



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

BUSIA HIGH COURT

HCR NO. 25 OF 2010

REPUBLIC...PROSECUTOR

VERSUS

J S E.....ACCUSED

JUDGEMENT

1. The circumstances of this case will require that J S E (**the Accused**) be dealt with under the Provisions of Section 166 of The Criminal Procedure Code.
2. The Accused is charged with the Offence of Murder contrary to Section 203 of the Penal Code as read with Section 204 thereof. It is alleged that on 21st July 2007 at Kakapel Village, Kakapel Sub-location in the then Teso District he murdered J A (the Deceased). The Deceased is his mother.
3. The Prosecution called direct evidence in respect to the unfortunate incident. C I (PW3) was at home on the fateful Saturday. She is the daughter of Deceased. At about 3.00pm the Accused asked the Deceased for his phone and uniform but the Deceased did not have them. The Accused, who was armed with a jembe (hoe), hit the Deceased twice on the back of her head with it.
4. At this point the witness ran away as she raised an alarm. The husband to the Deceased came to the rescue of the Deceased but he too was assaulted by the Accused. PW3 was aware that her injured parents were later taken to Hospital but her mother succumbed to the injuries and died.
5. A neighbor to the Deceased, M E (PW1) was at his home on 21st July 2007 at about 3.00pm when a child called E P came to him and told him that his father was assaulting his grandfather. It would seem that E is the son of the Accused. PW1 rushed to the scene and on reaching there he found the Accused hitting Mzee Romano with a jembe. The witness managed to disarm the Accused who then ran away.
6. PW1 carried the injured old man into his house. PW1 then went to a Banana farm which was about 20 metres from the homestead of Mzee Romano where he found the Deceased in a critical condition. She was bleeding from her head and arms and was unable to speak. She was unconscious. The witness sought a vehicle which took both the Deceased and Mzee Romano to the nearby Kocholwa Hospital. It was his further evidence that the Deceased passed on while at the Hospital while Mzee R recovered but died two years later in 2009.

7. A P O (PW2) is a brother to the Accused and a son of the Deceased. It was while in Kisumu, on 21st July 2007 at about 2.00pm, that he received a telephone call about what had transpired at home. He travelled home and got there at 9.00pm only to find both his parents admitted to Hospital. He visited the Hospital on the morning of 27th July, 2007 but by this time the Deceased had passed on.

8. There was further evidence by this witness which explained the unusual conduct of the Accused. PW2 told Court that in 2005, the Accused left home for Kitale and returned in 2007. On his return the witness noticed that the Accused was not himself. He noticed that the accused had become violent and harassed children around the homestead. At one point the Accused had threatened to knife and kill his own father, Mzee R.

9. The neighbours, too, noticed the change in the Accused and advised PW2 to get help for Accused as he was dangerous. PW2 heeded the advice and as a family sold a piece of land to enable them raise fees for the Medical help they intended to get. On 18th July, 2007, the witness attempted to persuade the Accused to accompany him to Kisumu so that he would attend Hospital but the Accused refused. The Accused would require further persuasion and so the witness returned to Kisumu, to enable him seek leave from his employer so as to attend to the Accused. Unfortunately, the incident came earlier than the help. Such is life!

10. CPI Mulongo Nyongesa (PW4) witnessed the Postmortem of the body of the Deceased which was performed at Bungoma District Hospital. The Postmortem Report was produced in Court by Inspector Martin Keli (PW5) as Dr. Alwanga who prepared it could not be traced. The Defence did not object to the production of the Report under the Provisions of Section 33 of the Evidence Act. In the Report the Doctor made the following observations of the External Appearance of the body;-

“Has Multiple cut wounds;

Scalp – Deep cut at occipital (left) area, 5x2 cm.

- Right temporal area 2x2cm

Limb- Right forecumposterially6x2cm(stitelied)

-left fore cumposterially 10x2cm

- bruise on the right

Internally, the Doctor found that there was Massive bleeding in the scalp and a linear fracture form the Occiput to the Right Parietal area. He also found intracranial bleeding. In the end the Doctor formed the opinion that the cause of Death was Cardio respiratory failure secondary to a head injury as a result of an assault.

11. At the close of the Prosecution case, the Accused was invited to give his Defence. This is what he said;-

“I am S J. I do not know my third name”.

Then the Accused went mute.

12. The findings on Postmortem were consistent with the evidence of PW3 who say the Accused assault the Deceased using a jembe. The witness saw the Accused hit the Deceased twice on the back of her head. This was an eye witness account. The witness knew both the Accused and Deceased well. The Accused is her brother and the Deceased her mother.

13. When PW3 left the scene in haste, her father (Mzee R) had come to the rescue of the Deceased. PW1 a neighbor of the Deceased also came to the scene on being alerted about the ongoing assault. When he

reached the scene he found the Accused assaulting Mzee R with a jembe. The witness disarmed the Accused. The Accused and Mzee R are both well known to PW1. Not only is he a neighbor but a distant relative. He has known the Accused for a long time.

14. The assault weapon was produced in Court as an exhibit (PExhibit1). There is overwhelming evidence that the Accused assaulted both the Deceased and Mzee R on 21st July 2007 and injured them. The Deceased succumbed to the injuries while Mzee R

15. survived them. The Postmortem Report corroborated the evidence of PW1 as to how the Accused assaulted and caused injuries to the Deceased. There is no doubt in my mind that it was the Accused who caused the Death of the Deceased.

16. At the conclusion of the hearing, Counsel for the Defence argued that the Accused could not be held to be criminally responsible because at the time of commission of the Crime he was suffering from intermittent problems of Mental Disorder. Counsel urged the Court to find that a Defence under Section 12 of the Penal Code had been established.

17. Alternatively, Counsel urged the Court to invoke the Provisions of Section 166 of the Criminal Procedure Code and commit the Accused to a Mental Hospital. The State supported the invocation of Section 166 of the Criminal Procedure Code.

18. The Prosecution has proved that the Accused assaulted the Deceased and caused her Death to the standard required in Criminal Law. There was however insightful evidence by PW2 that would explain the unusual and unfortunate conduct of the Accused. PW2 had observed that the Deceased was mentally disturbed and was at the time of the commission of the assault preparing to have the Accused seek Medical help. The family had in fact sold a piece of land so as to raise money that would meet the expected Medical Bills.

19. PW1, a neighbor to the Deceased and the Accused had noticed that the Accused was mentally unstable. This is what the witness said in cross-examination,

“What the Accused did was unusual. The Accused had left home for about 5 years. On returning he seemed to be mentally unstable. He would have mental problems off and on. He had refused to get Medical attention”.

This evidence supports that of PW2.

20. This Court is urged by both the Defence and Prosecution to find the Accused guilty of the Act but insane. This Court accepts that it is the proper verdict to reach in this matter not only because of the evidence (which I have analyzed above) but also because of some events in the course of the proceedings herein.

21. The Accused took plea on 22.10.2008 before Justice Msagha and hearing of the matter commenced on 22.7.2009 before Justice Muchemi. On 7.11.11 Judge Muchemi observed;-

“The Accused has refused to talk even to the Court. He cannot answer a single question and just stares at the Judge and Clerk as we ask him questions”.

The Accused was thereafter committed to Kakamega Provincial Hospital Psychiatric Unit for treatment.

22. After some considerable time had passed, the Court received a letter dated 13th December, 2012 declaring the Accused person mentally fit to plead. Fresh plea was taken on 29th April, 2013, and hearing fixed for 4th June, 2013 but the matter did not proceed then. On 14th May, 2014 the State Counsel told Court:-

“Today, the Accused assaulted a Prison Officer, he appears to be unwell. We request that he be taken to a Mental Hospital for treatment”.

The Defence counsel was agreeable to that proposal and the Court directed that the Accused person be escorted to a Mental Facility at Kakamega Provincial General Hospital.

23. The Accused received treatment at Kakamega County General Hospital and on 15th January 2015 Dr. Wakhudu reported that the accused had made good progress and was ready to stand trial. Thereafter, hearing began and concluded.

24. I have briefly set out what transpired before plea was taken, after plea was taken and just before the hearing of witnesses to demonstrate that what PW1 and PW2 told Court about the mental illness of the Accused is indeed credible.

25. Although there is overwhelming evidence that the Accused viciously assaulted the Deceased and caused her fatal wounds, there is also credible evidence that at the time of the offence the accused person was insane so as not to be responsible for his acts. This Court therefore invokes the Provisions of Section 166 of the Criminal Procedure Code and finds the Accused person guilty but insane.

26. This case shall be reported for the Order of The President under the Provisions of Section 166 (2) of The Criminal Procedure Code through the Cabinet Secretary responsible for The Kenya Prison Service. In the meantime the Accused shall be detained in Psychiatric Unit of Kakamega County Hospital for treatment.

27. Whilst the provisions of subsections (4), (5) and (6) of Section 166 are laudable they can prove to be doomsday for a Detained Person if they are not adhered to. There is a real danger that the Detained Person can be forgotten. Those provisions are:

“(4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained at the expiration of a period of three years from the date of the President’s order and thereafter at the expiration of each period of two years from the date of the last report.

(5) On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.

(6) Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.”

So that J S E is not forgotten, this Court does hereby grant liberty to the Defence or Prosecution to move the Court from time to time to check on the compliance of the above Statutory provisions.

Dated, Signed and Delivered in Court at Busia this 16th Day of August, 2016.

F.TUIYOTT

JUDGE

PRESENT:

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..... Court Clerk