



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE NO. 6 OF 2011

BETWEEN

REPUBLICPROSECUTION

AND

S O M ACCUSED

JUDGMENT

1. The accused, **S O M**, is charged with the murder of **A H O** ('the deceased') contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)* which took place on 11th January 2011, within Ukwala location of Ugenya District, Siaya County. After denying the charge, the prosecution called 5 witnesses while the accused elected to exercise his right to remain silent when I put him on his defence.

2. The accused is the deceased's grandson. The key witness, **E A O** (PW 1) told the court that on 10th January 2011, the accused had been behaving strangely by locking her and the deceased in the house. She recalled that this was not unusual as he had been having mental illness in the past. She went to the river that evening and left the deceased behind with the accused. As she was there, a child came and told her to go back home as the accused was beating the deceased. When she arrived at the homestead, she found the accused beating the deceased with a jembe handle. PW 1 recalled that the deceased had been injured on the head, face and arms. She raised alarm and neighbours came to rescue the deceased.

3. PW 1 then called her elder brother, **T O O** (PW 2) and told him about the incident. PW 2 recalled that PW 1 had called earlier that day and informed her that the accused was disturbing them. As he was in Bumala, he told her that he would come later. When he arrived home in the afternoon, the deceased had been injured. He arranged to take her to Ukwala but due to her severe injuries she was referred to Busia District Hospital. When PW 2 spoke to her, the deceased told him that she had been beaten by the accused. PW 2 also called his aunt, **S W** (PW 3) and informed her of the incident. She also assisted to take the deceased to the Hospital.

4. **R A W** (PW 4) testified that the deceased had called her earlier that day and told her about an incident where her roof had been torn apart by someone throwing stones. She was informed later by PW 2 that the deceased had been injured by the accused. By the time she arrived at Busia District Hospital, the deceased had passed away.

5. According to the Investigating officer, Senior Sergeant, Chrisantus Mukoma (PW 5), PW 4 came to report the incident at Ukwala Police Station. When he went back to the deceased's home with PW 4 and other officers, they found the accused hiding in a bush. He was violent and they used force to arrest him.

PW 5 took statements and organised for the post-mortem which was done by Dr. Kisilu at Busia District Hospital on 17th January 2011 after the deceased's body was identified by PW 4. According to the Post-mortem report, produced without objection by PW 5, the deceased died from a head injury caused by blunt trauma.

6. There is no doubt that the deceased succumbed to injuries sustained as a result of being assaulted by the accused. This is supported by the direct testimony of PW 1 who found the accused beating the deceased and the statement made by the deceased to PW 2 that the accused had assaulted her. The injuries sustained by the deceased on the head are consistent with those described in the Post-mortem form. I therefore find and hold that the accused inflicted the injuries as a result of which the deceased died.

7. The main issue in this case is whether the prosecution proved malice aforethought. There is evidence that the accused suffered from mental illness. According to his brother, PW 2, he had been suffering from some mental affliction since he was in primary school and had even been treated for it. All the other prosecution witnesses admitted as much. On the material day PW 1 noticed that the accused had been behaving strangely. When PW 5 came to arrest him, he noted that the accused was talking to himself and behaving violently.

8. When the accused was initially charged, he was examined on 11th March 2011 by Dr A. Onyango, a Consultant Psychiatrist at New Nyanza General Hospital. In his report, he stated that, "*This boy has an underlying mental illness. He is currently not able to follow court proceedings.*"

9. Although he was well after some time to the extent that he was able to plead to the charges on 29th November 2011, he relapsed and he was committed to Mathare Mental Hospital but for some unexplained reason he was not taken there. The accused was once again examined by Dr Edwin Nyaura, Consultant Psychiatrist at Jaramogi Odinga Oginga Teaching and Referral Hospital on 28th March 2017. Dr Nyaura reported that, "*According to this assessment S O M is labouring under a psychiatric mental disorder that requires immediate treatment*".

10. The accused attended court for mention several times and he was able to communicate with me clearly and lucidly. I therefore summoned Dr Nyaura and on 26th July 2017 he accepted to evaluate the accused's illness. In his report of 29th August 2017, he declared that the accused did not display any psychopathology whatsoever and was therefore fit to plead to the charge against him. It is after this assessment, that the matter proceeded for hearing.

11. Although the prosecution shoulders the burden of proving the offence beyond reasonable doubt, the accused bears the evidential burden of showing that he suffers from a mental incapacity that would negate *mens rea* or malice aforethought. Such a defence of insanity may be affirmative or may emerge from the evidence. In the latter case, the court has a duty to consider the defence. The defence of insanity is governed by **section 12** of the **Penal Code** which states as follows;

12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission, but a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or more of the effects above mentioned in reference to the act or omission.

12. The accused need only prove the defence of insanity on the balance of probabilities (see **Tadeo Oyee s/o Duru v R [1959]EA 407**). Where such a defence is raised by the defence or emerges in the evidence, the prosecution is required to disprove it beyond reasonable doubt. **In that case**, the East Africa Court of Appeal held that the word "*disease*" is **section 12** of the **Penal Code** is not necessarily a disease of the mind in the narrow sense. It held that a high grade *mental deficiency may be a disease affecting the mind* and that the trial court took too restricted a view of the word "*disease*".

13. In *Leonard Mwangemi Munyasia v Republic* MLD CA Criminal Appeal No. 112 of 2014 [2015]eKLR, the Court of Appeal held that in considering the mental status of the accused, the trial court ought to take into account all the circumstances including medical opinion. It observed that:

We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.

14. There is sufficient evidence that the accused suffered from a mental illness as was clearly outlined by PW 2. The other family members confirmed as much. Considering the accused's behaviour before and after the violent incident, the medical history and medical reports produced during the proceedings, I find that on the balance of probabilities that the accused was suffering from a disease of the mind at the time he committed the felonious act.

15. As I have found that the accused committed the act that led to the death of the deceased, I make a special finding under **section 166(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* ("the *CPC*") to the effect that the accused committed the act of killing but was insane at the time. I am by law required to direct that the accused be kept in custody at Kisumu Maximum Security Prison pending the President's order in accordance with **section 166(2)** of the *CPC* which provides that:

When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.

16. However, this is not the end of the matter as I have doubt as to the constitutionality of these provisions particularly in light of the recent Supreme Court decision in *Francis Karioko Muruatetu and Another v Republic* SCK Petition No. 15 and 16 of the 2015 (UR) where the court held that it is the judicial duty to impose a sentence that meets the facts and circumstances of the case. This suggests that a law that leaves the length of the sentence to another authority violates the fundamental rights and freedoms of the accused.

17. Apart from the case I have cited, our expansive Bill of Rights and Kenya's international obligations under human rights treaties and conventions and in particular the *Convention on the Rights of Persons with Disabilities* provide a fresh lens with which this court must examine the law.

18. Several cases have cast doubt on constitutional validity of provisions that impose an indeterminate sentence on an accused at the instance of an authority other than the courts. For example, in *AOO and 6 Others v Attorney General and Another* NRB Petition No. 570 of 2015 [2017]eKLR, Mativo J., held that the provisions of the *Penal Code* where a child found guilty of murder is held at the pleasure of the President is unconstitutional as it violates the right to a fair trial under the Constitution.

19. Our courts have also been concerned about the treatment of persons with mental disability under the provisions of the *CPC*. In *Hussan Hussein Yusuf v Republic* Meru High Court Criminal Appeal No. 59 of 2014 [2016]eKLR, Kiarie J., held that **section 167(1)** of the *CPC* which directs that a person suffering from mental disability and is unable to understand the proceedings is to be detained at the pleasure of the President is unconstitutional as it violates **Articles 25 and 29** of the Constitution that prohibit cruel, inhuman and degrading treatment. The learned judge reiterated this position in *B K J v Republic* MERU HC Criminal Appeal No. 16 of 2015 [2016] eKLR. In *Joseph Melikino Katuta v Republic* Voi HC Criminal Appeal No. 12 of 2016 [2016]eKLR, Kamau J., emphasised the point that **keeping a mentally ill person in prison for an indeterminate period of time is cruel, inhuman and degrading treatment contrary to Articles 25 and 29 of the Constitution.**

20. In light of the observations I have made, I adjourn the sentencing proceedings to enable the parties address me on the constitutionality or otherwise of **section 166** of the *CPC* and the appropriate sentence to be imposed on the accused.

21. This judgment shall be served on the Office of the Attorney General to make any necessary intervention in the matter.

DATED and DELIVERED at KISUMU this 19th day of December 2017.

D.S. MAJANJA

JUDGE

Mr Olel, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.