



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Criminal Case 75 of 2003**

REPUBLIC APPLICANT

VERSUS

WILLIAM KIPKOSGEI SEWEREI ACCUSED

JUDGMENT

The accused WILLIAM KIPKOSGEI SEWEREI stands charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 25th day of September, 2003 at Ndanai farm in Uasin Gishu District of the Rift Valley Province murdered BRENDA JEPTARUS.

The prosecution called seven (7) witnesses in support of their case. Serah Chelimo Kosgei testified as PW1. Her evidence was that she lived at Ndanai in Ainabkoi location, Ainabkoi division, and was a farmer. The deceased was her daughter and the accused was her husband.

On the 25.9.2003 at about 3.00 a.m. the accused became sick. He woke up and started running away. Then he came back into the house but locked her outside. She woke up her daughter called Carol and told her to open the door because the accused, her husband, had locked her out of the house. When the door was opened the accused came with stones and wanted to stone her. When she asked him why he wanted to hit her, he said sorry, but then tried to strangle her. She overpowered him, and got into the house. The accused then ran to the gate.

Then he came back from the gate and got into the house. One of their daughters called Loice screamed. The accused came in and searched for the witness. He got hold of her and knocked her down. She asked Carol to scream and Carol went out and screamed, and the accused left her and went out for Carol. Carol went out and woke up the boys from another house.

When the accused came back, he found that the witness had locked the door of the house. Then he hit the door with stones. He then followed Carol but did not get her. He entered the house of the boys and then came back.

The witness came out of the window of the house and hid in the farm. She then heard the screams of the younger boy called Kiptotich. She thought that the accused had strangled the young boy. She hid in the farm for two hours. Then the male children Andrew and Kiptotich ran into the maize. Carol screamed for neighbours to come and help.

The witness went to her mother in law's house. Her mother in law was not there. This was at about 6.00 a.m. She then heard the voice of the two cows. She went home and found Carol, who said that the accused was now asleep. They milked the cows and then she went to call a person called Musa to come and persuade the accused to go to hospital for treatment. Then Loice came and told her that the accused had woken up. Musa told her to go ahead.

On the way she met her son Kiptotich who told her that the deceased was screaming in the house and the accused was in that house. She got shocked and went and asked a neighbour called Esther to go quickly and call Musa. Esther ran to Musa's house, who came shortly. Musa led to the house and they met the accused at the door.

When Musa asked the accused whether there was any problem, the accused said that there was no problem. He also asked Musa why he had come to his house early as he did not like people coming to his house that early. He also asked Musa whether he had come to poison him. There was a youngman who had followed Musa and the accused started chasing him. Musa then remarked that the accused was in a bad state and he did not know how to assist.

After a while, the accused child started crying in the house. When the witness went in and got hold of the child who was 4 years old, the deceased protested. Then Musa told the accused to leave the child alone, as the child was hungry. She took the child to the kitchen and gave her some tea. Thereafter, when the other children had come from taking the cows from the dip, she told them to take the child (the deceased)

elsewhere and go and take tea there, as their father (the accused) was sick. She took tea to the house where the accused and Musa were. The accused then ran out of the house and went to the window. He told Musa to tell her to get out of the house. At that time, the accused had two stones in his hands and was biting his lips.

She then came out of the room where she was hiding. She sat down and took some tea, though the accused did not like the idea of her taking tea. Then the accused told her to go out of the house. He asked where she was when the children attacked him. He was still holding stones and biting his lips. They talked the issue at a neighbour's house. Then she went into the farm.

While at the farm, she heard voices as if the children were quarrelling. That was about 9.00 a.m. to 10.00 a.m. She told Loice to bring the deceased, who was a young child, to her. Loice told her that the accused had refused with the child. She told Loice to go and persuade the accused, who was her father, to release the child. The accused threatened Loice with a machete (panga). He chased Loice who jumped over the fence. The accused also chased his son Kipkirui and tried to slash him with a panga. The deceased followed Loice. They met Musa and he offered to help carry the deceased. Musa started running with the deceased, but the accused chased them. Musa got scared as the accused was carrying a panga. Musa left the deceased on the ground. Then the accused picked the deceased, he cut some trees and, as neighbours started arriving, he started cutting the deceased with a panga. She actually saw the accused cut the deceased with a panga. She was just about 50 meters away. The people who had gathered started screaming. They tried to save the deceased by throwing stones and soil out the accused but in vain.

An uncle of the accused called the police. Before the police came, members of the public had arrested the accused. The accused cut the deceased's body and placed it at the house of his mother.

It was her evidence that the accused had been to hospital previously for his illness. He had later however refused to take medicine.

In cross-examination she stated that when the accused was hospitalized before the day of the incident, the hospital officials said that he was suffering from cerebral malaria. He used to keep quiet and also talk alone. She did not know that the accused was a mad man, but she thought that he was a mad man because of his behaviour on the fateful day. The accused had been admitted in hospital between 5.2.2003 and 25.2.2003. That was a period of almost three weeks. On the fateful day some of the children went to a neighbour's house, while three children remained behind. Musa left the child behind because the accused had caught up with them. She did not hear the children attacking the accused. She contended that if the parents of the accused had come to assist in taking the accused to hospital, the killing would have been avoided. She did not see the accused leak the panga.

MUSA KIBIWOT KIGEN testified at PW2. His evidence was that he resided at Ndanai in Ainabkoi. He knew the accused, as he was married to the accused's sister.

On 25.9.2003 in the morning, the wife of the accused called Sarah came and told him to go and persuade the accused to take some medicine, as the accused was experiencing mental problems. They went together. On arrival they met the accused holding the deceased (a child). They told him to release the child as the child was hungry. Initially he did not respond, but later he released the child.

Initially the accused was not talking. However, after a while he looked around and said that he was seeing cows and funny things. He then said that they should go to a neighbour. They went to a neighbour's house. However, at the neighbour's house the accused did not say anything. After a while the accused said that they should go back home, and they did so. Then the accused armed himself with stones and told him to go away, as the accused had given him a wife. The accused's wife ran away. When the accused realized that his wife had run away he also started running. The witness told a daughter of the accused to take the children away. Three children had remained in the house. The accused ordered the children to remove their things from the house. The witness went on for about 50 metres and then heard screams from the house of the accused. He ran there. At the gate he saw two children running. The deceased was climbing a fence. He picked the deceased child. When he looked behind he saw the accused running towards him with a panga. Then he heard neighbours say that he should leave the child. Therefore he placed the child on the ground. The accused came and got hold of the child by the left hand. Then he said that he would kill, and started cutting the child on the head. He continued cutting the child and then took the child to a place with trees and cut the child's neck. It was not possible to help and save the child. Then the accused took the child to the house of his mother. He threw the panga at the dog and armed himself with stones. He threw the stones and then members of the public arrested him. A report was then made to the police who came and arrested the accused and took away the body of the deceased child.

In cross-examination he stated that the accused was under treatment for a mental problem. However, it was wrong for him to kill the child. The brothers of the accused left and did not assist or report the problem. If they had reported, the child would not have been killed. He was aware that previously the accused had been admitted at Moi Teaching and Referral hospital due to mental illness.

LOICE KOSGEI testified as PW3. Her evidence was that she was a girl aged about 15 years attending Kamural Primary School. She knew the deceased Brenda Cheptarus who was her sister. The accused William Kipkosgei was her father.

On 25.9.2003 at about 4.00 a.m. their mother told them that their father (the accused) had started getting sick. They woke up and opened the house. Their mother entered the house and their father followed her into the house and started pulling her. They screamed and went and woke up their brothers, who came and told their father to leave their mother alone. Their father then went to the main house to sleep. He slept until 7.00 a.m. Then they prepared some tea. Thereafter their father called for a sister of hers called Carol. Carol was not present. Then she heard the deceased crying. Her mother went to call a neighbour called Musa. When her mother came with Musa, the accused said that he did not want anybody in his compound. The accused came out with a panga. He followed Loice with the panga. She ran away and the deceased followed her. Musa then went and picked the deceased and started running with her. The deceased followed them and told Musa to leave the child (the deceased). Musa left the deceased. The accused picked the deceased and cut her on the head. After the deceased (Brenda) died the accused took her to her grandmother's house. Thereafter members of the public came and overpowered her

father and tied him up. The police came later and took the accused and the deceased's body.

In cross-examination she stated that the accused chased people around. He appeared to be like a madman. He had been sick earlier and was admitted to a hospital at Eldoret. It was malaria which had also affected his head.

KIPKEMBOI LELEI testified as PW4. Her evidence was that she resided at Ndanai and was a farmer.

On 25.9.2003 at about 12 noon he had driven cows to the river when he heard screams. He was the brother of the accused.

He ran to where the screams came from. He found Musa running with a child. It was the child of William Sewerei. William Sewerei was chasing Musa while carrying a panga. Musa then left the child and ran away. Then Musa cut the child then went to a place with trees and cut the child's neck. They did not restrain the accused because of fear. Then the accused took the child and laid her at the door of his mother. He threw the panga at a dog. Then the public arrested him and tied him with ropes.

He thought that William, the accused was sick. He appeared to be mentally unwell. Previously he was sick and was taken to Moi Referral Hospital. He identified the accused in the dock by pointing at him.

In cross examination he stated that after cutting the deceased, the accused licked the panga. That was not a usual thing.

ISAYA KEMBOI LAGAT testified as PW5. His evidence was that he was a watchman at Soliat School in Ndanai. He is a brother of William (the accused).

On 25.9.2003 at 1.00 p.m. he came from duty and went home. The Serah came and informed him that William was sick and that they did not sleep the whole night. When he went to the home of Serah, he was informed that William had killed a child with a panga.

On 29.9.2003 he identified the body of the deceased to the postmortem doctor.

In cross examination he stated that Serah had told him in the morning of the fateful day that William was not well. He went there but William (the accused) told him to go away and he feared and went away. He had, on an earlier date, taken William (the accused) to Moi Referral Hospital Eldoret where he was confined for sometime with mad people.

No.42564 CPL. SULEMAN CHERUIYOT testified as PW6. His evidence was that he was stationed at Tarakwa police station, on driving duties.

On 25.9.2003 at 11.30 a.m. he received a report on the cell phone that there was a murder incident at Ndanai farm in Burnt Forest area.

He proceeded to the scene and found a large crowd. The accused was already arrested by members of the public and tied with a rope. It appeared that he was beaten and had a cut on his face. He found a dead body lying outside a grass thatched house which, he later learnt, was the house of the mother of the accused.

He uncovered the body which was covered with a blanket. The body had multiple injuries on the head and the neck was slit open. He was handed over the panga which appeared to have blood stains. He arrested the accused and took the body of the deceased and the panga to Tarakwa police station. He produced the panga as exhibit 1. Then he took the body to Moi Teaching and Referral Hospital.

On 29.9.2003 post mortem examination was done by Prof. Kozolva who handed over the postmortem form to him. On 2.10.2003 he took the accused to Moi Teaching and Referral Hospital for mental examination. He was examined by Dr. Omar who handed over the medical examination P3 form to him. He identified the accused in court.

He testified that before he took the body to the mortuary, he took the scenes of crime personnel to the scene. They took photographs of the body and the tree stump where the neck of the deceased was slit. That was done by an inspector Ngetich of scenes of crime section.

In cross examination he stated that when he sent the accused for medical examination, the doctor noted that the accused was not fit to stand trial.

DR. OMAR JUMA ALY testified as PW7. He testified that he was a medical doctor MBCHB and MMED (Psychiatry). He was the Chief Psychiatrist at Moi Teaching and Referral hospital Eldoret. He started practicing medicine in 1980.

He examined William Sewerei on 02.10.2003. The patient was escorted by PC Suleman Cheruiyot. He observed a swollen left eye. A dirty wound was on the front, and a vertical wound was on the left side of the head. The injuries were less than one week old and the degree of injury was harm. He found the patient to have a mental illness and not fit to plead. He produced the P3 form as exhibit 2.

On 26.05.2004 he again medically examined the patient. He observed evidence of alcohol ingestion and mental illness. However, the patient was fit to plead. He made a written report which he produced as exhibit 3. He also produced the postmortem form on the deceased, which was filled by Dr. Kozolva under Section 77(1) of the Evidence Act. (Mr. Chepkwony stated that he did not have an objection on the production of the postmortem form in the absence of Prof. Kozlova).

He therefore produced the postmortem report on the deceased Brenda Jeptarus done on 29.09.03. The cause of death was multiple wounds on the body and all over the neck. There was fracture of underlying bones, the larynx was severed, and the windpipe (trachea) and great vessels of the neck were severed. The injuries were caused by a heavy sharp object.

In cross examination he reiterated his report that the accused was mentally ill. That mental illness can be recurrent. Initially accused was unfit to plead. The second medical report showed that he was mentally ill, but knew of his surroundings, and was therefore fit to plead. The accused was probably treated.

In re-examination he stated that the fitness to plead was the summary of his entire examination.

That was the prosecution case.

In his defence, the accused elected to keep quiet. He however, called one witness in his defence. The witness was David Cheruiyot DW1.

DW1 testified that he resided at Kondoo farm in Burnt Forest area. He was a farmer. He knew the accused William Kipkosgei Sewerei who was his older brother. The accused had ten children, one of whom was Brenda Cheptarus, who was his young daughter.

The accused became sick in 2002 and was taken to hospital and treated for mental illness. He was treated at Moi Teaching and Referral hospital, then discharged home for six months. He became mentally ill again in February 2003. This time they tied him and took him to Moi Teaching and Referral hospital. He was admitted for about 20 days and they then took him home to continue taking drugs. However, after sometime he refused to take the drugs saying that he was well. However, on 24.9.2003 his mother came and told him that his brother was sick. On the 25.9.2003 he prepared to go to his brother's home. On the way he was told that his brother was quarreling some people. Then when he reached near, he was told that his brother had killed a child. When he arrived at the scene he found his brother the accused already tied with ropes. His opinion was that his brother was mad and that he did not know what he was doing.

In cross examination he stated that when he arrived at the scene his brother (the accused) recognized him. He was however talking a lot. Earlier he had been given drugs from the hospital but he later refused to take the same and said that he was fine. They did not take him to hospital, which might have been an error.

In re-examination he stated that it was the doctor who decided to release the accused from hospital.

That was the defence case.

At the end of the case for the prosecution and defence, the defence counsel Mr. Chepkwony and the State Counsel Mr. Omutelema addressed me. Mr Chepkwony submitted that the accused was not mentally well and had no intention to kill or commit a felony. It was his contention that the accused was mentally unwell when the incident occurred. That he had earlier on been admitted to Moi Teaching and Referral Hospital. The P3 form filled after the incident also confirmed that the accused was mentally ill, and this was produced as exhibit 2. Both the P3 form signed on 2.10.2003 and another medical report signed on 26.5.2004 show that the accused was mentally ill. The only difference is that the P3 form signed on 26.5.2004 showed that the mental illness had subsided and the accused was fit to plead. He urged me to take into consideration the provisions of Section 166 of the Criminal Procedure Code.

The Principal State Counsel Mr. Omutelema submitted that the State had proved malice aforethought in terms of Section 206(a) of the Penal Code. The evidence was on record from the witnesses that the accused was very violent, for sometime before killing the deceased. That was evidence of intention to kill. He contended that the mere fact that someone had suffered insanity previously did not mean that he was insane at the time of committing the offence. The accused's action in telling his brother (DW1) to take him to hospital showed that he knew what he was doing. The burden was on the defence to prove insanity on the balance of probabilities. They had not. However, if the court found the accused insane, it should proceed in accordance with Section 166 of the Criminal Procedure Code.

After summing up to the assessors, they returned a unanimous opinion that the accused was guilty of manslaughter, as he was mentally ill when the act was done.

The accused has been charged with the murder of BRENDA JEPTARUS. The burden is on the prosecution to prove all the elements of the offence beyond any reasonable doubt. The prosecution has to prove that the deceased died. It has to prove that it was the accused who caused the death. Thirdly, the prosecution has to prove that the death was caused with malice aforethought. I have to consider first of all whether BRENDA JEPTARUS is dead.

There is evidence from eyewitnesses that the deceased was dead with injuries at her grandmothers house on 25.9.2003. The police came and took the body from there. They took the body to Moi Teaching and Referral hospital. On 29th October 2003 Prof. Kozlova conducted a postmortem on the body which was identified by ISAAH LAGAT and SELINA KIMUTAI. The doctor found multiple injuries. She found the cause of death to be multiple chopping all over the head and the neck with fracture of the underlying bones, and severing of the larynx,

trachea and great blood vessel with a heavy sharp object. It is therefore my finding that, indeed, BRENDA JEPTARUS died. It is also my finding that the cause of death was as established in the postmortem form filled by Prof. Kozlova.

Was the deceased's death caused by the accused person? The prosecution witnesses who were eye witnesses PW1, PW2 and others testified that the accused cut the deceased several times in broad day light, in the presence of members of the public. He used a panga to cut the deceased severally and to slit her neck. The deceased was in fact the accused's own daughter aged about 4 years. The accused then went and laid the deceased's body near the house of his mother. These are witnesses who knew the accused well. It was also during broad daylight on that day, about 10.00 a.m. There was no possibility of mistaken identity. The accused was arrested by members of the public on the spot. The accused chose to keep quiet in his defence. That is his right to do so. He called one witness who merely testified to his sickness of the mind. From the evidence on record, I find that the prosecution has proved beyond any reasonable doubt that the accused killed the deceased, by cutting her severally and slitting her neck with a panga.

Was the killing with malice aforethought? The prosecution holds that there was intention to kill. The defence holds that the accused was of unsound mind at the time that, he committed the offence.

The evidence on record is that the accused had previously been admitted to hospital in February 2003 and was diagnosed with a mental condition. He was later discharged and given drugs to take at home. He discontinued taking the drugs, but no one took him to hospital again. In the night before the killing, he started harassing his wife and children at 2.00 a.m. Even the intervention of his brother in law PW2 did not help things. In the end, in the presence of members of the public, he slashed his own young daughter of 4 years several times on the head and slit her throat, thus killing her instantaneously. That was on 25.9.2006. He was medically examined on 2.10.2003. Dr. Omar Aly (PW7) found him not fit to plead. He found him to have mental illness. He was again examined on 26.5.2004 by the same Dr. Omar Aly. He was still found to be mentally ill, but now fit to plead.

If an accused person relies on a defence of insanity the burden is on him to prove insanity. The burden is discharged by proving on a balance of probabilities that it seemed more likely due to mental disease, that 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 intention to have killed the deceased. SEC MARI – vs – REPUBLIC [1985] KLR 710.

I have considered the evidence before me. Both the evidence for the prosecution and that of the defence shows that the accused had mental illness. However, for that mental illness to remove guilty intention, it has to be a disease of the mind that makes the accused either not to know what he was doing or not to know that what he was doing was wrong at the time of committing the offence. The conduct of the accused has been demonstrated by the evidence of witnesses who testified. It is for the prosecution to prove malice aforethought.

My assessment of the evidence is that through the prosecution tried very hard to prove that the accused killed the deceased intentionally, it did not do so. Their own evidence attests to the fact that the accused was mentally ill. That the accused's conduct was out of the ordinary. The deceased must have suffered a very painful death. She was also a very young and innocent child. However, from the evidence on record, I have no choice than to find that it is more likely due to mental disease, that the accused either did not know what he was doing at the material time, or that he did not know that what he was doing was wrong.

I therefore find that the accused was insane at the time of commission of the offence. I therefore make a special verdict that while the accused is guilty of the act charged, he was insane when he did it in terms of Section 166(1) of the Criminal Procedure Code (Cap. 75 Laws of Kenya

Consequently, by virtue of Section 166(2) of the Criminal Procedure Code, I order that the case be reported for the orders of H.E the President and meanwhile I order that the accused be detained in Eldoret Prison, at which prison such further specialist treatment in custody as is necessary may be arranged.

It is so ordered.

Dated and delivered at Eldoret this 24th day of November 2006.

George Dulu

Ag. Judge