



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO.9 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ANM.....ACCUSED

JUDGEMENT

1. The accused ANM is faced with the offence of having murdered her husband FM on the 24th of February, 2013 at [particulars withheld] village of Namwela location within Bungoma.

2. It took Alice the accused several months; March to August (7) to take a plea and a plea of not guilty was entered on 27th August, 2013.

3. On the 14th of July, 2014 the Court's attention was drawn to the fact that the mental assessment done on the accused dated 25th February 2013 had an indication that she was not fit to plead. The Court directed that another assessment be done and a report dated 22nd July, 2014 was made available to Court. Another report on 31st July, 2014 giving an indication that the accused was still mentally unfit.

The accused remained in that state and undergoing treatment. Another assessment was ordered and on 15th June, 2015 the Court was furnished with a report dated 19th January, 2015 which certified the accused fit, the Court also noted the progress in her health and her ability to communicate, the hearing thereafter commenced on the 19th of November, 2015.

4. The Prosecution's evidence through its seven witnesses was that on the night of 24th February 2013 the accused who was mentally unfit appeared to have been irked by her husband's state of drunkenness and a quarrel ensued. The accused attacked the husband using a jembe and a panga fatally injuring him. She dug a shallow grave and buried him. She then prepared her evening meal ate and slept.

5. **PW1 Dr. Ramzan Mansur** produced the postmortem report on behalf of his colleague Dr. Emirundu formerly of Bungoma district hospital. The report indicated several fractures Externally as follows;

- Left Radius and Ulna (open)
- Lumbar Region (3rd and 4th)
- 6th and 7th ribs.

Multiple deep cut wounds over the left facial region exposing teeth of the lower jaw.

Internally

- Had Haemothorax of the left lung
- Fracture over the left temporal region extending to the parietal with intracerebral haemorrhage secondary to chest trauma, head injury and open fracture of the radius.

6. PW2, 3, 4 & 5 are witnesses who went to the scene of crime on the morning of 25th February 2013 and found the deceased body buried in a shallow grave.

PW6 W M aged 14 at the time of testifying recalled vividly what transpired on the fateful day. It was his evidence that their deceased father had gone for unga and their mother for vegetable. Their father gave the unga to his siblings to bring, he came later making noise, a fight between his parents ensued, their mother went and locked herself in the house, their father knocked then got in through a space, the then accused opened, the witness got in and saw his mother pick a jembe cut the deceased, then picked a panga and likewise cut him, the witness

asked the mother to stop but instead she asked them to go and prepare water for ugali; the accused left for the toilet and their father asked the children to alert the neighbour. On return their mother who found them talking to the deceased said she would cut and finish him. She then dug a grave and buried the deceased. She then cooked, ate and slept.

The following morning the witness told PW5 to tell the neighbours about the incident. The neighbours came questioned the accused who said their father had gone to Cheptais. Cyrus his brother then spilled the beans.

It was also his evidence that though they are 10 children not all stayed home and that his mother had a mental problem.

PW2 John Nyongesa, the village elder confirmed that the accused had a mental problem.

7. The Court placed the accused on her defence. She gave a sworn statement admitting that she killed her husband, it was her further evidence that she could not recall the date of the incident but recalled that her husband returned home on the fateful day at 9p.m. and when she opened for him he attacked her. She ran and locked herself in another room (kitchen) to hide away but he followed her. She took firewood and hit him.

She further testified that she has a mental illness which started after she got her 5th child. She was taken to hospital but there was no follow up but after her incarceration she underwent treatment and has continued with the said treatment and has tremendously improved since then.

She stated also in evidence that the husband would drink, take Bhang and beat her. He had refused to take their children to school, however against the violence her parents encouraged her to stay in the marriage as they had children together.

In cross examination she said that she could not recall if she used other weapon to hit her husband other than the firewood and that after killing him she went to sleep.

Further that at the time she was not well.

8. There is clearly an admission by the accused that she killed her husband however in defence she raised the issue of provocation and insanity. PW6 corroborated both whereas PW2, 3 and 7 confirmed that the accused had a mental problem. A report done on 28th February 2013 immediately after the incidents and subsequent reports until the later one of 19th January, 2015 confirm the mental status of the accused.

9. With the above evidence there is no doubt in my mind that though the accused killed her husband she has two very strong defences. No doubt she was provoked, moved away and the accused followed. The issue of her mental status cannot be over looked either.

10. Notable also is that the Prosecuting Counsel did not inform the Court at the time of taking plea that the accused had been assessed as mentally unfit, it appeared to have been an oversight. The hearing did not take place though until the accused was certified fit to proceed with the matter.

11. Counsel for the accused in his submission argued that the accused may have suffered from a disease of the mind and referred the Court to the McNaughten Rules, and the Cases of **Leonard Mwangemi Munyasia V Republic 2015 eKLR** where the Court of Appeal extensively explained the Case of **Daniel McNaughten** in extenso as follows;

“The Law on the defence of insanity was refined in 1843 following the trial of Daniel McNaughten, who, operating under the delusion that Sir Robert Peel, Prime Minister, wanted to kill him, set on a mission to kill the Prime Minister first. Executing this intention, McNaughten in an attempt to assassinate the Prime Minister shot his secretary, Edward Drummond and killed him instead. McNaughten’s trial at the old Bailey was high profile attracting two solicitors, four barristers and nine medical experts. Medical evidence in the trial indicated that McNaughten was psychotic, suffering from what would today be described as paranoia and delusion. Consequently, the Court acquitted him by reason of insanity. This provoked considerable public furor followed by a debate in the House of Lords culminating with a direction to a panel of Justices of the Queen’s Bench Division presided by Chief Justice of the common Pleas, Sir Nicholas Tindal to craft new rules on the defence of insanity based on a series of hypothetical questions framed by the House. The principles developed by the panel have come to be known as the McNaughten Rules. That marked the beginning of forensic psychology. Under the rule insanity is a defence if at the time of the commission of the act, the accused person was laboring under such a defect of reason, from a 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 he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under Section 167(1)(b) of the Criminal Procedure Code he would be convicted and ordered to be detained during the President’s pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.”

12. Counsel also quoted **Ahmed Mohammed & 5 others Vs Republic (2014)eKLR** in support of the defence of provocation where the Court of Appeal state;

“The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in **PALMER v R(1971) A.C. 814**. The decision was approved and followed by the Court of Appeal in **R v McINNES**, 55 Cr. App. R. 551 Lord Morris, delivering the judgement of the Board, said:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ...

Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. ...The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

Consequently the Court Held:

Taking into account the provisions of Section 17 of our Penal Code that import application of the English Common Law into cases of this nature, we are satisfied that the appellants’ defences of self-defence were improperly rejected because the learned trial Judge did not apply the right test. For this reason, we allow this appeal, quash the convictions for murder and set aside the death sentence passed by the trial Court as against each of the appellants. The appellants are set at liberty unless otherwise lawfully held.”

13. Having analysed the evidence and considered the authorities cited by the defence Counsel I agree with him that not only was the accused provoked moving this Case from being one of murder to one of manslaughter, she was not in a mental state to understand the gravity of the offence; and may not have been in her right state of the mind to appreciate her actions.

A medical report dated 11th March 2013 gave her condition as follows;

Memory: good

Speech: not clear, difficult in expression

Mood: Flat – emotionless

Thought Process: Seems to have delusions. No abstract reasoning.

Perception: Has visual and auditory hallucination.

Judgment: Does not understand consequences of her behavior to self or others.

Conclusion: She is mentally sick and cannot stand trial.

2nd Medical assessment report.

Dated 22/7/2014

“On assessment today she was calm, well-kept with no gross abnormal behavior. Her speech is coherent, she has paranoid beliefs that people want to harm her, including her late husband. She hears strange voices talking to her, she believes she has wires in her body that brings confusion. In conclusion the accused suffers mental illness. This illness may have contributed to the circumstances behind her arrest.

...she does not fully comprehend the meaning of pleading guilty.”

3rd Medical assessment report

Dated 19/1/2015

“The above named was examined and found lucid. From the father (John Sirari) there is history of recurrent reclusive behavior, not communicating and wandering for the past seven or so years.

Most probably Alice suffers a schizoaffective disorder.”

14. With the above the defence of insanity clearly is applicable herein.

The accused over the years underwent treatment and has tremendously improved. Secondly she was arrested on the 25th of February 2013 close to 4½ years and she has all along remained in custody.

In the circumstances of this Case ordering that she remains incarcerated at the president’s pleasure would not be efficacious, she has recovered to a large extend although one cannot tell for how long as she has a recurring condition, she has also served 4½ years in custody which would in the circumstances be adequate punishment. Coupled with the infringement against her right of having been made to plead

while not in her correct faculty, in my view the best this Court can do in the interest of Justice is to set the accused free on condition that she will be released into the safe hands of her father (John Sirari) who is directed to ensure that the accused is always on medication so that she does not become a danger to another member of her family or any other citizen.

DATED and DELIVERED at BUNGOMA this 21st day of December, 2017

ALI-ARONI

JUDGE