



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.264 OF 2003

REPUBLIC PROSECUTOR

VERSUS

MTAKULI MAKILE ACCUSED

JUDGMENT

The Accused herein is charged with an offence of murder. The particulars of charge is that on 16th January, 1995 at Kahawa Garrison, Nairobi he murdered Kipkorir Rotich.

It is trite law that to prove that a person has murdered another human being, malice aforethought is an essential ingredient.

I have observed this ingredient simply because the deceased has raised defence of insanity or mental incapability at the time of commission of this crime.

It is amply on the record that it was the accused person who inflicted fatal injuries on the deceased person. Apart from clear and credible evidence of PW.1 John Okimo Oluma, PW.4 Charles Chebet and PW.6 James Kipkoech Rotich that they saw the accused inflicting injuries on the deceased person, the Defence Counsel has in his submissions agreed to the veracity of their evidence. The Accused, deceased and the aforesaid three witnesses were Army Officers and were living in Kahawa Army Barracks.

Thus I can safely find that it was the accused who inflicted stab injuries with a knife on the deceased in Kahawa Barracks on 16th January, 1995. His body was identified appropriately by PW.2 (Alex Bett) and PW.3 (David Cheruiyot Rotich). As per post mortem report, the cause of death is shown to be massive haemothorax due to tear of the right side lung and heart consistent with sharp object. I can unmistakably find that knife is a sharp object.

PW.5 James Maithya, also an Army Officer at material time, went to medical Reception Centre and heard the doctors attending the deceased pronouncing the deceased dead. He saw three stab wounds near his ribs and on right hand.

It is on evidence (PW.1, PW.4 and PW.6) that they, as colleagues were not aware of any dispute or misunderstanding between the Accused and the deceased. All of them also stated that they did not talk to the Accused after the event while PW.4 added that it was not possible to do so.

The Defence case was opened by sworn testimony of the Accused which was interrupted by this court giving orders to have the Accused examined and to put him in custody of Mathare Hospital.

In his incomplete sworn testimony the Accused stated that he recalled having been in Army in the year 1995 but did not remember any of his colleagues. He denied that he killed the deceased but reiterated that it was the Army which killed him. Then he incidentally recalled what happened to him after the arrest. He gave time and duration of his removal to Hospital from police custody. He remembered names of police officer who arrested him, the Hon. Judges who remanded him to Mathare Hospital and names of doctors who treated him.

Dr. Nelly who gave expert Medical evidence and who observed and treated him after my order of 3rd December, 2004, testified inter alia that in his mental condition of schizophrenia, the Accused can forget events which occurred. She described the symptoms of schizophrenia and stated that it is a severe and chronic mental illness characterized by mental delusions and hallucinations and bizarre behaviour with marked deterioration in social function.

She also testified on medical records of the Accused held at Mathare Hospital since 30th March, 1995. During his first stay up to 1996, his mental status was found to be mute because the Accused simply refused to answer any questions from doctors. She classified muteness as organic one and an elective one. According to her a person cannot pretend for such a long time and added that even if that could be the case, it is a case of mental disorder.

After clarifying that presently after the treatment the Accused is in perfect mental health without any psychotic features, she recommended that she would not release the Accused to the society as he needed to be constantly observed.

She of course strengthened her opinion from the chequered history of the Accused in the Hospital and also from his present clinical features like posture, level of hygiene, his changing moods, non disclosure of emotions. She also stated that each patient exhibits different behaviour and that the Accused had not exhibited delusions or hallucinations. She finally stressed that her diagnosis is definite and that the Accused in her opinion was not pretending. Although she did not mention whether the Accused was unable to understand what he was doing at the time of commission of the act, in my view, it was not possible for her to give the opinion on the issue. I advisedly say so, because she was not the one who treated or observed him during earlier admissions at the hospital. It can also be noted, and has to be done so, that almost immediately after appointment before the court, he was ordered to be admitted to the Mathare Hospital and even after his release (I am not told under what circumstances) from the custody and after his re-arrest he was sent to Mathare Hospital. I also had to make similar orders after I saw his demeanour in witness box. Eventually the court heard the medical evidence on the Accused mental condition of the Accused.

The Defence has thus raised a defence of insanity which is a complete defence as per provisions of Section 12 of Penal Code (Cap 63). Section 12 stipulates and I quote:

“Section 12 - 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.”

Because of the nature of the defence as per law (Section 111 of Evidence Act (Cap. 80) has placed the burden of proof of this defence on the accused. Thus it is an exception to the general principle of Criminal law that the burden to prove the charge beyond reasonable doubt against the Accused is squarely on the Prosecution and does not shift to the Accused.

Section 11 of the Penal Code stipulates and I quote:

“Section 11 – 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.”

By dint of the said provision and that of Section 111 of the Evidence Act, the burden to establish this defence is on the accused.

If so, what is the standard of proof which the accused is required to discharge? It is trite that the standard of proof is not as high as is placed on the prosecution to prove guilt of the accused. What an accused person is expected to do, is to call evidence which will show on balance of probability that at the time of commission of the act he was suffering from a disease which affected his mind and he was incapable of understanding what he was doing or of knowing that he ought not to do the act or to make the omission.

(see **Goerge Ngugi Mungai –v- Republic (Cr. Appeal No.122 of 2000 Unreported)** and also **Maranda M'Aririmi –V- Republic (1982 – 88) I K.A.R. 161**).

When it is required to prove on balance of probability, what is really required to be shown is that it could be probable and a reasonable doubt is created in mind of the court about its probability. In other words court can say that it could be true.

From the case of the Prosecution, nothing is shown that the Accused had any dispute with the deceased when he inflicted injuries on the deceased which in fact he did.

It was done in broad day light in presence of all the Army cadets living in barracks. The Accused was arrested immediately and his behaviour after his arrest was also suggested some kind of abnormality. In March 1995, he was admitted in Mathare Hospital under order of the High Court. The law as to committal proceedings was in force and thus I could safely state that the order of committal to hospital was given almost immediately after his appearance before the High Court.

He stayed in Hospital for almost two years. While in Hospital he was noncommunicative and I do agree with the opinion of Dr. Nelly (DW.2) that the Accused was not pretending. A normal person cannot remain mute for such a long time even under fear of prosecution of a criminal trial, which in any event he faced eventually after being admitted severally in Mathare Hospital.

Apart from the medical evidence on record, I have personally observed the Accused person since beginning of trial which was on 9th November, 2004. He has been insisting during trial to let him go home and being generally unkept, and with changing moods. His medical history also speaks for itself.

All these factors are sufficient to create a reasonable doubt in my mind that it could be true or it could be probable that the Accused committed an act of killing when he was suffering from disease which affected his mind and that he did not understand or was incapable of knowing that he ought not to do the act with which he is charged.

With these observation I enter my finding that the Accused is in reality guilty of the charge of murder as leveled against him, but he did commit this offence under the disease affecting his mind and thus was insane when he committed the act.

Because of this special finding which I made under provisions of Section 166(1) of the Criminal Procedure Code, I direct that the case be reported for the order of the President.

In the meantime, I direct that the Accused be placed in custody of Doctor-incharge of Mathare Hospital.

Right of Appeal within 14 days.

The Assessors have also agreed that the Accused was mentally incapable when he committed the act.

Dated and delivered at Nairobi this 17th day of May, 2005.

K.H. RAWAL

JUDGE

17.5.2005