



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

Criminal Case 206 of 2003

REPUBLIC APPLICANT

VERSUS

COSMAS NDUNGU KIHARA..... RESPONDENT

JUDGMENT

The accused person Cosmas Ndungu Kihara is charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap. 63 Laws of Kenya). The particulars of offence in information dated 22nd October, 2003 stipulates that on 22nd September, 2003 the accused person, at Wangige market in Kiambu district in Central Province, murdered Penninah Wairimu Njuguna.

The version of the prosecution case, from evidence of its witnesses, is that the accused was working under Daniel Njoroge Njeri (PW6) to supply water to nearby residents in Wangige area. Daniel Njoroge Wainaina (PW3) was accused's co-worker. The deceased was one of their customers.

On the material day i.e. 22nd September, 2003 at around 10.00 a.m. PW3 and the Accused were near the homestead of the deceased. PW3 entered the homestead of the deceased to supply the water to her leaving the deceased outside with other cart and drums of water. When PW3 was approaching the house of the deceased, he saw the accused rolling another drum of water which went downhill into the farm. That was unusual and thus PW3 went behind him and held him while the drum has already fell in a ditch in the farm. When he asked the accused the latter simply looked at him and started going up towards the direction of the deceased's house. Pw3 went after him and asked the crowd gathered to disburse as he thought ***"something was amiss"*** with the accused.

PW5 Francis Kariuki Karanja also testified to similar effect. He saw the accused following PW3 with a drum which rolled down in a ditch in the farm. When PW3 got hold of the accused and when they both started coming up, PW3 told all of them, who had gathered, to leave as it seemed Ndungu (the accused) was not well and that he was a sick person. He also added and I quote ***"I saw the accused as being different than what I used to see him"***.

PW4 Rose Wairinge Chege whose child was also hit by the accused during the skirmish also stated that on her way back home from market around 11.00 a.m., she saw the accused with a drum as if ***"it was not in his control"*** and saw it rolled down in the farm.

In his further testimony PW3 testified that when the accused was coming up PW3 followed him and the accused was chasing PW5 and others and then the accused hit the door of the deceased's home which broke, the deceased fell down. The accused then hit the deceased with a piece of wood presumably from the pieces of broken door. PW3 got hold of the accused and pushed him out of the deceased's house. This

fact has also been testified by PW5. When he was out, the accused then went rushing towards people gathered and hit a small child. The crowd then got hold of him and overpowered him.

PW4 also testified that the accused hit her child outside the deceased's house. She testified that after the accused came up followed by PW1, he went to the house of the deceased taking a sack from her and hit a child. When she screamed the accused threw a stick at her. She ran inside her sister's house. While in there, she heard noise like iron sheets being hit. When she came out, she saw the accused with a stick on her hand being held by Njoroge (PW3) who was also trying to pull him out. She started screaming and people gathered.

This witness is a daughter of the deceased so is PW2. PW1 is her son. The last two were informed that their mother (the deceased) was hit by the accused. The deceased was taken to Thogoto Hospital first and then transferred to Kenyatta National Hospital. They described her injury on the head and also testified that after one week she died in the hospital. PC Gabriel Mweu also visited the deceased at Kenyatta National Hospital in ward 5A also saw her with her head bandaged. He also testified that she was not in position to talk to him.

PW6 Daniel Njoroge Njeri the employer of the accused and PW3 was informed of the incident by PW3. When he arrived at the scene he found the accused seriously beaten by members of the public and he then arranged to take him to Kenyatta National Hospital.

Dr. Jane Wasike (PW7) produced the post mortem report prepared and signed by Dr. Maundu who had since retired. She was so allowed after the application under Sec. 77 and Sec. 33 of the Evidence Act (Cap. 80 Laws of Kenya) was successfully made by the learned state counsel. The learned defence counsel also did not object to the production of post mortem report by this witness.

The cause of death as per Dr. Maundu was heard injury, fractured skull, brain hemorrhage due to blunt object.

From the evidence as to deceased's death, it is proved beyond reasonable doubt that she met her death from the injuries suffered by her on 22nd September, 2003. From the evidence of prosecution witnesses like PW3, Pw4 and PW5 it is also proved by the prosecution that she received those injuries after she was attacked by the accused. The evidence of these witnesses are sufficiently corroborated in all material aspects and I also found them to be truthful as well as unbiased witnesses. They testified what they saw on that fateful morning.

P.C Gabriel Mweu PW8 was one of the investigating officers in this case and produced P3 (Ex. 4) form duly filled in by Dr. Kungu who checked the accused before he was arraigned.

He was allowed to do so after an application to that effect was made by the learned state counsel, not objected to by the learned defence counsel and was allowed by me after due consideration under Sec. 77 and Sec. 33 of the Evidence Act (Cap. 80 Laws of Kenya).

The P3 form showed that the accused had history of mental illness and was mentally unstable. The accused was allowed to take his plea only after undergoing treatment at Mathare hospital. Dr. Ngugi Gatere in his report had found that the accused was suffering from drug induced psychotic disorder but due to medication he was in remission and was allowed to take his plea. The accused still is under treatment for this ailment.

The learned defence counsel had submitted that from the evidence led by the prosecution witnesses, it is amply shown that the accused was under influence of the disease and was incapable of understanding what he was doing.

The accused had also stated in his unsworn statement that around 10.00 a.m. on the material day, he lost consciousness and did not remember what happened.

Be that as it may, it is on record that the witnesses present found the action and behaviour of the accused as abnormal. I have already stated that PW3 warned the people gathered to leave/disburse as there was something amiss with the accused at that time. All the witnesses had categorically stated (including deceased's children) that they were not aware of any indifference or dispute between the accused and the deceased. From the evidence it is shown that at the material time the accused charged anyone who came to his sight including a small child.

This behaviour, which is posited from the case of the prosecution coupled with medical reports, does point to some mental illness suffered by the accused. I am aware that the burden to prove that he was suffering from disease affecting his mind is on the accused person. But the burden to prove that fact is not as onerous as beyond reasonable doubt. It is on balance of probability.

In this case I find that this burden is further eased by the evidence led by the prosecution witnesses. They said that what the accused did was not normal.

In view thereof, I can easily find, and do hereby find that the accused was suffering from a disease affecting his mind.

I can further find also that through that disease, the accused was incapable of understanding the consequences of his action and was not knowing that he ought not to have killed the deceased. **[See Chemagong v. Republic (1984) KLR 611].**

With this findings on facts and laws I do find that it was the accused who killed the deceased but looking to the circumstances under which he did so, I do enter a special finding that the accused acted as charged but that he was insane and incapable of knowing or understanding the consequences of his act and therefore order that the case be reported for the order of His Excellency the President of Kenya and meanwhile the accused be kept at Mathare hospital.

Dated and signed at Nairobi this 19th day of December, 2005.

K.H RAWAL

JUDGE

19.12.05