REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 36 OF 2012

LESIIT, J.

REPUBLIC……………………………………..........……...PROSECUTOR

-VERSUS -

HESBON NJATHI………..……………..……..................ACCUSED

JUDGMENT

1. The accused **HESBON NJATHI** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are as follows:

> **"On the 29th Day of April, 2012 at Kahawa West Jua Kali Estate Nairobi County murdered Ashley Wambui."**

2. I must start by stating that this case was heard by Muchemi, J. I took over the defence case under section 201 (1) of the Criminal Procedure Code. The prosecution called total of five witnesses.

3. The facts of the Prosecution case are that on 29th April 2012 the accused and his wife were home when their immediate neighbour, PW3 saw that accused wife carrying their child to their landlord's house. The landlord was PW2. PW2 asked PW3 to escort the wife of the accused, referred to as Mama Ashley, to hospital. The child, Ashley had an abdominal injury. The intestines were protruding from the abdomen and her mother blamed the father of the child, the accused in this case, for the injury. The child was pronounced dead at Kiambu Hospital where PW3 and Mama Ashley had taken it.

4. PW3 testified that he met the accused 2 days earlier on 27th April 2012 when he informed him that he was unwell and had already received treatment for malaria. He heard the accused shouting from his house that night saying that demons were tormenting him. On the 29th April 2012, he saw the accused looking sickly with his wife and daughter. That evening at around 9:30 pm the accused wife came out of their house carrying their child saying that she had been injured on her stomach by the accused. Mama Ashley went to PW2's house who hired a taxi and asked PW3 to accompany Ashley's mother to hospital.

5. Police from Kiamumbi Police Station were called to the scene by PW2. By the time they arrived at the scene, they found PW2 and others trying to break into accused house where he had locked himself. The door was made of steel and they could not break in. It was the accused who eventually opened the door and collapsed at the entrance. He had a cut on the throat. He was taken to hospital. After he recovered, the accused was charged for the death of the deceased.

6. PW1 who is incharge of the forensics division at the Ministry of Medical services performed the postmortem on the deceased body on 14th May 2012. The doctor's finding at post mortem was that the body had two stab wounds below the chest and another stab wound on the right side of the umbilical cord. The left side of the chest also had a stab wound. The left lung had collapsed and she was bleeding on the left chest cavity. She also had multiple injuries on the intestines and bleeding in the abdominal cavity. He formed the opinion that the deceased had died of multiple injuries due to stab wounds.

7. The accused in his unsworn defence stated that he was unwell. He told the court that he fell ill and went for treatment on three occasions; however he did not get better. The accused gave details of how he was left in the house with his daughter and how he saw strangers who attacked him. He said he fought back. He said he came to in Kenyatta Hospital with tubes all over his body. He had injuries on the throat and stomach and was in chains. He showed his wounds on the throat and stomach to court. The accused stated that his brother is the one who told him that his daughter had died and that he was the cause of her death.

8. The accused faces a serious offence. It is upon the prosecution to prove the charge against the accused beyond any reasonable doubt. The prosecution must adduce evidence to establish that it was the accused that by an act or omission inflicted an injury on the deceased out of which the deceased died. The prosecution must prove that at the time the act or omission causing death was inflicted, the accused was motivated by malice aforethought. Section 206 of the Penal Code lists some of the ingredients that constitute malice aforethought 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) …**
>
> **(d) …**"

9. The evidence adduced by the prosecution clearly shows that the accused became berserk on the evening of the 28th April. The wife of the accused was not called as a witness. The prosecution is therefore relying on circumstantial evidence. In the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

> **"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."**

10. In **Bakari vs Republic (2012) 2 EA 34** the Court of Appeal of Tanzania held:

> **"In a case depending conclusively on circumstantial evidence, the court must before deciding on conviction, find that the inculpatory facts are incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilty."**

11. The prosecution has adduced evidence that has established that accused was home with his wife when PW3 saw the wife leave their house carrying the deceased. The deceased had a serious injury and her intestines were protruding from her stomach. PW2 and 3 testified that the deceased mother implicated that accused with the injury. The accused has not denied that he hurt his daughter.

12. The prosecution relies on circumstantial evidence. The prosecution has firmly and cogently proved the circumstances upon which the inference of guilt is based. These circumstances point unerringly towards the accused guilt. Considering the totality of the prosecution case, and the accused admission, the accused is the only one who could have inflicted the injury on the deceased and committed the offence. I find that there are no co-existing circumstances which may destroy the inference of guilt and that the inculpatory facts are incompatible with the accused innocence.

13. The defence has argued that the motive for the offence was not proved. At the same time there is the accused defence of temporary insanity due to illness. Under S.11 of the Penal Code a person is presumed to be of sound mind unless proved otherwise. That section provides as follows:

> **"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."**

14. On the other hand S.12 of the Penal Code regarding criminal responsibility in case of insanity states as follows:

> **"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."**

15. 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."**

16. The accused has the burden to prove that at the time he caused the deceased death he was insane. The standard of proof is on a balance of probabilities and the question the defence is proved is a matter of fact.

17. The accused in his defence stated that he fell ill two days before the incident. PW3 confirmed this in his evidence. The accused said that he started hallucinating and fighting strange looking beings and that it must have been the time he hurt his daughter and also himself as he later realized. He said that he did not

know himself and had lost his senses until two weeks after his admission in hospital. PW3 said that the accused started behaving strangely and to say weird things the day of the incident. After that Mama Ashley was seen carrying the seriously injured girl from the accused house.

18. PW2 and the Police Officers who visited that scene iPW4 all testified that by the time they went to rescue the accused from himself, he had injured himself seriously and had even collapsed. He was not in his right mind when he was admitted at Kenyatta Hospital ICU.

19. PW3 described the accused as a calm man before the incident. His behavior on the day in question was therefore unique.

20. Having examined and analyzed the facts and evidence before me I find that the accused had no prior history of insanity. I find that on the day in question his mind was affected by illness, and that since then he has recovered. I find that on a balance of probabilities, the accused was sane on the material day, but due to illness he did not appreciate the full consequences of his actions. Due to the circumstances of this case, it was not necessary to prove the motive for this attack.

21. Having considered the entire evidence before me I find that the prosecution did not prove malice aforethought. Consequently the offence of murder was not proved. I find that the offence proved is manslaughter. In the result I substitute the offence of murder contrary to section 203 of the Penal Code with that of manslaughter contrary to section 202 of the Penal Code. I find the accused guilty of the substituted charge of manslaughter and convict him accordingly.

DATED AT NAIROBI THIS 19th DAY OF DECEMBER, 2014

LESIIT, J.

JUDGE