



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL CASE NO.44 OF 2010**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**ELISHA ANDAI .....ACCUSED**

**J U D G M E N T**

**Introduction**

1. The accused herein is charged with two counts of Murder contrary to Section 203 as read with Section 204 of the Penal Code. On the 1<sup>st</sup> count the Prosecution alleged that the accused on the 18<sup>th</sup> day of October 2010 at Ebusembe village in Central Bunyore location within Vihiga district within Western Province murdered ALICE KARANI.
2. On the second count the Prosecution alleged that the accused on the 18<sup>th</sup> day of October 2010 at Ebusembe village in Central Bunyore location in Vihiga district within Western province murdered GRACE ISHMAEL.
3. On 15.12.2010 accused took plea before Justice Lenaola and pleaded not guilty to both counts. He took plea in a language which the Court recorded that he understood. On the 20/6/2011 defence counsel Mr. Khayumbi told the Court that the accused appeared to have mental problems. Justice L. Kimaru ordered that the accused be taken to the Kakamega Provincial General Hospital to be examined by a Psychiatrist to determine his mental status.
4. The case was mentioned several times before Justice L. Kimaru for the Psychiatric report. On the 21/9/2011 the Court found that the accused was mentally fit to stand trial and confirmed the hearing date of 30/11/2011. When the matter came before Justice Chitembwe on the 1/12/2011 it was ordered that the accused be taken for a second medical/mental examination to determine whether he was mentally fit to stand trial. Again the matter was mentioned several times after that and on the 20/6/2012 Justice Chitembwe ordered that the accused be taken to Mathare hospital for treatment. On the 11/11/2013 the accused told the trial Court that he was ready to proceed with his case. It is important to set out the above background of the case because it will guide this Court in making its final conclusion.

**The Prosecution Case**

5. The Prosecution called seven (7) witnesses in this case. The incident herein took place within a village setting and was witnessed by three (3) persons. PW1, PW2 and PW7 and it was raining that evening. PW1 JOY OMENDA OMUKHANGO testified that on the 18/10/2010 at about 5.00p.m she was at home with the deceased in count 1 when the accused entered with a panga.

- Accused had come from his house and wanted to cut the deceased. She stopped him and the accused went away. The deceased then decided to go and untether her cows but the accused ran after her and assaulted her with the panga. PW1 said she witnessed the accused beating the deceased with the side of the panga. She claimed that Police were informed and accused who had run away was later arrested at 9.30p.m.
6. PW1 testified that she knew the accused who she says was normal. She pointed at him in the dock. She also informed the Court that the accused was his brother in law while the deceased was accused's mother. She identified the panga which was marked as "PMFI 1". On cross examination she told the Court that she did not witness the accused cutting the deceased with a panga and reiterated that she was seated on the veranda with the deceased.
  7. PW2 NOEL ATUOR testified that on the 18/10/2010 at about 5.00pm she heard screams and when she went to check she saw the accused assaulting GRACE ISHMAEL with a panga. She called GRACE and locked her in her house. After a while GRACE decided to go and check on her children and PW2 opened the back door for her and she left. She testified that she decided to follow her after a while and on entering GRACE'S house she did not find her. That is when she saw the accused assaulting the deceased (GRACE) who fell on the ground and died She immediately reported the matter to the Assistant Chief who notified the Police. Police came and took the bodies and also arrested the accused who was found at a neighbours compound. Noel told the court that the accused was her brother in law and the last born in the family. She testified that the accused was normal and was not drunk that day. Noel too identified the panga the accused had that day "PMF I 1."
  8. On cross examination PW2 explained that her husband's father is related to the husband of GRACE ISHMAEL (deceased) and that ALICE KARANI (deceased) is her mother in law. She maintained that she witnessed the incident and saw GRACE fall down. She further explained that when the Police came they took the panga from the accused. She reiterated that the incident took place at 5.00p.m when it was raining. She explained further that there was no dispute at the homestead that evening and that the accused who normally drinks was sober on the material day.
  9. PW2 explained that her mother in law Maximila was not at the scene during the incident though she might have gone there later. She said that it was not normal to kill two people at once and that people didn't like the accused.
  10. PW3 ELIJAH RESA OMBETE witnessed the postmortem at Sagam Hospital of the bodies of his mother and sister-in-law. PW5 ISHMAEL OMBETE who works at Nairobi testified that he was telephoned on the 18/10/2010 and told that his wife GRACE ISHMAEL had been killed by his cousin. On 23/10/2010 he identified his wife's body for purposes of post mortem and later buried her.
  11. PW4 DAVID OLOCHO the Chief of Central Bunyore location but previously an Assistant chief of Egara sub location testified that on the 19/10/2010 at about 5.45p.m. he got a phone call and was informed that at Ebusenge village one Elisha had disagreed with his parents Mama Trufena during the day. He was told that Elisha assaulted his mother and killed her. PW4 then went to the scene together with two Police officers and during that visit, they learnt that the accused also killed his sister in law GRACE who was trying to stop him from killing his mother.
  12. PW5 testified that when they went to the scene, they did not find the accused at home but at about 8.00pm he was informed that the accused had gone back to the home. They went back and arrested the accused as she was knocking the window of Johnston's house. They also took the panga from him. He was taken to Luanda Police Station while the bodies taken to the mortuary.
  13. On cross examination PW4 explained that he did not know Elisha but only knew his parents. He also told the Court that the deceased was Trufena and that he came to know the person who called him as Maximilla. He further explained that Maximilla told him that the accused was mentally unstable, though when they arrested the accused he was with the Police and he didn't check if the panga had blood stains. He was re-examined and explained that it was raining when he got the first call and the rain had stopped at 8.00p.m.
  14. On the 10/11/2014 this Court took over the hearing of the case after due compliance with Mr. Khayumbi for the accused person told the Court that they had no objection to proceeding from where the case had reached. The Court complied with Section 200 of the CPC. The accused expressed his wish for the case can proceed from where it stopped.
  15. PW6 DR. AWINO BOB did the post mortem examination for both the deceased persons herein.

- In the case of ALICE KARANI, the subject of the case against the accused in count 1 he opined that the cause of death was massive intracranial haemorrhage and lacerated brain tissue secondary to assault. He signed and rubber stamped the death certificate No.663463. He produced the post mortem report which was marked as PExhibit 2. In the case of GRACE ISHMAEL OMUKAYA the subject of the case against the accused in count 11, he opined that the cause of death was intracranial haemorrhage due to head injury secondary to assault. He signed and rubber stamped the death certificate no.663464 and produced the post mortem report which was marked as PExhibit 3.
- 16.PW7 REUBEN ANGALO SHIKUKU testified that as he was going to milk the cows on the 18/10/2013 at about 5.00p.m he heard screams at ELISHA ANDAI's home. He rushed there and saw the accused cutting his mother with a panga and hitting her with stones. She fell down and the accused continued cutting her. He went close and beat the accused in effort to stop the accused from doing further harm to the mother, but accused continued cutting her. The accused then started chasing PW1 around the home and then went back and continued cutting his mother until she died. It was then that PW7 ran to a neighbour's house and reported the matter. He was later informed that the accused had also killed PW7's Aunt Grace. He did not witness the killing of Grace. He pointed out the accused from the dock. He knew him and testified that the accused had not taken any alcohol on that day.
  - 17.On cross examination by Mr. Khayumbi for the accused PW7 explained that he belongs to the same clan as the accused who is also his neighbour. He further told the Court that Grace's death did not go down well with him. He explained that the accused person's mother was cut on the hands and on the head and what he testified about was what he saw happening to Alice. He said he saw Noel Atuo Akulo who was locked inside the house and Alice was being cut near Noel's house at the material time. He denied knowledge of the accuseds mental status. He confirmed that it was raining and reiterated that he was going to milk the cows and that the attack took place when it was raining.
  - 18.On re-examination by Mr. Oroni PW7 explained that he first saw the accused chasing his mother and that when his mother fell down the accused beat her several times on the back before he started slashing her with a panga. PW8 No.69112 PC DANIEL ODONGO from Luanda Police station crime office investigated this crime. He testified that on 18/10/2010 at about 6.40p.m. he was informed of the murder incident by the Assistant chief of Esaba sub location (PW4) where it was alleged that the accused had killed his mother and sister in law.
  - 19.Together with the OCS they visited the scene where they found the bodies of 2 female adults lying dead on a footpath. After making enquiries they were directed to where the suspect was and found him still armed with the panga. They arrested him and took the panga. They then removed the bodies which had visible head injuries and took them to Sagam hospital. On 23/10/2010 post mortem was conducted after which they charged the accused person with the murder of the two victims. He produced the panga they had recovered as PExhibit 1.
  - 20.On cross examination by Mr. Khayumbi PW8 explained that he took the panga after being informed it had been used to cut the deceased. The panga had no blood stain because of the rain. He also stated that there were eye witnesses, namely PW7, PW2 and PW1. He explained that he later learnt that the accused was mentally unstable and had been treated at Mathare Hospital. One of the deceased was the accused's biological mother. He could not say whether or not the accused had been provoked. He also couldn't establish what happened between the accused and the deceased persons.
  - 21.After hearing the evidence of the Prosecution witnesses this Court ruled that a prima facie case had been established against the accused person and placed him on his defence in compliance with Section 306 (2) of the Criminal Procedure Code.
  - 22.Accused instructed his Counsel on record Mr. Khayumbi to inform the Court that he would give a sworn statement and was not going to call any witness.

### **Defence Case**

- 23.The accused person ELISHA ANDAI KARANI who testified as DW1 stated that he knew why he was in Court. He testified that the reason he was in Court was because he beat ALICE KARANI his mother. He also said he knew GRACE ISHMAEL her sister in law but claimed that he did not

know where the two ladies were. He told the Court that on the 18/10/2010 some people beat those two ladies but the people ran away and instead he was arrested. He did not know those people. He was arrested from his home in the evening in the presence of the Assistant chief PW4. He also said he knew Maxmilla who is like his sister in law.

24. The accused denied that he chased his mother on the material day. He also claimed that he was drunk on that day. He denied that he smoked bhang. He confirmed that he had been taken for psychiatric treatment in Nairobi. He denied beating Alice Karani or Grace Ishmael. On cross examination by Mr. Omwenga for the DPP the accused told the Court that he was taken for psychiatric treatment while he was in custody. He explained that he was never taken for such treatment when he was at home because he was fine. He reiterated that he did not chase his mother nor did he kill her. The defence closed their case. Both the Prosecution and the defence filed written submissions.

### **The Law and issues for Determination**

25. Section 107 of the Evidence Act Cap 80 Laws of Kenya provides:-

**“S.107 (1) whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist. When a person is found to prove the existence of any fact it is said that the burden of proof lies on that person.”**

The standard of proof placed on the Prosecution in this case is to prove the guilt of the accused person beyond reasonable doubt see **Republic –vs- Gachanja [2001] KLR 428.**

26. It is a cardinal principle of law that the burden to prove the guilt of an accused person lies on the Prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities. In this particular case the following are the issues for determination:-

- a. Whether the Prosecution proved the fact and the cause of death of the deceased persons.
- b. Whether the said deaths were caused by the direct consequence of an unlawful act or omission on the part of the accused person, namely whether mens rea has been proved.
- c. Whether the said unlawful act or omission by the accused person was committed with malice aforethought as defined under Section 206 and as required by Section 203 of the Penal Code.

With regard to the first issue there is ample evidence that the two deceased persons, ALICE KARANI and GRACE ISHMAEL died. PW3 and PW5 identified the bodies of the said deceased persons to Dr. Awino Bob, PW6 who conducted the post mortem examination on the two bodies. The Post mortem report on Alice Karani was produced as PExhibit 2 while that of Grace Ishmael was produced as PExhibit 3.

27. On ALICE KARANI Dr. Owino concluded that the cause of death was massive intra-cranial haemorrhage and lacerated brain secondary to assault. On GRACE ISHMAEL OMUKAYA he concluded that the cause of death was intracranial haemorrhage due to head injury secondary to assault. I am therefore satisfied that the first ingredient of murder has been proved. The next question is whether the accused caused the death of the deceased through an unlawful act.

28. It was the evidence of PW1 that she chased away the accused when he came to her house where she was sitting with ALICE KARANI. Accused was carrying a panga and had threatened to cut ALICE (deceased). Later she saw the accused beating ALICE with the back of the panga but she didn't see him cutting her PW2 on the other hand saw the accused assaulting GRACE ISHMAEL with a panga. She took Grace into her house to protect her from the accused. Later Grace left PW2's house to go and check on her children. She followed Grace and saw Grace on the ground dead.

29. PW4 the area assistant chief was told of the incident and went to the scene of crime together with the Police. He found that truly the deceased persons had been killed and the bodies were lying in

the said compound. He also arrested the accused person who had a panga. PW7 stated he saw the accused cutting ALICE his mother with the panga. He tried to distract the accused by beating him but the accused continued cutting Alice until she died.

30. PW8, the Investigating officer on receiving the report of the incident went to the scene and saw the bodies of the deceased in the said compound. He also re-arrested the accused person. He was told what had happened but could not establish why the accused went on the rampage. When put on his defence accused maintained that he did not kill his mother but that the two were attacked by people who ran away thereafter. He explained that on the material day he was wrongly arrested by the Police while standing on the road side near his house. He did not call any witness.

31. From the evidence on record it is not in doubt that the accused is the one who caused the death of the deceased persons herein. The murder weapon which was a panga was also produced and identified by the Prosecution witnesses. It was not lawful for the accused person to kill either Alice Karani or Grace Ishmael. The only remaining issue in this connection is whether the Prosecution proved that the accused had the necessary malice aforethought in killing the deceased persons. To prove malice aforethought the Prosecution must prove by evidence any of the following circumstances.

- a. an intention to cause 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.

32. In their submission the Prosecution contended that the accused's act of returning after being told to leave the house by PW1 was a clear indicator that he had intention of attacking and killing Alice Karani. They also submitted that the actions of the accused on the fateful day of 18/10/10 were perfectly planned and executed at a time when it was raining and the accused person would let no one come between him and his plans. In his submissions Mr. Khayumbi for the accused stated that in view of the law and facts of this case it cannot be established that the accused had premeditated his reactions towards the deceased persons.

33. After carefully considering the evidence and the submissions, I find that the accused person intended to kill the deceased person for the following reasons:-

- He used excessive force on his mother and sister in law without any provocation. This is seen from the injuries the deceased persons sustained. He must have known that his acts of repeatedly cutting the deceased persons on the head would probably cause the death of or grievous harm to the deceased person.
- He never heeded the calls of PW1 and PW7 who tried to stop him from cutting the deceased persons to death.

34. I am satisfied from all the above that all the ingredients of murder have been proved by the prosecution beyond reasonable doubt.

(b) whether the accused committed the offence while under the right frame of mind.

The defence counsel submitted that from the facts of this case, the evidence on record and the conduct of the accused immediately before and immediately after the death of the deceased and during the trial clearly brought out the defence of insanity. PW1, PW2 and PW7 who were from the said village and were neighbours maintained that the accused person was sober and had the right frame of mind at the time he committed the crime. This Court sent the accused for mental examination twice as stated earlier and from the Doctors/Psychiatrists evidence the accused was found to be fit to go on with the case and make his defence.

35. I also find that the accused person understood the contents of the charge when plea was taken and pleaded not guilty. In his testimony during cross examination the accused stated that he had never been taken for psychiatric treatment when he was at home because he was fine which means that even at the time he committed the crime he was of sound mind. The defence of insanity was first formulated in the 19<sup>th</sup> century Scottish case of **McNAGHTEN CASE [1843] 10ct & FM 200, 8ER 718** in these words.

**“.....to establish a defence on the grounds of insanity, it must be clearly proved at the time of committing the act, that the party accused was laboring under such a defect of reason from the 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 what he was doing was wrong.”**

36. The above formulation was grafted into Section 12 of our Penal Code Cap 63 Laws of Kenya which provides as follows:-

**“S.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.”**

37. In the case of **Republic –vs- Gachinja [2001] KLR 428**, Etyang J restated the cardinal Principle of Law that the burden of proof of guilt of accused persons lies on the Prosecution, and that an accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probability whereas indeed an accused assumes no responsibility to prove his innocence. Where however an accused person assumes one of the statutory defences of provocation, insanity or other similar defence such as intoxication, the burden does not shift upon the accused, but the Court must consider whether there is cogent evidence to prove the existence or otherwise of any of those defences.

38. For the Prosecution to establish the defence of insanity, the Court must clearly be satisfied that when the accused person committed the act of which he is indicted, he was:-

- a. **Suffering from a disease which affected his mind and by reason thereof.**
- b. **He was incapable of understanding what he was doing or knowing that he ought not to do the act or make the omission.**

39. From the evidence on record, there is no indication that the accused person had a history of mental illness. The record shows that it was only after the accused took plea that the defence requested the Court to order a psychiatric examination for the accused person. The accused person himself on cross examination told the Court that he had never been taken for any psychiatric treatment or examination while he was at home.

40. In the circumstances, I do not accept the defence of insanity. The clear impression I have formed from the evidence on record and from an observation of the accused person as he testified and also as he sat through the trial is that he was of sound mind at the time he ferociously cut Alice Karani and Grace Ishmael to death. This is not a case that falls into the category of cases of mental instability cited to this Court by defence Counsel. The correspondence from psychiatric experts showed that the accused person was stable and of sound mind and this assertion by the medical experts was confirmed by PW1, PW2 and PW7.

## **Conclusion**

41. In the premises and for the reasons above given, I find the accused person herein, ELISHA ANDAI KARANI guilty of the murder of ALICE KARANI in count 1 and I also find him guilty

of the murder of GRACE ISHMAEL in count 11.  
42.I accordingly convict him in both counts under Section 322(1) of the Criminal Procedure Code.  
43.Orders accordingly.

Judgment delivered, dated and signed in open Court this 12th

Day of November 2015.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Omwenga (present) for the State

Mr. Shimwega for Mr. Khayambi for the Accused

Mr. Okoit - Court Assistant