



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL CASE NO 7 OF 2000

REPUBLIC PROSECUTOR

VERSUS

JOHN RATEMO GUTO ACCUSED

JUDGMENT

The Accused in the case before this court is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that the Accused on the 3rd day of February, 1999 at Nyagacho estate in Kericho District of Rift Valley Province murdered Priscilla Chepkurui Ng'eno.

Murder is defined in Section 203 of the Penal code as follows:

“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”

Malice is further defined as follows:

- (a) A intention to cause the death of the deceased or any other person or**
- (b) An intention to cause greivous harm to the deceased or any other person. It is immaterial that the person targeted is not the one who is finally killed or injured**
- (c) An intention to commit a felony.**

The evidence presented before this court includes the following.

PW 1, Richard Nyakenogo Manyura, a Regional Manager with Co-operative Insurance Company based in Nakuru testified that on the material day he was fast asleep in his house when at about 6.00 am he heard someone crying and screaming outside his house. He went outside the house and found a woman lying outside his door, bleeding in the head and unable to speak. It was the deceased, a milk seller who used to supply him with milk. According to him, he was the first person to see her. She was bleeding on the head, lying unconscious, and unable to speak. He called PW 9, a neighbour, to help him take the deceased to hospital.

PW 9's testimony is crucial. He is the only one who claims to have seen the Accused beat up the deceased. There are no other eye witnesses. PW 9 testified that at about 5.45 am on the material date he was sleeping in his house when he heard noise outside. He went out and saw the accused beating a woman, and then immediately running away. He said he was the first to see her. In cross-examination he admitted that in his statement made to the police after the incident he never told the police he saw the Accused beat deceased – only that he saw him run away.

PW 2, Juliana Chepkoriri Too told the court that she used to sell milk with the deceased and was with her that morning. After selling milk they parted company. Later she was informed that a woman was found lying down bleeding by the roadside. She went and found the deceased unconscious.

She accompanied three men who took her to the hospital.

PW 3 and PW 4 (Lukia Ohinga and Hassan Kiprerich respectively) did not see the Accused beat the deceased but later found a crowd beating the accused for his alleged involvement in the death of the deceased. PW 4 a village elder, told the court that the accused confessed to him at that time that he had beaten the deceased with a piece of wood which he identified in Court. Asked why he killed the deceased, the accused simply said he did not know. According to this witness, the Accused did not look normal.

PW 5 Rebman Tanui, an Assistant Chief of the village corroborated PW 4's evidence. The accused confessed to him hitting the deceased with a wooden bar for no apparent reason. PW 6, the Chief, corroborated PW 5's evidence and said that the Accused repeatedly told him "If I had time I would have killed her" and that he looked confused.

PW 10, PC Julius Murungi of Kericho Police Station, testified that he took over the investigation from PC Omali who had been transferred to Transmara. He produced the wooden bar, the murder weapon, as an exhibit.

PW 11, Dr. Stephen Okech, a medical doctor at Kericho District Hospital testified on behalf of Dr Laikong who examined the Accused person for mental assessment. He stated that the accused did not show any abnormal behaviour or sign of mental instability at the time of the examination. He was epileptic and on medication at the time of examination. The doctor found him fit to stand trial and asked him to continue taking medication for epilepsy. Dr Stephen Okech also testified on behalf of Dr Thome who conducted a post-mortem on the deceased's body, and who had concluded that the deceased died due to cardiopulmonary arrest due to severe head injury arising from the assault.

In his unsworn defence, the accused said he had been sick for a long time and did not remember anything. DW 1 Lawrence Ombati Guto, brother of the accused testified that the accused was sick and had suffered from epilepsy since 1995. He testified that his brother, who lived in the same estate had a sickness of the mind; was forgetful; suffered from epilepsy and constantly fell down. He had taken him to the hospital on many occasions. He said that when his brother had an epileptic attack, he would collapse, and would then forget what he did. Often times he would become violent.

This Court notes that the Accused had had two such epileptic attacks during the course of this trial, forcing the Court to adjourn the trial on each occasion.

Accordingly, the defence submitted that the accused did not kill the deceased. But if he did, he was suffering from a mental condition and he could not be held responsible for his actions.

In his reply, Mr. Mutuku, for the State, argued that, the defence cannot claim the defence of insanity and at the same time deny the act of killing. If they claim insanity they should say that the Accused did the Act, but was insane.

Mr. Mutuku submitted that there was clear evidence to show that the Accused killed the deceased. He cited the testimony of PW 3, 5, 6 and 9 who came to the scene immediately after the assault. As these witnesses were there waiting, the Accused returned and admitted that he was the one who had killed the

deceased. He was arrested, beaten up by members of the public, and then he led the officers to the recovery of the murder weapon. The post-mortem showed that death arose from head injury.

I agree with the State Counsel's submission that the Accused indeed killed the deceased. This finding is based on all the evidence before this Court, including the admission made by the Accused before witnesses.

The issue is whether the Accused had the mental capacity to be responsible for his act, in which case Section 166 Criminal Procedure Code should apply. The Section states as follows:

“Where an act or omission is charged against a person as an offence, and is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.”

Medical evidence before this Court indicates that the accused was suffering from epilepsy at the material time. His behaviour at the time indicates that he could not have possibly formed the mental intent to kill the deceased.

The assessors have unanimously returned a verdict of not guilty by reason of insanity. The defence of insanity is contained in Section 12 of the Penal Code, and, in order to establish this, it is necessary for the Accused to prove that at the time he committed the offence he was:

- (a) suffering from a disease affecting his mind
- (b) through such disease he was incapable of
 - (i) understanding what he was doing or
 - (ii) of knowing that he ought not to kill the deceased person. *See Muswi s/o Musele vs Republic* (1956) EACA 622 .

Accepting Dr Laikong's evidence, as I do, I find that there did exist a probability that at the time of the killing, the Accused, was suffering from a disease of his mind or insanity as a result of epilepsy. As I have indicated before, his behaviour was strange and abnormal as witnessed by PW 3, PW 4 and PW 5.

I, therefore, make a special finding under Section 166 (1) of the Criminal Procedure Code to the effect that the Accused committed the Act of killing but was insane at the time. Pursuant to Section 166 (2), I order that the accused be detained in prison custody pending the order of His Excellency the President.

Dated and delivered at Kericho this 28th day of July, 2004.

ALNASHIR VISRAM

JUDGE