PW7** told the court that on the night of 26/5/2010 they were all at home. The accused has a disagreement with his wife as he was unhappy that she had returned home late. The family took their supper and retired to sleep all in the same room but in different beds.

PW5 told the court that he awoke at 5.00am feeling pain in his head. He ran out to the living room but the accused carried him back to his bed room. **PW5** then lost consciousness and next woke up to find himself admitted in hospital. He realized that he had a wound on the back of his head. Later **PW5** came to learn that his mother and brother were both dead.

On her part **PW6** told the court that on the material night she awoke to find the accused standing over her bed. She called out to her cousin the 1st deceased who questioned the accused. The accused made a non-committal reply. The next day when **PW6** woke up she had wounds and swelling on her face and cuts on her forehead. She phoned her aunt. Immediately thereafter **PW6** lost consciousness. She awoke to find herself at the Nyahururu District Hospital.

PW2 M W N was the aunt to the 1st deceased. She told the court that on the morning of 27/6/2010 she received a call from her niece **PW6**. She rushed to the home and found **PW6** injured and bleeding. **PW6** told **PW2** that they had been attacked. **PW2** entered the house and found both ‘**G W**’ (1st deceased) and ‘**B N**’ (2nd deceased) lying dead inside the house. She removed their bodies and called for help. The neighbours came and police also arrived. Both bodies were removed to the mortuary. Upon completion of police investigations the accused was arraigned in court and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused elected to keep silent and he offered no statement in defence.

This court is now required to analyze the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt as required in law.

Section 203 of the Penal Code defines the offence of murder in the following terms;

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

In order to prove the charge the prosecution is required to adduce evidence sufficient to prove the following

- (i) The fact as well as the cause of death of the deceased
- (ii) That the deceased met his death due to an unlawful act or omission on the part of the accused
- (iii) That said unlawful act or omission was committed with malice aforethought

The fact as well as the cause of death of the deceased have both been readily proved. **PW1** an aunt to the deceaseds told the court that she found the bodies of her niece ‘**G W**’ and her son ‘**B N**’ lying dead in their house. **PW4 J M G** was the father of the 1st deceased. He told the court that he went to the mortuary where he identified the bodies of his daughter and her son. Both **PW5** and **PW6** who were in the same house as the two deceased persons on the night in question confirm their deaths.

PW1 DR. FREDERICK KARIUKI a medical officer attached to Nyahururu District Hospital produced the post-mortem reports in respect of both deceased persons. In the case of ‘**G W**’ (the 1st deceased) she was found to have a cut wound on the forehead as well as a skull fracture and bleeding within the brain. The cause of death was opined to be ‘**cardiac pulmonary arrest due to severe head trauma**’. In the case of ‘**B N**’ the 2nd deceased, who was a two-year old child he was found to have bruising above the eye. Fracture of the 3rd cervical column and dissection of the spinal cord. The cause of death was opined to be ‘**severe spinal injury dissection of the spinal cord**’. **PW1** produced both post-mortem reports as exhibits **P. exb 1** and **P. exb 2**. This was expert medical opinion evidence and it was neither challenged nor controverted by the defence. I therefore find that the 2 deceaseds met their unfortunate deaths as a result of severe assault to their person.

Having proved both the fact and cause of death, the prosecution must tender evidence to prove that it was the accused who so viciously assaulted the deceased persons and caused their deaths.

On the night in question aside from the two deceased person, the other occupants who were present in house were **PW5**, **PW6** and the accused. **PW5** was a minor aged 12 years. He told the court that on the night of 26/6/2010 the family took supper together and they all retired to bed. **PW5** slept in the same bed as his deceased mother, his aunt **PW6** and his deceased brother. The accused slept alone in a separate bed.

PW5 stated that at about 5.00am he awoke in pain. He ran to the living room. The accused picked him and returned him to the bed-room. Thereafter **PW5** lost consciousness. He later awoke in hospital to find that he had injuries to the back of his head. **PW5** states that he has no idea how he sustained those injuries. In his evidence-in-chief **PW6** clearly states as follows

“When I awoke the next morning I felt I was hit. I do not know who hit me”.

Later **PW5** states

“I was told it was my father who killed my mother and my brother”

PW5 does not say who gave him this information and it is not clear whether the person who divulged this information to him witnessed the attack or not.

On her part **PW6** gave a somewhat similar story. She told the court that on the night of 26/5/2010 the accused and his wife had a minor disagreement over the fact that the wife had returned home late. After supper every one retired to sleep.

PW6 states that during the night she awoke to find the accused standing over their bed. **PW6** alerted the 1st deceased who woke up and asked accused why he was scaring them.

It would appear that at this point the 1st deceased had no injuries as **PW6** did not mention having seen any marks on her. They all returned to sleep.

The next morning **PW6** awoke to find that she had injuries on her person. She apparently did not see or notice the 1st or 2nd deceased at the point. She merely phoned **PW2** and immediately thereafter she too lost consciousness.

Just like **PW5**, **PW6** says she did not see who attacked her. More specifically **PW6** did not see the accused attack her. **PW6** says that she ‘**believes**’ that it was accused who committed the fatal assaults. Under cross-examination by defence counsel **PW6** says

“I did not see who attacked my cousin and her son. I believe it was accused because he had argued with this wife that night since

she came home late”

Thus the basis for this **belief** by **PW6** that it was the accused who committed the crimes was because the couple had argued the previous night. Couples argue all the time. A minor argument would hardly be the reason for a man to so viciously attack and kill his wife. Even if the court were to accept that the argument by the couple the previous night provided the motive for the accused to kill his wife what possible grudge would he have had against his 2 year old child. Neither **PW5** nor **PW6** has made any allegation, that they had themselves disagreed with the accused therefore what possible motive would he have had to assault them.

Based on the evidence on record, despite there having been several persons present inside that house on the material night, there is no single witness who is able to positively identify the accused as the person who fatally assaulted the 2 deceaseds. Given the fact that the witnesses are all related to the accused, it could be possible that they are hesitant to directly implicate him in this offence. Whatever the case, this court can only base its decision on what the witnesses have stated in their evidence, not what they may have left unsaid.

Although **PW6** in her evidence stated that she did not see who attacked her. **PW2** told the court that when she arrived at the scene J W **PW6** told her that she had been attacked by ‘**Baba V**’ (the accused herein). However under cross-examination **PW2** admits that she did not include this crucial piece of information (as told to her by **PW6**) in her statement to the police. It is highly unlikely that having been informed of the identity of the assailant by an eyewitness no less, **PW6** would ‘**forget**’ to include this in her statement to the police. I find that this witness was not being entirely honest in this regard.

On the whole there is no direct evidence identifying the accused as the person who attacked and killed the deceased persons. Neither **PW5** or **PW6** saw him commit the deed. **PW5** said that he only saw the accused carry him back to his bed-room when he ran to the living room. **PW6** only said that she saw the accused standing over their bed. The 1st deceased had not been injured. Indeed according to **PW6** the 1st deceased spoke to the accused and asked him what he was doing. The accused gave a non-committal response and everyone went back to sleep. Neither **PW5** nor **PW6** saw the accused commit any act of assault either on themselves or on any other person in the house.

The evidence on record undoubtedly leads to the ‘**suspicion**’ that it was the accused who committed the crimes. However it is a well established principle in law that suspicion alone cannot form the basis for a conviction. In the case of **SAWE Vs REPUBLIC [2003] KLR 364**, the Court of Appeal held as follows

“The suspicion may be strong, but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence”. (Own emphasis)

In this case the evidence on record does not prove beyond reasonable doubt that it was the accused who fatally assaulted the 2 deceased. As such I find that the ‘**actus reus**’ for the offence of murder has not been proved.

Even if the ‘**actus reus**’ for murder had been sufficiently proved (which is not in the case here), the law requires that the prosecution tender evidence to prove beyond reasonable doubt the ‘**mens rea**’ or the mental ingredient necessary for the offence of murder. In law **mens rea** is defined as ‘**malice aforethought**’, and it includes evidence of the existence of intent or the premeditation required to make an act (in this case as assault) a crime.

Several witnesses, in this case have testified that the accused was not entirely mentally sound prior to this incident.

PW3 G K M was a brother to the deceased, told the court that the accused was being attended by a Dr. Ombachi at Kenyatta National Hospital. Under cross-examination **PW3** stated

“Although he [accused] was sick mentally, he kept it a secret for fear of losing his job in the prisons”

PW3 also told the court that the accused had simply walked out of his job at the Prisons Department an act which **PW3** considered ‘**Strange**’.

There is evidence that after the incident the accused did not flee or abscond **PW3** the accused’s brother told the court that it was the accused himself who called him and requested **PW3** to accompany him to the police station. This is not the behavior of one who has a guilt mind.

PW3 further told the court that on that day 27/6/2010 when he met the accused at about 2.30pm he did not appear well.

Aside from what has been stated by the witnesses I have also carefully perused the court file. I note that when the accused was first arraigned in court on 30/11/2010 the initial psychiatric report indicated that he was ‘**mentally insane**’ and was found unfit to stand trial. In a medical report dated 8/7/2010 Dr. J. N. Njau the government psychiatric stated as follows

“On mental assessment I found him (accused) to be mentally unsound, he does not understand why he was arrested, but somebody has told him that his wife and child has been murdered. His concentration and attention are impaired, and he is not capable of following the court proceedings or instructing a lawyer”.

The court on 20/2/2010 directed that the accused be detained at Mathare Mental Hospital for treatment. It was only after a period of psychiatric treatment at Mathare Hospital that the trial proceeded on 17/11/2011, 16 months after he had first been arraigned in court.

Even after the trial commenced there were periods during the trial when comments were made regarding the apparent state of health of the

accused. On 7/5/2012 'Mr. Mongeri' counsel for the accused made the following application

“The accused has asked me to seek adjournment as he is suffering from severe headache. He has not improved. In his state he cannot follow the proceedings. He had had this problem for a long time – to be taken to PGH”.

Again the court adjourned the matter and directed that the accused be taken to PGH for treatment.

Given this history, there exists the very real possibility that at the time when this incident occurred the accused was incapacitated by a mental infirmity. He only recovered after a long period of court ordered treatment after his arrest. In such state he would not have had the capacity to formulate the requisite *mens rea* for the offence. The prosecution have not proved to this court that at the time of commission of the offence the accused was sane and had full capacity to formulate the malice aforethought required to prove the charge. I find that there remains grave doubt regarding the mental capacity of the accused at the time of the incident. Consequently there remains grave doubt regarding his capacity to formulate the necessary *mens rea*. The benefit of such doubt must be accorded to the accused.

For the above reasons I find that this charge of murder has not been proved beyond reasonable doubt. I therefore enter a verdict of '**Not Guilty**' and I acquit the accused. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 23rd day of June, 2017.

Mr. Mongeri for Accused

Ms Nyakira for DPP

MAUREEN A. ODERO

JUDGE