



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 27 OF 2012

REPUBLICRESPONDENT

VERSUS

MWACHIA WAKESHO..... ACCUSED

JUDGMENT

MWACHIA WAKESHO hereinafter referred to as the Accused is charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code.

The particulars are that:-

“On the 17th day of May, 2012 at Magale Village, Kishushe Location of Taita Taveta County he murdered WAKESHO NDIGILA”.

The prosecution called nine (9) Witnesses in support of their case. The defence availed the Accused as their only Witness.

The Deceased was staying with the Accused in the same house. She was his mother. On the 17th day of May, 2012 the Deceased daughter Eliza Mkaisaka (PW 1) heard screams from her mothers compound. The time was around 6:00 pm. She rushed from the shamba and proceeded to her mothers compound. Her mother (the Deceased) was shouting and saying that she was being killed. Upon arrival she found her lying on the ground with blood oozing from her mouth and nose. The Accused who is her brother was standing nearby and when she asked him of what had happened. He did not answer her. She screamed for help and members of public went to the scene and apprehended the Accused whom they tied with ropes.

PW 2 David Mkalla who is a neighbour of the Deceased was attracted to the scene when he heard screams by the Deceased. Upon arrival he found her lying on the ground with blood oozing from her mouth and nose. She was already dead. The Accused had already been apprehended by members of public and tied with ropes. Near the body of the Deceased there was a piece of wood which was treated as the murder weapon.

Dr. Macharia PW 7 conducted a post mortem examination on the body of the Deceased. It had a depressed fracture of the occipital region and there was blood oozing from the ears and mouth.

There was dislocation of right shoulder, rib fracture right upper chest, fracture, dislocation of both knees. He formed the opinion that the cause of death was cardio respiratory arrest due to brain injury due

to blunt head trauma.

In his defence the Accused told the Court that he beat up his mother after taking drugs and feeling dizzy.

The offence of murder is defined under section 203 of the Penal Code thus,

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

Section 206 of the Penal Code provides,

“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”.

In the instant case nobody saw the Accused inflict the fatal blows on his mother. What is before the Court is circumstantial evidence. The Accused and his mother were staying in the same house. The incident took place at around 6:00 pm. The sister of the Accused (PW 1) was attracted by screams from her mother who was uttering words to the effect that she was being killed. She was at a shamba about 50 metres from the house. Upon arriving at the scene she found her mother lying on the ground with blood oozing from her mouth and nose. She was already dead. The Accused was seated nearby. Upon being asked as to what had happened he was not able to explain but kept quiet thereafter he was arrested with the help of members of public.

There was nobody else at the scene at the time. He had ample opportunity to attack his mother. A piece of wood was recovered at the scene and was treated as the murder weapon.

In his defence he admitted having beaten up his mother after taking and consuming some drugs that made him dizzy. The circumstantial evidence before the Court irresistibly points to the Accused as the person who inflicted the fatal blows to his mother (the Deceased).

Before plea was taken the Court had called for a psychiatrist report. A report dated 29th May, 2012 prepared by Dr. Macharia of Wesu District Hospital was produced in Court. His findings were that there were no psychotic features and the Accused was able to follow proceedings.

In Court, an application was made for a second report as to his mental acuity. The Court noted that the Accused appeared scared and timid.

The second report was prepared by Dr. Mwangombe a consultant psychiatrist at Coast General Hospital. In that report the Accused denied having had a history of mental illness. Upon examination his behaviour, mood, speech and cognition were found to be normal and the Doctor formed the opinion that the Accused was fit to plead.

There is a running thread stemming from the line of cross examination of the Witnesses suggesting that at the time of the incident subject matter of this case the Accused was insane.

It is the same line of defence exhibited by the Accused when he told the Court that he beat up his mother after taking drugs.

The investigating officer did observe that the accused appeared mentally disturbed. During the course of the hearing the Court also did observe that the Accused did not appear very normal but can these observations afford him the defence of insanity?

Section 12 of the Penal Code provides,

“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”.

As argued *Supra* the two medical reports do not allude to a situation as envisaged under section 12 of the Penal Code on insanity.

The first report dated 29th May, 2012 by Dr. Macharia has these following observations.

Behaviour – Calm

Speech – Coherent

Mood – Normal

Orientation – well oriented in time and place.

Concentration – Good

Perceptual disorders – No hallucinations no illusions.

Judgment – Good

Insight – Present

Conclusion – No psychotic features able to follow Court proceedings.

The second report is dated 1st August, 2012 and was prepared by Dr. Mwangombe. He interviewed the Accused whom he found calm and not mentally disturbed.

His behaviour, mood, speech and cognition were normal and he found him fit to to plead.

In view of the findings on the two medical reports it would not be available for the Accused to bring himself under the ambit of the defence of insanity. At the time of doing the act he was not suffering from a disease affecting his mind to be incapable of understanding what he was doing and that it was wrong.

I am satisfied that the Accused knew what he was doing and that it was wrong.

The Accused had the intention to cause death or to do grievous harm going by the nature of the injuries sustained by the Deceased. Injuries on the head – Depressed fracture of the occipital.

Upper Limbs – Right shoulder deformity suggesting of dislocation.

Chest – Right upper chest deformity suggestive of its fracture.

Lower Limbs – Bilateral knee deformity suggestive of fracture and dislocation.

There was no suggestion of provocation on the part of the Deceased or any injuries inflicted on the Accused by the deceased.

I am satisfied that the prosecution has proved its case beyond reasonable doubt. The Accused is found guilty as charged of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and is Convicted accordingly.

Judgment delivered, dated and signed this **18th** day of **September, 2015**.

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M. MUYA

JUDGE

18TH SEPTEMBER, 2015

In open Court in the presence of:-

Learned Counsel for the prosecution Mr. Masila

Learned Counsel for the defence absent

Court Assistant Mr. Musundi

Court:

Mention on 1st October, 2015 for mitigation and probation report. Notice to issue to Mr. Mwawasi Advocate.

M. MUYA – JUDGE