REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE N0.70 OF 2012

LESIIT, J.

REPUBLIC……..……..…….PROSECUTOR

VERSUS

JOED MURIU KAGURU…….....……..…ACCUSED

JUDGEMENT

1. The accused person **JOED MURIU KAGURU alias MORENO** is charged with **Murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are:

> **'That on the 30TH of August 2010 at Ndeiya Location Slums within Kiambu County murdered Francis Munyua Kigwai.'**

2. The prosecution called a total of 9 witnesses.

3. The facts of the prosecution case are that the accused is alleged to have found the deceased in his house and suspected he must have been the one who previously stole his radio, among other things from his house. He attacked and injured him after which the deceased succumbed to the injuries and died in the process. The prosecution's case is that the accused had a history of mental illness that could have affected his judgement, leading to the attack on the deceased which caused his death. The police recovered a panga from the accused house that he allegedly used to attack the deceased.

4. The accused gave an unsworn statement. He stated that he was facing a charge of murder of one Francis Kigwai. He said that he could not re-call what happened. He stated that on 30th September, 2012 he felt like suffocating. He explained that he used to smoke but by that time he had not smoked and had also not eaten. He said that he had gone to buy cigarettes. That he just felt a bang and then fell unconscious. He said that he could not say what happened next but that he saw his face full of blood. He said that he prayed to God to help him overcome the temptation of the assaulter. He said that he could not concentrate due to loss of blood. He was then asked to enter a car. The accused stated that he had a stable mind and used to control his guts.

5. The accused faces a charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. In order to prove the charge against the accused, the prosecution must adduce evidence to establish that the deceased died; that the accused caused his death and that at the time the accused caused the deceased death, he had formed the intention to cause death or grievous harm of the deceased.

6. The law sets out what constitutes malice aforethought under **section 203** 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."**

7. There are three issues for determination in this case:

> **i) whether the prosecution has adduced sufficient evidence to establish that the injuries which led to the deceased death were inflicted by the accused person, and;**
>
> **ii) Whether the prosecution has established that the accused had formed the necessary malice aforethought when he inflicted the injuries in question on the deceased?**
>
> **iii) Whether the defence of insanity applies to this case, and to what effect?**

8. There was no eye witness in this case. The prosecution is relying on circumstantial evidence to link the accused with the offence. In order to sustain a conviction on the basis of circumstantial evidence the prosecution evidence needs to meet the threshold as set out in the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** as follows:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**
>
> **(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,**
>
> **(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
>
> **(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."**

9. The prosecution relies on the evidence of PW1 Solomon Kinuthia Kaguru who testified that he had come from work on 30th August 2012 and was with his son Mbugua who was in form three. He sent him to the shops that evening.

10. PWl said that he heard noises at around 7:15 pm near his brother's house, the accused in this case that was a distance of 30 meters from his. This made him anxious as it was getting ark at the time and he remembered he had sent his son to the shops. He said he heard a struggle in the maize plantation and screams of a man. The place was dark and there were maize crops in between the houses. He said that he went there and called out for his brother, the accused who responded and warned him to go away and not move near him. The accused told PW1 that he had found someone in his house who had stolen a

radio and other things like food.

11. PW1 however moved closer and that is when he saw a man lying on the ground and bleeding profusely. Shortly after that, he saw his cousin's wife PW3 on the road coming towards him. PW1 and Miriam checked the man but they did not recognize him. They then proceeded to their brother Gitao's place which was a distance of 30 meters from the accused house but they did not find him there.

12. PW1 then proceeded to his brother Peter Mbugua Kaguru's place where he lived. He found him and they both went back to see the person that was injured. They were joined by other people who included the Sub-Chief. The Police came later and arrested the accused person and took the deceased body away. The deceased who had passed on was bleeding from the head and neck. PW1 recognized the deceased who was their in-law and also came from their area.

13. PW1 took the police to the accused person's house where they found a panga that they took away with them. PW1 said that he knew the panga, as he used to cut grass with it for his cows and also used it for his other chores. He identified it as P. exhibit.

14. PW3 corroborated the evidence of PW1 that they found the deceased lying inside the accused shamba with deep cuts and the accused standing nearby. PW4 was the Sub-Chief also confirmed that the body of the deceased was found inside the accused shamba. PW4 confirmed that the accused was found in his house with the blood stained panga near him.

15. PW7 and the I. O. PW 8 were the Police Officers who were the first to visit the scene of the incident and they did so with the Sub-Chief, PW4. PW7 was an Administration Police Officer testified that they saw footprints from where the body was found leading to a mud house. Inside that house they found the accused seated with a bloodied panga, P. exhibit 1, a bloodied belt, P. exhibit 3 and bloodied shirt P. exhibit 4 which PW8 collected as exhibits. PW8 took the exhibits to the Government Chemist, together with the blood samples taken from the body of the deceased and from the accused.

16. The Government Chemist was PW6 and she did DNA profiling of the blood stains in the pieces of clothing, the panga, the belt and the two blood samples. He found that they all matched the DNA of the deceased and concluded that the blood on these items was from the deceased body. The report is P. exhibit 5 and the memo forms P. exhibit 6 (a) and (b).

17. PW2 was the pathologist who examined the body of the deceased. After the examination he formed the opinion that the deceased died as a result of hemorrhage due to a head injury due to sharp trauma consistent with assault. The doctor found 8 deep wounds on the head, 4 deep cut wounds on the right hand and fractures of the head bones near the left ear. He observed that there were no defence injuries on the deceased meaning there were no signs of a struggle. His report is P. exhibit 2.

18. The prosecution has adduced evidence to establish that the deceased was found lying dead with deep wounds and bleeding profusely from his head and neck. The prosecution has adduced evidence to show that at the place where the deceased body was found were foot prints which led to the house of the accused. The prosecution has also adduced evidence to show that from the accused house police officers recovered a bloody panga, belt and shirt and the accused seated inside. The DNA profiling established that the blood on the panga, shirt and belt matched the DNA of the deceased blood. This was proof that the three items were stained with the deceased blood.

19. The accused has a statutory burden to discharge a rebuttable presumption created under **sections 111(1)** and **119** of the **Evidence Act**. The two sections prescribe as follows:

> "**111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

"119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

20. Under these sections the accused is expected to explain how the deceased came to be fatally wounded outside his, accused house and at the same time how the accused had in his possession a weapon, belt and shirt having the blood of the deceased.

21. The accused in his defence stated that he felt like suffocating and decided to go and buy cigarettes as he used to smoke and he had not smoked that day. He said that he was also hungry. The accused said that he then felt a bang, then felt blood on his face. He then lost concentration due to loss of blood. He said he that he was hen told to enter a vehicle which he did. The accused said he could not explain what had happened.

22. Mrs. Nyamongo for the accused urged the court to consider the evidence of the Deputy Director of Medical Services, PW9. Counsel urged that the doctor found that the accused suffered from Bipolar Disorder. Counsel invoked **section 9 (1)** and **(11)** of the **Penal Code** and urged that the acts he was accused of occurred independent of the exercise of accused will.

23. Before considering the evidence of the psychiatrist let us consider that of accused brother, PW1. PW1 informed the court that the accused was diagnosed with a mental illness in 1989 and had since been going for treatment at Mathare Hospital. PW3, their sister-in-law confirmed that indeed the accused had a history of mental illness.

24. It is true the prosecution adduced the evidence of a Consultant Psychiatrist, PW9 who gave the history of the accused mental illness. Her evidence was as follows.

25. PW9 Dr. Nelly Kitasi a Specialist Psychiatrist examined the accused on 24th March 2014. She noted that one Dr. Njuguna re-evaluated him again on 20th November 2014. He went through the accused's file record and noted that he was first with a bipolar mood disorder. The records indicated that the accused was admitted several times for treatment .between 1987 and 1992. He escaped from hospital in 1990. On 26th November 2012 he was brought by a prison warden for evaluation and on evaluation he was found to be psychotic and treatment commenced. Dr. MJ Kisivuli made a report to court on 20th October 2012 indicating that the accused person was not fit to plead. He was brought back for re-evaluation on 31st January 2014 when he was found fit to plead.

26. Dr. Kisivuli prepared a report dated 23rd January 2014 that was brought to court to that effect. PW9 said the accused was brought again on 24th March, 2014 when he found him fit to plead. She said that there was a final report on 10th November 2014 by Dr. Njuguna which found the Patient had a normal mental status and was fit to plead. The report is authored by PW9 but signed by Dr. Kisivuli. PW9 produced all the reports on the accused as P. exhibit 7, 8 and 9.

27. I am satisfied that the accused had a long standing history of mental illness. The question is whether **section 9** of the **Penal Code** applies to his case?

28. **Section 9** of the **Penal Code** provides:

9. (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

29. That section of the law must be read together with **sections 11** and **12** of the **Penal Code** which provide as follows:

'"11. Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.'

"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 other of the effects above mentioned in reference to that act or omission."'

30. The burden to prove insanity lies with the accused person who pleads that as a defence in his case. That burden is however not that of the same standard as the prosecution has. In the Court of Appeal case of **MARII V REP [1985] KLR 710,** NYARANGI JA, PLATT AND GACHUHI Ag. JJA held:

"1. Where an accused person raises the defence of insanity, the burden of proving insanity rests with the accused, because a man is presumed to be sane and accountable for his actions until the contrary is shown.

2. The burden on the accused to prove insanity is not as heavy as the one of the prosecution. The burden is discharged by proving on a balance of probabilities that it seemed more likely that due to mental disease, the accused did not know what he was doing at the material time, or that what he was doing was wrong, and so he could not have formed the intent to kill the deceased.

3. Whether the defence has proved the case of insanity is a matter of fact for the judge and assessors. Where it is found that the accused was insane, a special finding may be entered; if he is found to have been sane, the finding may be murder or manslaughter; and in the case of manslaughter, that would be due to the fact that although sane, by reason of illness, the accused did not appreciate the full consequence of his act."

31. As the finding whether insanity has been proved or not is a question of fact, the court is entitled to look at the entire evidence adduced in the case, not just the accused defence.

32. In this case we have the evidence of accused history of illness from PW1 and 3. His old school mate, the Sub-Chief PW4 testified to the fact the accused was normal when they were in school. He said that he saw the accused later in life he realized he had mental problems.

33. The medical reports are on record. They show that he started treatment 1987. The treatment included In-Patient treatment at Mathare Hospital. More relevant is the doctor's finding at the time of the accused arrest. The record shows that the accused was arrested on the 30th August, 2012. He could not plead because on the day plea should have been taken on 27th September, 2012 the State informed the court that the accused had been detained at Mathare Mental Hospital for treatment. The accused was not produced in court again until 4th February, 2013.

34. The reports produced by PW9 shows clearly that on 26th November, 2012 when accused was taken to Mathare he was found to be psychotic and was commenced on treatment. That was after the brief period of admission reported to the court on the 27th September, 2012 about two weeks after his arrest for this offence.

35. I find that there is ample medical evidence of accused mental illness both before and after this offence. I have also considered the manner in which the offence was committed. We have the evidence of PW1, accused brother who first heard a commotion, then a male screaming and finally a horrifying sound. He then heard as if there was a flow of water nearby. On walking towards the accused, the accused warned him not to draw near as he had caught a thief. The accused then reported to him that he had done a very commendable act because there was a person who had disturbed him and he had dealt with him.

36. The doctor's finding at post mortem and people's observation at the scene is also noteworthy. What PW1 heard like running water was actually the excessive bleeding from deceased neck after the accused cut him severely. When they finally flashed a torch at the body, PW1, 4 and others who did not testify realized that it was not only for a neighbor but a Pastor and an in-law of the accused and PW1.

37. Having taken all these factors into consideration I am satisfied that on a balance of probabilities the accused was of unsound mind and was not in control of his actions and was incapable of knowing what he was doing, or that it was wrong when he committed the act which resulted in the deceased death. Having come to that conclusion I find the accused guilty of the offence of murder contrary to **section 203** of the **Penal Code** but insane under **section 166(1)** of the **Criminal Procedure Code**.

SIGNED AND DELIVERED AT NAIROBI THIS 28th DAY OF JULY, 2016

LESIIT, J.

JUDGE