



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU CRIMINAL CASE 156 OF 2003

REPUBLIC PROSECUTOR

VERSUS

NICHOLAS MBAE MURIITHI ACCUSED

JUDGMENT

The accused is in this case charged with murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are that on the night of 9th/10th September 2003 at Nturiri Village, Kiraro Sub Location Chogoria Location in Meru South District within Eastern Province murdered Kandogo Mbae. PW6, the accused father and the grandfather of the deceased begun by saying in evidence that he had a bad relationship with the accused for 10 years. That the accused used to abuse him and even wanted to kill him. He said that the accused seemed to have changed for the worse after his 18th birthday. That he became very fierce. That the accused resided near him but when he became abusive PW6 asked him to move a further 6 meters away from his house. PW6 remembered that he was with the deceased child and her brother on 9th September 2003. However, in the evening of that day at about 4pm, he got the impression that the children were not well. On 10th September 2003, he did not see the children at all. PW6 went to the accused house with a view to greeting the children. The accused sent him away. It should be noted that those two children were the children of the accused. PW6 said that he did not see the children on 10th September 2003. On that day, because of his concern of not seeing those children, he decided to go to the accused's estranged wife to check if the children were with her. He found that they were not with her. The accused estranged wife said that she had not seen the children. PW6 said that he got worried when he found that the children were not with their mother. He reported his concern to the sub area who referred him to the sub chief. He could not trace the sub chief immediately but later in the evening when he did find him the sub chief said that it was night time and they could not look for the children in the night. On 11th September 2003, the sub chief went to PW6 house and they sat with PW6, his son and a neighbour. The four of them strategized on how they would get the accused to allow them to see the children. PW7 was Gilbert Reche who was a good friend of the accused. Reche agreed to inquire from the accused about the whereabouts of the children. Reche approached the accused house and seems so feared was the accused that the other three hid in the bushes. Reche was able to see the children lying on the accused bed. However, after he saw them, the accused threw a hammer at him which caused him to run from the accused house. It was then decided that they would get the assistance of the people in the market area. These people came and broke down the accused door and tied up the accused. PW6 noted that the deceased was already dead but her siblings were still breathing but only slightly. PW6 was advised by the OCS to take the one who was breathing to hospital. The accused was however arrested. PW6 then stated:-

“Accused from age 18 years he started bad behaviour. Accused was perhaps mentally sick and fierce. One time, I asked someone to take the accused to hospital. I don’t know if he was taken.”

Later on being cross examined PW6 said that his brother called Nkonge used to visit the accused often. That Nkonge had told him that the accused was saying that there were some people trying to kill him. So bad was the relationship between PW6 and the accused that when the group of people came from the market place to apprehend the accused, PW6 informed them that they could kill the accused. PW7 Reche stated that he was previously a friend of the accused. He said that the accused used to visit them as a friend. However, he said that he was told by PW6 that the children had not been seen on 10th September 2003. When Reche approached the accused house to inquire about the welfare of the children, the accused, who was standing outside his house ran inside the house and locked himself in. Reche gave the accused some tea and requested the accused to give some of it to the children. The accused responded that the children were sick. Reche saw the two children lying on the bed but on seeing the accused handling a hammer, he ran out of the house. When he ran outside, he informed the chief that the children could have been dead. It is then that the chief got the assistance of the members of public to apprehend the accused. Reche had this to say of the accused:-

“I knew him, have never observed a problem with his mental status. I had been a friend for 3 years. When he was asking for tea, accused (sic) I observed some changes on accused face but I did not know what but (sic) he complained of being hungry.”

On being cross examined, Reche further said about the accused:-

“Accused did not speak. Accused face looked different that day. He had changed.”

PW1 the assistant chief corroborated the evidence of PW6 and 7 in respect of the demeanor of the accused. PW2 was a police officer who went to the scene. He found the accused had already been apprehended by the members of the public. He found the accused children inside the accused house lying on the bed. One child was already dead and the other had an injury on the head and was breathing slowly. The one who was still alive was taken to

Chogoria Mission Hospital. This officer collected a hammer at the scene which had blood stains. The accused had been separated from his wife for 2 years before the incident. On being cross examined, this officer said that the accused was very violent at the scene. That although the accused was tied, he was struggling and was shouting. PW3, also a police officer who also went to the scene said that the accused on being examined was found to be mentally sick. The accused while at the police station continued to make noise. He was given drugs at the police station. The P3 that was produced in relation to the examination of the accused had this to say:-

“Patient brought for MSA in the clinic, he look (sic) a bit emaciated and very unkempt, with swollen foot due to small bruises. He was making a lot of noise.

M.S.A.

Rapport – Easily established. Speech – has flight of ideas and pressure of speech. Mood – very elevated. Orientation – poor. Concentration – poor, memory – poor, abstract reasoning – poor. Thought process – good. Dellusions – present – delusion of grandeur, persecutory.

Perceptual disorder – has been having auditory and visual hallucinations for about 2 years Judgment – poor, insight lacking.

Plan: To be started on treatment

RX (1) Tabs largactil 100 mg tabs x 1/12

(2) Tabs septrin ii BD x 5/7

Opinion:- He has been mentally sick and is not ready to plead.”

PW3 produced the post mortem report which showed that the deceased suffered head injuries and that there was bleeding from the ear. The cause of death was found to be cardiopulmonary arrest due to intracranial hemorrhage. PW5 is the brother of the accused. He was there when Reche saw the accused children lying on the bed. He had this to say about the accused:-

“Accused has never gotten on with our father, he was like a criminal.”

He however said that the accused was not mad. The court found that the accused had a case to answer. In his defence, the accused stated that the deceased and the other child who was alive were his children. On being arrested for this present offence, he said that he was taken to Nyeri Hospital. At that hospital, his father PW6 came and told him that he had killed his daughter the deceased herein. On being asked what happened on the 10th September 2003, he had this to say:-

“I don’t remember. My father came to hospital because I was very sick and told me I killed my child. I was told I killed Kandogo.”

The accused stated that he had no memory of what occurred before he was taken to Nyeri hospital, nor could he recall how the deceased died. He said that he used to be sickly and often took malaria tablets. He suffered with headaches which would lead him to faint and he would then be taken to hospital.

It is clear from both the evidence of the prosecution witnesses and the accused himself that the accused suffered from mental sickness. It is clear that particular on the 11th September 2003 the accused was not behaving normal. Even PW7 Reche who was his friend observed that the accused did not look well on his face. The P3 that was filled by the doctor who examined the accused clearly shows that the accused was suffering from mental sickness. That apart, it is clear that the prosecution in the evidence it adduced did not prove by direct evidence that the accused killed the deceased. The evidence that was adduced against the accused was circumstantial evidence. The accused was said to have been in the house where the deceased was found dead. He had in his possession a hammer which had blood stains. Although the doctor who carried out the post mortem examination stated that he obtained blood from the deceased body for further examination, there was no evidence adduced to the effect that the blood on the hammer was that of the deceased. That apart, I find that the prosecution has proved that the circumstantial evidence adduced was incompatible with the innocence of the accused. The Court of Appeal in the case **Andrew Okoth Simba Vs. Republic** Criminal Appeal Case No. 309 of 2008 referred to circumstantial evidence and had this to say:-

“The case of Kipkering Arap Koske and Kimure Arap Matata [1949] 16 EACA 135 at page 136 gives the standard required to prove a case based on circumstantial evidence. Borrowed from Willis on circumstantial evidence 6th Edition P. 311 the predecessor of this court stated as follows:-

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

The Court then added:-

“The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

Having found that the circumstantial evidence adduced proves the guilt of the accused, and also having found that the accused was mentally sick in accordance to section 166 (1) of the Criminal Procedure Code, I find the accused is guilty of murder of Kandogo Mbae but was insane at the time when he did it. Accordingly, in accordance with section 166 (2) of the Criminal Procedure Code, this court will report this case for the order of the president of this republic. In the meanwhile, I order the accused to be detained at

Mathare Hospital in Nairobi.

Dated and delivered at Meru this 8th day of October 2010.

MARY KASANGO
JUDGE