REPUBLIC OF KENYA

High Court at Nakuru

Murder Case 15 of 2009

REPUBLIC……....PROSECUTOR
VERSUS
ROSE SERENOI KIPUKEL……ACCUSED

JUDGMENT

Rose Serenoi Kipukel, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence as contained in the information are that on 12/2/2009 at Topoti Village in Narok District, Rift Valley Province, murdered Suyanga Kipukel and Terian Kipukel. When she was arraigned before the court, she denied the charge. The prosecution called a total of 7 witnesses in support of their case. after the close of the prosecution case, the accused was called upon to defend herself and she gave an unsworn statement.

PW1 Kibarisho Enole Kipukel testified that the accused was the wife to her son while the deceased children were her grandchildren. She recalled that on 12/2/2009, at about 5.00 p.m., she heard a child crying in accused's house which was next to hers. She went to find out what was the matter but found the door to accused's house locked from the inside. She asked the person who was inside to open and the accused opened. She was holding a panga. PW1 entered the house, found the deceased children on the floor and their heads were chopped off but not completely severed. She saw blood on the panga that accused was holding. She did not talk to the accused nor did accused talk to her. PW1 identified the panga in court as accused's panga (PEx.1). PW1 denied that the accused ever had a mental problem there before and that she lived in that home with the son, accused and the children. Her son was away when the incident occurred and nobody else had been in that home on that day.

PW2, Sammy Kipukel, a brother-in-law to the accused knew the deceased, one was 4 years (boy) and another 2½ years (girl). He identified the bodies to the doctor before post mortem was done. He denied having heard of accused having a mental problem there before.

PW3, Jimmy Odupoi Kipkukel, a cousin to the deceased also identified the bodies to the Doctor before post mortem was done.

PW4, PC Isaiah Modin, then of Mau Narok Police Station, recalled that on 12/2/09 while at the police station, at 9.40 p.m., two Administration Police Officers and members of public took the accused to the police station alleging that she had committed murder. He also recovered a blood stained panga which was allegedly used in the murder. Police from Ole Turto collected the accused and the panga.

PW5, William Muturi of Ol Turto Police Station was the Investigation Officer. On 13/2/09, he collected the accused from Mau Narok Police Station. He also received a blood stained panga which was allegedly the murder weapon (PEx.1). He visited the scene of the murder, found the two deceased children in a pool of blood in a house said to be accused's house. He drew a sketch plan (PEx.2), collected the bodies and took them to Narok District Hospital and attended post mortem on 16/2/09. PW5 also escorted the

accused for mental assessment and received the report (PEx.3) which indicated that she was mentally ill. He was not able to interrogate her since she was not talking.

PW6, Doctor Gerishom Abakalwa, then of Narok District Hospital, performed the post mortem on the deceased on 16/2/09. He examined Terian Kipukel, a female of about 8 months old and Suyanga Kipukel, a male 3 years old. Both had several cut wounds and the Doctor was of the opinion that they died of cardiac arrest due to severe haemorhage due to the cut trauma to the heads and necks. He produced the P3 forms, most mortem reports as PEx.4 & 5.

PW7, AP Sgt. David Ronko of District Commissioner's office Narok received a report of the murder, visited accused's home, found her locked up in the house. On opening, found her seated on the bed and the bodies of the two children and a panga were on the floor. They took the accused to the Chief's camp with the panga and later handed her over to the Mau Narok Police Station.

When called upon to defend herself, the accused made an unsworn statement in which she said that she was married, had two children and does not know where they are. She could not recall what happened on 12/2/09. She said that she had a mental problem even before she got married and when it occurs, she is not able to tell what happens. She told the court that presently she is well because she has been on treatment while in remand. She asked the court to dismiss the case against her.

Mr. Wambeyi, Counsel for the accused made closing submissions urging this court to acquit the accused for reasons that the evidence against the accused is circumstantial, is weak as not to found a conviction and secondly, that there is no proof that the accused had malice aforethought considering her defence that she had mental illness.

I have carefully evaluated the evidence adduced by both the prosecution and the defence. The two issues for determination are who killed the two deceased? Is it the accused and if it is the accused, did she have the necessary malice aforethought? Even as I consider the above issues, I bear in mind that the burden always lies in the prosecution to prove its case beyond any doubt. In this case, nobody witnessed the murder and the therefore the prosecution relied on circumstantial evidence. In **James Mwangi v Rep. (1983) KLR 327, pg 331**, the Court of Appeal held as follows of circumstantial evidence:-

"In a case depended on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on evidence – 10th Edition p. 31). It is also necessary, before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference Teper v Rep. (1952) AC 480 at page 489."

From a reading of the above passage, for the court to found a conviction based on circumstantial evidence, it should be such that it excludes any other person from the crime. Other than the accused, in this case we have the evidence of PW1 who was the first at the scene of the murder. She told the court that only her, the accused, her husband and the children lived in that home. PW1 heard screams from accused's house, rushed there, found the door locked and the person who opened the door was the accused, who had a blood stained panga in her hand. PW1 did not talk to the accused nor did accused talk to her. PW1 said that, then, the accused's husband was away from home. After PW1 raised an alarm, PW7 was one of the first officers at the scene. He found the accused still in the house, seated on the bed while the children's little bodies lay lifeless in a pool of blood and on the same floor was a blood stained panga which PW1 had seen. The same panga was handed over to PW4 at Mau Narok Police Station. PW1 is the mother-in-law of the accused. She recalled that accused and her son had not disagreed there before nor had she disagreed with accused. The accused did not allege any disagreement between them. I believe that PW1 was a truthful witness and I am satisfied that the circumstantial evidence points at none else but the accused as the person who had the opportunity and actually killed her two children.

The deceased were two children of tender age. They were the accused's children. She was with them in

the house at the time of their death. Under **Section 111** of the **Evidence Act**, imposes a duty on her to explain what may have happened that led to the death of the deceased having been the last person with the children. That does not necessarily shift the burden on the accused but an explanation is required. **Section 111** of the **Evidence Act** reads:-

"S.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.

(2) Nothing in this section shall –

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity."

The accused's defence is that she remembers nothing about the fateful day. In absence of any explanation this court finds that it is the accused who killed her two children.

On 13/2/2009, a day after the murder, PW5 escorted the accused to the Narok District Hospital and on examination the Doctor Leposo found that she was depressed and mentally unfit to plead to the charge and recommended institutionalised care (PEx.3). When PW1 found accused in the house where the murder took place, the accussed did not talk to her. Indeed the Investigation Officer (PW5) was not able to interrogate the accused because she was not talking to anyone. Even when she appeared in court on 19/2/09 for plea, the record shows that she was not talking to anyone. Dr. Njau a Consultant Psychiatrist confirmed that the accused was not fit to stand trial. The Doctor observed that the accused suffers from chronic episodic disorder (mental illness). However, as of 19/8/09, the accused was certified fit to stand trial and that is when trial commenced.

The accused raised the defence of insanity that she suffers from mental illness and does not remember what happens during that period when she is unwell.

A defence of insanity is available to an accused person who proves on a balance of probability that due to his or her state of mind, he/she did not know what he/she was doing at the material time or that what he/she was doing was wrong and so he could not have formed an intent to kill the deceased. In **Marii v R (1985) KLR 710**, the Court of Appeal held as follows:-

"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."

I am satisfied from the evidence adduced that the accused had been suffering from a mental illness and on the material day, she was suffering from that illness and I am persuaded that at the time of committing the act causing the death of her own two children, she was not responsible for her actions. There was no evidence of misunderstanding between the accused and her husband or her mother-in-law, (PW1) or anyone else. The children were too young to have disagreed with her. It is therefore clear to me that at the time the accused attacked and hacked the two children to death, she did not know what she was doing or that it was wrong.

In the end, I make a special finding that the accused is guilty of murder but was insane, in accordance with **Section 166(1)** of the **Criminal Procedure Code**. This finding will be reported for the orders of His Excellency the President. Meanwhile the accused will be detained in prison. The accused has 14 days right of appeal.

DATED and DELIVERED this 26th day of April, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:
Mr. Chirchir for the State

Mr. Kipkoech holding brief for Ms Kahinga for the Accused

Accused present

Stephen Mwangi – Court Clerk