



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL CASE 27 OF 2005

REPUBLICPROSECUTOR

VERSUS

DICKSON MJAPE MWAKUPHAACCUSED

J U D G M E N T

Dickson Mjape Mwakupha is before this court on information of the Attorney General facing a charge of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the offence are that on the nights of 25th and 26th July 2005 at about 3.00 p.m. at Buguta Village, Buguta sub-location in the then Tatia/Taveta District within Coast Province murdered Machochi Mjape.

The prosecution lined up the evidence of seven witnesses to support its case. Loice Dzame (P.W.1) told this court that on 25th July 2005, she, her daughters Mwaka Mjape and Machochi Mjape, (the deceased) together with Dickson Mjape Mwakupha were at home. At 2.00 a.m. P.W.1 said she was woken up by the accused. The accused demanded to know the sex of the child she was carrying in her womb. The accused inserted his hand into the private parts of P.W.1. He took P.W.1 outside the house where he repeated the ordeal but only stopped when P.W.1 screamed for help. By then the children were asleep. P.W.1 said the accused threatened to kill her or one of the children if he did not establish the sex of the child she was carrying in her womb. He ordered P.W.1 to smear soil on her body. At this juncture, P.W.1 said she managed to disengage herself and ran for her dear life. She sought for refuge in the house of her neighbour, George Mwachuchu (P.W.4) who in turn took her to the area assistant chief James Nyale (P.W.3). The area assistant Chief directed P.W.1 and P.W.4 to book a report at Buguta A.P.'s camp.

At Buguta, P.W.1 and P.W.4 found A.P.C. John Mollen who accompanied them to the home of P.W.1 where they found the accused holding one of his daughters. He released the said child when he saw P.W.1, P.W.4 and A.P.C. John Mollen approaching the homestead. The Administration Police arrested the accused. P.W.1 entered her house but did not find the deceased.

P.W.1 and P.W.4 got information that the deceased had been killed and her body dropped into the pit latrine within the homestead of P.W.1. A.P.C. John Mollen is said to have flashed his torch inside the pit latrine where he saw the deceased's body. The police demolished the toilet in the morning and retrieved the deceased's body. A big blood stained stone was found next to the toilet where the deceased's body was found. P.C. John Wambua (P.W.5) a scene of crime officer visited the homestead where he took photographs of the toilet, deceased's body and the stone. P.W.5 produced the photographs as exhibits in evidence. I.P. Willie Mutai (P.W.6) the investigating officer visited the scene where he rearrested the accused. P.W.6 sent the accused for mental examination by the provincial Psychiatrist. Dr. Charles Mwangombe (P.W.7), the Provincial Psychiatrist who examined the accused produced the mental report

on the accused dated 17th August 2005. The report showed that the accused was normal and fit to stand trial. P.w.7 said that at the time of his examination he did not see any sign of mental illness. He did not also detect that the accused had previously suffered of a mental disease. The doctor (P.W. 7), did not rule out the possibility that the accused could have been mentally ill at the time of committing the offence. P.W.6 produced the postmortem report under Section 77 of the Evidence Act because the witness who performed the autopsy was out of the country having gone for further studies. Doctor Mutwiwa, a medical officer based at Voi noted in the post mortem report dated 5th August 2005 that the deceased was aged 2¹/₂ years at the time of her death. The doctor found that the deceased suffered a fractured skull and that there was a depression along parietor temporal bones. He formed the opinion that the cause of death was due to head injury.

When placed on his defence, the accused gave an unsworn statement. The accused admitted being present at home during the nights of 25th and 26th July 2005. He said he woke up at night feeling unwell. He claimed he lit a match put on the lantern lamp but the lamp was put off by his wife several times. The accused claimed a quarrel arose between him and his wife and this prompted his wife to run away from the matrimonial home in the wee hours of the night. He claimed his wife (P.W.1) came back accompanied by boys who senselessly beat him up after which he was arrested, tied with a rope and left to stay in the cold until the area assistant chief came. He said when the assistant chief came he was questioned about the death of his child. He claimed that he was shocked to learn of the death of the child as he did not know the child had died. In short, the accused's defence is that he was not in a good mental state to know what was happening that particular time.

At the end of the evidence both Mr. Monda, the learned Senior State Counsel and Mr. Kaburu, learned advocate for the accused made submissions. It is the submission of Mr. Monda, that the prosecution had proved its case to the required standard of beyond reasonable doubt. The learned Senior State Counsel argued that the necessary ingredients i.e. *mens rea* and *actus reus* were established by the prosecution.

On the other hand Mr. Kaburu is of the view that the aforesaid ingredients have not been established. The learned advocate argued that there was no malice aforethought. It is his submission that the accused did not know what was happening.

I have considered the evidence tendered by both sides and the able submissions presented by learned counsels. In order for the offence of murder to be proved two main ingredients must be established: First, the element of *actus reus* and Secondly, the element of *Mens rea*. There is no doubt that the accused was at home in the nights of 25th and 26th July 2005,. It is also not disputed that the accused and his wife (P.W.1) had a quarrel that night. According to P.W.1, the accused wanted to determine the sex of the child in her womb. She had been threatened with dire consequences by the accused if he did not meet his objective. P.W.1 had to flee her home fearing that the accused may terminate her pregnancy. She left for the home of George Mwachuchu (P.W.4) who in turn took her to the home of the area assistant chief. As she fled, she left behind her two children namely: Mwaka Mjape and Machocho Mjape (deceased) who were asleep. When she came back she found the accused holding Mwaka Mjape. She did not see Machocho Mjape (deceased). The deceased's body was later found dropped in the family toilet. According to the accused, P.W. 1 fled the matrimonial home because they had a quarrel over whether or not to leave a lantern lamp on. From the evidence tendered it is clear that the deceased was alive and asleep when P.W.1 fled home. The accused was the only adult person left behind. The accused has said he did not know what happened. He has alluded that he could have been mentally sick. There is no direct evidence to show that the accused actually murdered the deceased. The evidence relied upon to link the accused is circumstantial. The law is well settled that where the prosecution's case relies on circumstantial evidence, the following principles must be applied: First, the circumstances from which the inference of guilt is sought to be drawn must be established by cogent and credible evidence. Secondly, those circumstances should unerringly point to the guilt of the accused and Thirdly, when the said circumstances are taken cumulatively, they 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 no one else. In this case, it is obvious the accused was at home while the deceased and her other sibling were asleep. His wife (P.W.1) had fled the home after they had a quarrel. I am convinced that the accused had

the opportunity to commit the offence. He was found holding Mwaka Mjape but released her when he saw P.W.1 and P.W.4 approach the homestead. I am convinced the element of *actus reus* was established.

The other element which must be proved is *mensrea*. In other words the prosecution must establish malice aforethought on the part of the accused. The penal code under section 206 clearly enumerates the circumstances which will be established to prove malice aforethought. One of the circumstances is knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person. The evidence on record show that a huge stone with blood stains was found next to the toilet where the deceased's body was dropped. It is said that the stone was used to

crash the head of the deceased. According to the post mortem report, the deceased's skull was fractured. I can only infer that the accused used the stone to hit the deceased. He had knowledge or he ought to have known that such a stone could cause death or grievous harm on the deceased. For the above reason I find that the accused had malice aforethought. Of course I am aware that the blood-stained store was not subjected to examination. That notwithstanding I am convinced that the same was used to crash the deceased's head.

The remaining issue which came out as a peripheral issue is whether or not the accused was sane. Doctor Charles Mwangombe (P.W.7) the Psychiatrist who examined the mental state of the accused came to the conclusion that the accused was mentally fit to stand for trial. He told this court that he had no previous history of the mental status of the accused. There was no witness who gave evidence showing that the accused had been previously treated for mental illness at any time.

In the end, I am convinced that the defence raised by the accused did not displace the prosecution's case. It would appear the accused wanted to raise the defence of insanity but unfortunately there is strong medical evidence given by Dr. Mwangombe (P.W.7) indicating otherwise. I see no merit in the defence. I dismiss the same. I find the accused guilty of the offence of murder. He is convicted and sentenced to suffer death in the manner authorized by law.

Dated and delivered and Mombasa this 27th day of October 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Ondari for the state and in the presence of the Accused and in the absence of Mr. Kaburu for Accused.