



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS
Criminal Case 24 of 2007

REPUBLIC

VERSUS

WAFULA KAMUKOTA ACCUSED

JUDGMENT

1. Wafula Wamukota, the accused herein, is charged with 4 counts of the offence of murder

contrary to section 203 and 204 of the Penal Code. The circumstances of the offence were that on the night of 2nd and 3rd June 2007, PC Thomas Kimilu (a house mate of the accused person) as well as his wife, Margaret Nthambi Kivuva, daughters Felista Ndulu Kimilu and Benendeta Ndile Kimilu, were all fatally shot while asleep in their house within Mwingi Police Station lines in Mwingi District. The accused person was arrested as the suspect in the multiple murders and he denied the offences and the evidence before me was as follows;

2. That according to PW1, Sgt Ephantus Mwangi, PW3, Cpl. Jacob Okeng’o, and PW10, PC Apollo Oluoch, all police officers based at Mwingi Police Lines on the material night, they were all asleep when gunshots rung out and they dashed out of their houses. It occurred that the gunshots came from an aluminium structure popularly known as a “Unihut” which was occupied by the accused person and the late Thomas Kimilu. Sgt Mwangi and other officers armed themselves with pistols and while others covered his back, Sgt Mwangi kicked the door of the unihut and went in. He found the accused persons holding a G3 rifle and Sgt Mwangi took it away and ensured that it was safe before proceeding to check on the persons who had been shot. Only Kimilu’s wife was clearly alive and she stated that the accused person had shot them all. The accused person, although injured on the neck, was alive and Sgt Mwangi arranged for the injured to be taken to Mwingi Hospital. Later Kimilu’s wife also died and the accused person was arrested and charged with the four murders.

3. PW6, Alex Muindi Mwandawiro, a fire – arms examiner confirmed that all the cartridges fired at the scene came from a G3 rifle recovered from the accused person.

4. PW8, Dr. Catherine Syengo Mutisya produced a medical report prepared by Dr. Susan Hinga who had assessed the mental status of the accused person on 12.6.2007. It was Dr. Hinga’s findings that “*the accused at the time of the offence revealed a reactive depressive illness*” and this was “*due to the diagnosis of HIV status in December 2006*” and “*there was also a neuro-psychiatric manifestation reported in 10% in HIV – infected persons*”. Dr. Mutisya also noted that at the time of the offence, the accused was mentally incapacitated.

5. The accused person in his defence, stated that he could not recall the incident leading to the charges and that a doctor at Mathari Mental Hospital told him that he had committed the offence, a matter he regretted because the deceased persons lived with him and he had no reason to murder them. He admitted that prior to the incident, he had problems that almost lead to his death twice when he almost drowned in a river and when a motor vehicle almost knocked him at a road block while he was on duty.

6. I have taken into account the evidence on record and I have no doubt at all that on the material night, the accused person armed with a G3 rifle fired into a unihut that he was sharing with all the deceased persons. It is also clear from Dr. Hinga's report dated 12.2.009 (*P.exhibit 10*) that when he was examined on 12.6.2007, the accused person was suffering from "reactive depression (secondary to offence and HIV status)." He was again examined on 28.6.2007 and he was suffering from "major depressive disorder" and the same diagnosis was made on 22.10.2007 and the final diagnosis made was that at the time of the incident, the accused suffered from "neuropsychiatric manifestations of HIV" and Dr. Mutisya added that in about 100 similar cases that she had dealt with, patients commit offences that include "murders that are depressive induced homicides".

7. The implication of all these findings, coupled with the accused person's defence that he has no recollection of the incident of murder would then lead me to determine whether he was legally insane at the time. I say this because section 11 of the Penal Code 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."

8. Further section 12 of the Penal Code provides 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."

9. The onus of proving that he was legally insane in any event, rests on the accused person and Sachdeva J. in *Republic vs Jeremano M'Ngai* [1980] KLR 18 at 20 states as follows:-

"The onus on an accused person to establish insanity is no heavier than on a party in a civil case on whom is laid the burden of proving a particular issue (see Republic vs Noormohamed Kanji [1937] 4 EACE 34, Republic vs Retief [1948] 8 EACA 17, Republic vs Kabande w/o Kihigwe [1948] 15 EACA 135 and Republic vs Mwose w/o Mwiba [1948] 15 EACA 161. Again it has been stated that the burden of proof resting upon an accused person to prove insanity is not as heavy as the burden of proof resting upon the prosecution to prove its case beyond reasonable doubt. It is, generally speaking, sufficient if he produces such a preponderance of evidence as to show that the conclusion that he was insane at the time of the offence is substantially, the most probably of the possible views of the facts (see Republic vs Kachinga [1946] 13 EACA 135)."

10. In this case, in fact the accused person called no evidence to establish insanity but Mr. Konya for the accused person submitted that Dr. Hinga's evidence has not been challenged. As I understand it, the general rule is that the evidence as to the accused's state of mind should be called by the defence and not the prosecution.- see *M'Ngai (supra)* and *Muswi s/o Musele vs Republic* [1956] 23 EACA 622. However each case must be looked at in its special circumstances and since the prosecution has not moved to negative the claim and evidence of insanity, I will have to look at the evidence on record in a wholistic sense and in the wider interests of justice.

11. Having carefully read Dr. Hinga's report and Dr. Mutisya's evidence, I can only conclude that the accused person's HIV status induced both a murderous and a suicidal streak in him

which led to the fatal shooting of the deceased persons and his near suicidal shot on himself.

Although only 10% of recorded cases of HIV positive patients exhibit that streak, the accused person falls in that category and I can only conclude that he was legally insane at the time of the offence.

12. Like Sachdeva J. in M'Ngai (ibid) I can only conclude that the accused person is guilty of the four counts of murder but was insane when he did the acts (see also Jama Warsama vs Republic [1950] 17 EACA 122) and therefore I shall invoke section 166 (1) (b) of the Criminal Procedure Code and this case shall be reported for the order of His Excellency the President and in the meantime the accused person shall be kept in custody.

12. Orders accordingly.

Dated and delivered at Machakos this 29th day of July 2009.

Isaac Lenaola
Judge

In the presence of; Mr. Konya for accused
Mr. Omirera for Republic

Isaac Lenaola
Judge