



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**Criminal Case 1 of 1998**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**BENARD KARIUKI NAMU ..... ACCUSED**

**JUDGMENT**

Bernard Kariuki Namu, the accused, was charged with the offence of murder contrary to Section 203 read with Section 204 of the Penal Code that on 18.09.97 at Gichiche village in Embu District within Eastern Province, murdered NAMU MBUI (hereinafter called 'deceased').

Right from the beginning there was doubt as to the accused's mental status. After examination and treatment he was found fit to plead and conduct his defence on 09.04.02. The Attorney General indicated his intention to proceed and continue with prosecution of the accused. However, by 04.03.04 the Court (Justice Khamoni) ordered that the accused be sent for examination by a psychiatrist and a physician and treatment as necessary.

On 28.11.06 trial commenced when PW 1 gave evidence as to cause of death. PW 2 also gave evidence. He was the Assistant Chief of Runyenjes. His evidence was that he was informed by Njeru Njagi that accused had killed his father. He went to the home of deceased and found the deceased outside his home with blood flowing from his head. The body was burnt on right side. He looked like he was dead.

There were people trying to put out the fire. He took the suspect into his custody, he got a vehicle to take the deceased to hospital where he was pronounced dead and body taken to the mortuary. Later, he took accused to the Police station. He had left the fimbo which he had seen at the scene at home

**PW 3** was aged about 14 years in 1997. At the time of giving evidence he was 21 years. She remembers that on the material day she was with her brother Wilson and her Grandfather Namu. There was a quarrel, Bernard went to the kitchen and got out grass thatch which he put on grandfather and lit the fire with paraffin and grass. Then Jacob Namu came to help. People came and helped to put off the fire. The grandfather was severely burnt and died in hospital same day. Bernard, accused, was escorted to police station.

On cross - examination, she said there had been exchange of words between deceased and accused. She also saw the jembe stick being removed from the jembe but she did not see accused hitting deceased with the stick.

**PW 4** was Jacob Namu a farmer who was on that day in the shamba collecting fodder when he heard

screams coming from home of deceased. He went there and found a big fire. He started putting out the fire. He saw deceased two metres away from the fire and he saw the accused father, (deceased), burning.

**PW 5**, Wilson Muriithi was at home who witnessed the accused quarreling with the deceased and hitting him with a stick in the legs and head and making fire with some dry grass and burning the deceased. After this, the accused ran away.

**PW 6** was a daughter of deceased and was the one who identified the body of deceased at the mortuary for purpose of postmortem examination.

The evidence of the Government Analyst showed that the blood examined on the items analysed could have been from deceased or accused as both were of blood 'Group O.'

The prosecution closed its case on 29.01.2007. On 07.06.2007 Counsel for the accused reported to Court that he was unable to communicate with accused on his defence as the accused is mentally unstable. The Court made an order for accused to be examined by a Psychiatrist at Mathare Mental Hospital. The Mathare Mental Hospital sent a report dated 29.04.2008 certifying that the accused is fit to defend himself in this case.

It was on 09.06.08 that the accused was able to make an unsworn statement in his defence. He stated,

***"I am not denying what was said in court against me his (deceased) coat was burnt, he fell down as he was drunk. His coat was burnt. I am the one who burnt the coat. At that time I was sick but now I have recovered."***

According to the postmortem report, the clothes of deceased were partly burnt. There were burns on the back of 9 % superficial burns of 18 %. And the head had a depressed skull fracture measuring 6 x 4 cm.

The opinion of the doctor was that the death was caused by severe head injury. This opinion confirms the evidence adduced by witnesses that the deceased was injured in the head and that his body was exposed to fire.

The unsworn statement of the deceased suggests that he was sick when the incident occurred. This is confirmed by the many times he has been sent to Mathare for Psychiatric examination. It is clear therefore the accused suffers from mental illness from time to time. The important evidence should prove that when the incident to which he admits occurred he was mentally fit. Although every person is presumed to be and to have been of sound mind at any time which comes in question until the contrary is proved, there is in present case evidence to show that the accused may not have been sane at the material time due to his mental illness and he may not have been able to understand what he was doing.

No evidence was adduced as to his mental capacity at the time of the incident. The lack of such evidence creates a doubt as whether or not the accused was sane at the time of the incident. He says he was sick. It is therefore my finding that although the accused admits the evidence adduced by prosecution against him, there is no evidence that when the incident occurred he was mentally sane. I therefore acquit him of the charge against him. I also order that since he is now treated of his mental illness that he shall be released and set at liberty forthwith.

**DATED** this 31st of July 2008

**J. N. KHAMINWA**

**JUDGE**