



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAKURU
CIVIL DIVISION
CRIMINAL CASE 9 OF 2002

NAOMI MUTHONI KOILEKEN.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

The accused, Naomi Muthoni Koileken, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the night of 27th and 28th March 2000, at Ndingi sub-location, Ndingi village in Narok District, the accused murdered Kahuhu Koileken (hereinafter referred to as the deceased). When the accused was examined by Dr Otula on the 21st of June 2000, it was established that the accused was suffering from a mental illness diagnosed as schizophrenia.

The accused was therefore, then, found to be mentally unfit to stand trial. She was referred to Mathare Mental Hospital where she was under treatment for a couple of years. Finally on the 30th of January 2004, the accused was passed mentally fit to stand trial. She pleaded not guilty to charge. The prosecution called a total of six witnesses to establish its case on the charge of murder against the accused.

PW1 Dr Carey Francis Otula testified that, while at Narok District Hospital, where he was then a medical officer of health, he performed a post-mortem on the body of Kahuhu Koileken on the 3rd of April 2000. He observed that the body was of an African male adult of an uncertainable age. He was of good nutritional status. The body had started decomposing. His clothes were blood stained. There was a cut wound on the head on the occipital skull. At the back of the head there was a depressed skull fracture.

He observed that a force was applied to depress the skull inward. When he opened the skull, PW1 saw that there was intracranial haemorrhage. He was of the opinion that the cause of death of the deceased was cardiac arrest due to intracranial haemorrhage. He prepared a post mortem report which was produced as prosecution's exhibit No. 1. PW1 was of the opinion that the likely weapon used was a sharp object. PW2 Isaac Sangale Koileken, a son to the accused and the deceased testified that on the 27th March 2000, at about 7.00 pm he attended overnight prayers at a place called Sirbibi. He left his parents, the accused and the deceased at home. He slept at a friend's place and returned home at about 6.00 a.m. Outside the door to their home, PW2 saw blood.

He was shocked. He walked outside the house and identified the accused's footprints. He saw the footprints on the ground were zigzag. He opened the door and went inside the house. He saw his father's (the deceased) snuff box on the ground. The deceased was not in the house. His shoes were in the house. He saw blood on the place where the deceased used to sleep. He saw drops of blood which had left a trail.

He followed the blood trail to a bush nearby. He saw his father lying on the ground. He was dead. He had a head injury. He recalled the body was about sixty metres from the homestead. Upon making this discovery, PW2 went and informed his brother (PW3).

A report was made to Nairagie Enkare police station. The police visited the scene and took the body of the deceased to Narok District Hospital Mortuary. PW2 did not see the accused again until two months later when the accused was arrested. PW2 conceded that he could not be certain if someone else had visited the homestead on the night that he was away. PW2 reiterated that the footprints he saw outside their house were the size of his mother's feet. They were bare feet footprints. PW2 recalled that he was shocked when he saw the drops of blood. He confirmed that there was no struggle in the place where the body of the deceased was found laying.

When PW2 went to the house, he saw that the door had been locked from the outside with a latch. He also saw signs on the ground indicating that the body of the deceased had been dragged on the ground to a place in the bush where the body of the deceased was found. PW2 reiterated that he saw the deceased two months after the incident when the accused was arrested by the police of Nairagie Enkare Police Station. PW2 testified that the accused had suffered mental illness since 1989. At one time the accused had attempted to strangle someone but the person had escaped. The accused had been treated for her mental illness at various hospitals but her condition had not permanently stabilized. Her condition alternated between improvement and deterioration at any one point in time.

PW3 John Mwangi Koileken, a son to the deceased and the accused testified that the accused became mentally ill in 1989. Her condition worsened in 1990. At that time, the accused disappeared from home for three days. PW3 was able to trace her and subsequently took her to Nakuru Provincial General Hospital where she was admitted. She was later discharged and taken home. At home, the accused burnt down two houses, one belonging to one of PW3's brother (who is now deceased) and her own kitchen.

PW3 testified that the accused was not mentally stable. PW3 lived some distance from where the deceased, the accused and PW1 used to live. He was informed of the death of the deceased on the 28th of March 2000 at about 10.00 am by PW1. PW3 made a report to the police at Nairagie Enkare. He visited the scene with the police. He entered the house and saw bloodstains. There was a blood trail which led to the bush where the body of the deceased was found. PW3 saw the body of the deceased. It had an injury on its head (left side). PW3 found an axe inside the house with blood stains. PW3 identified the axe which was later produced in court as prosecution's exhibit No. 2.

PW3 did not see the accused at the scene. He saw the accused on the 18th of May 2000 at Nairagie Enkare. He informed the police who arrested her. PW3 testified that he was certain that it was the accused who had killed the deceased because of her previous conduct and her mental illness. PW3 recalled that the blood stained axe was found inside the house, under the bed. He was emphatic that the axe was found in the house and not near the place that the body of the deceased was found. He recalled that when he first saw the axe, it had an handle and was not dissimilar to the axe without an handle which was produced in court as prosecution's exhibit No. 2. PW3's belief that the accused had killed the deceased was reinforced by the accused's disappearing act after the incident. He testified that the accused had come back home because she was mentally unstable.

PW4 Corporal James Mbwika (P/F No 43531) was at Narok District Hospital Mortuary on the 3rd of April 2000 when the post mortem was performed on the body of the deceased by PW1. He was with PW3 when the post mortem was performed. He took charge of the post mortem report after the same had been duly filled by PW1. PW5 Police Constable Samuel Lubisia (P/F No. 55234) was at the Nairagie Enkare Police Station on cell sentry duties on the 20th of May 2000 when Police Constable Richard Langat (P/F No. 33789), who is now deceased, brought the accused and booked her for the charge of murder. The accused had been arrested by the said late P.C. Richard Langat.

PW6 Inspector Joshua Murema (P/F No. 18954) testified that on the 28th of March 2000 he visited Nairagie Enkare Police Station in the company of Chief Inspector Muthengi. They were on a routine visit when they were informed that a report of murder had been made. PW6 went to the scene of where the

body of the deceased was retrieved. He was led to the scene by PW3. When he arrived at the house of the deceased, he saw several items scattered on the floor. There were signs indicating that something had been dragged on the ground for about twenty metres. PW6 saw the ground was disturbed. He saw the body of the deceased in the bush covered with vegetation. The deceased had sustained a deep cut wound on his head.

PW6 was informed by PW2 and PW3 that they had suspected the accused for killing the deceased due to her mental illness which had persisted for several years. PW6 went back to the house and discovered an axe besides the bed. PW3 produced the axe in evidence as prosecution's exhibit No. 2. The police tried to trace the accused in vain. Three months later the accused was arrested at Nairagie Enkare and taken to Narok Police Station where she was charged with the current offence. PW6 conceded that he had charged the accused based on the information that he had received from PW2 and PW3, the sons of the accused.

PW6 reiterated that he recovered the axe from inside the house of the deceased. PW6 was emphatic that the axe produced as prosecution exhibit No. 2 could have been used to kill the deceased, because it was blood stained when he had recovered it from the crime scene. PW6 conceded that he did not get any evidence during his investigations to establish that the accused had handled the axe. The said axe was not dusted for finger prints.

At the close of the prosecution's case, this court ruled that the prosecution had established a prima facie case to enable the accused to be put on her defence. The accused opted to make an unsworn statement in her defence. The accused denied that she had killed the deceased. She denied that she was a person of unsound mind. She thanked the people who took her to Mathare Hospital for treatment because at the time of testifying before court she had recovered from her illness.

Miss Magana, Learned Counsel for the accused and Mr Koech, Learned State Counsel made submissions at the close of the defence case urging this court either to discharge the accused (on the part of Miss Magana) or to convict the accused (on the part of Mr Koech). I have considered the said submissions made. The issue for determination by this court is whether the prosecution has established to the required standard the charge of murder facing the accused. This court is alive to the legal requirement that the burden of proving the guilt of an accused, is in most circumstances, on the prosecution. This court is mandated to consider the evidence offered by the prosecution to determine whether or not the charge had been proved. It is only then that the court can look at the defence offered by the accused.

The evidence offered by the prosecution in its bid to prove the charge of murder against the accused is circumstantial evidence. There was no direct evidence linking the accused to the death of deceased. As Miss Magana rightly pointed out, to prove the charge of murder on circumstantial evidence the inculpatory facts must be incompatible with the innocence of an accused and incapable upon any other reasonable hypothesis than that of guilt (R vs Kipkering Arap Koske & Anor 16 E.A.C.A. 135).

The court of appeal held in *Mwangi vs Republic* [1983]KLR at page 531 that: "In *Simoni Musoke v. R.* [1958]E.A. 715 the predecessor of this court said: 'It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances that would weaken or destroy the inference'" What is the prosecution's circumstantial evidence against the accused in this? PW1, a son to the accused and the deceased testified that on the 27th of March 2000 at about 7.00 pm he went to an overnight prayer meeting in the neighbourhood. He left the deceased and the accused, his parents, at home. The accused and the deceased were the only two people who were left in the house. When PW1 returned home the following day at about 6.00 am, he found the house locked from the outside with a latch. He also saw drops of blood on the ground at the entrance to the house. He saw footprints.

The footprints were similar to the footprints of his mother, the accused. PW1 was certain that the footprints were the accused's. The footprints appeared on the ground in a zigzag manner. PW2 retraced his steps back to the house of his parents. On entering the house, he did not see his father. He saw his father's snuffbox and shoes. He also saw drops of blood where the deceased used to sleep. He saw blood splattered on the ground as if someone had dragged something on the ground. PW1 then decided to

follow the blood trail. It led into a bush. About sixty metres from the homestead, PW2 found the body of the deceased. The deceased had a head injury.

PW1 informed PW2. PW3 visited the scene in the company of PW6. They both saw the body of the deceased. When they entered the house, they found a bloodstained axe near the bed where the deceased used to sleep. The accused was nowhere to be seen. Both PW1 and PW2 suspected the accused to have killed the deceased. PW2 and PW3 were certain that it was the accused who had fatally injured the deceased because of the previous conduct of the accused.

The accused, according to both PW2 and PW3, became mentally sick in the year 1989. Her condition worsened in 1990 that she required hospitalisation. Over the years, the accused had variously undergone treatment at the Rift Valley Provincial General Hospital, Nakuru and at the Mathare Hospital. PW2 testified that the accused's mental condition was unpredictable; sometimes she was well. But other times she was unwell and mentally unstable. During this period, the accused exhibited aggressive behaviour. PW2 and PW3 gave instances where the accused attempted to strangle someone when in unstable mental condition. She also burnt down the house of her son and her kitchen in one of those unstable moments.

The accused had a proclivity for making disappearance acts when in the said state of mind. PW2 and PW3 concluded that it was the accused, their mother, who had killed the deceased, their father, in a moment of mental instability. When the accused was first arrested, (when she had resurfaced after disappearing for three months) she was examined by Dr Otula who formed the opinion that the accused was a schizophrenic (i.e. suffering from a disease of the mind). Having evaluated the evidence adduced by the prosecution, it is the finding of this court that the prosecution has established that it is the accused who killed the deceased, when not in control of her mental faculties. No one else could have harmed the deceased.

Nothing was stolen from the house of the deceased. Indeed when PW2 went back home in the morning of the 28th of March 2000, he found nothing untoward except for the fact that his father and mother were missing. The accused had an opportunity to kill the deceased. The accused's previous conduct is also a pointer to the fact that the accused killed the deceased. PW2 and PW3 testified that the accused developed violent tendencies when she became afflicted by the mental disease that she was suffering from.

At two previous occasions, she had attempted to strangle someone and had burnt down the house of his son and her own kitchen. The fact that the deceased disappeared after the act is further proof that the accused killed the deceased. I further hold that the accused was insane when she killed the deceased. In the circumstances of this case, I therefore enter a special finding under Section 166(1) of the Criminal Procedure Code that the accused is guilty but insane.

She was not in control of her mental faculties when she committed the offence. The three assessors who heard this murder trial with this court all entered a verdict that the accused had killed the deceased, but did so unintentionally, as she was not in control of her mental capacity. I agree with their finding. The accused, having been declared to be guilty but insane is hereby ordered kept in prison custody pending further orders of the President to which this court has made a report of the special finding of guilty but insane.

It is so ordered.

DATED at NAKURU this 13th day of July 2005.

L. KIMARU

JUDGE