



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO.11 OF 1998

REPUBLIC PROSECUTOR

VERSUS

ALI BEMBUZI MWAPOMBE ACCUSED

JUDGMENT

Ali Bembuzi Mwapombe stands charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya in that on 18/4/1995 at Ziwani Village, Tsimba Location in Kwale District in Coast Province he murdered Hamadi Bembuzu Mwapombe hereinafter called the deceased.

The evidence shows that the deceased was the brother of the accused.

PW.2, Abembuzi Mwapombe is the father of the accused, deceased and other children. PW.1 Bidu Omari is his grandson. PW2 testified that his daughter Halima who was residing in Mombasa came home to Ziwani accompanied by his brother the accused. This was on 13/4/95. She told the father(PW2) that the accused was coming home to build a house for himself. Infact the accused had already erected on land a house which he burnt. The father said he would allocate him a piece of land upon which to erect his house. The two stayed at home for a few days. The accused was sleeping in the house of the father(PW2). On 18/4/1995 at about 6.30 according to PW.1, the father left the home to buy food nearby. He left accused in the house with his brother the deceased. PW.1 Bidii had also left the home. It was only the accused and deceased alone in the house. They were not quarrelling but were talking together. PW.1 says the deceased was drinking beer.

PW.1 was away for about 45 minutes to attend to a call of nature in the bush as there was no toilet in the compound and PW.2 says he returned after a little while. When PW.1 came back he found inside father's house accused was slaughtering(cutting) deceased. Deceased was sleeping on the floor and the accused was cutting the deceased's neck. He was about to finish severing the head from the body of the deceased using a knife which was exhibited. The house had 2 rooms. PW.1 saw the accused go into the other room and come out with a black plastic bag. He put in the head of the deceased in the bag. After obtaining by threat Shs.30/- from PW.1 accused took the bag and went away. PW.1 saw as the accused took the bag and went away. PW.1 reported the matter to the others and they went to call the police who came and viewed the body. This incident took place at evening and PW.1 says there was sufficient sunlight to enable him to see what was happening. The evidence of the PW.1 is the most direct witness. PW.2 the father returned from the shop and found the house empty. He thought the floor of the house was wet. He went to another person's (PW.5) house nearby, returned with a torch and after looking inside the house he found on the floor the body of the deceased without the head. He was to see the head later at the Police

Station in the bag carried by the accused. He identified the head as that of his son Hamadi (deceased). He was also shown the knife which was used to cut the head.

The other part of the prosecution evidence is that the accused after placing the deceased head in the plastic bag he was thereafter found at the door of witness number 4 – that is PW.4 Tibor Gaal a white man Architect and Honorary Consul for Austria.

His (PW4) evidence is that on 18/4/1995 at about 9.00 p.m. as he was preparing to go to bed at his home in Shelly Beach, Likoni he was called by one of his servants who told him that the accused was outside and wanted to see him. He testified that the accused used to work for him as unskilled labourer, but had left employment for about a year prior to this night. The witness went to see the accused and found him standing by the kitchen door. The accused told him that he had something in the bag for him(PW4) upon which the witness lifted the plastic bag and put it down again. He was reluctant to open it and tried to persuade the accused to go away with it. However accused opened the bag and told this witness that it was a human head. The witness suggested they go to police and the accused calmly agreed. They put the plastic bag in the boot of his (PW4) car and drove to police station at Likoni. The accused had a knife which he showed this witness. At the police Station PW.4 told the story. The police took the bag and informed him that it was a human head. PW.6 is the officer who received the head with the accused and the knife with blood stains. He took the head and knife and locked the accused in the cells. Later he called Kwale Police who came and collected accused with the head and knife.

Evidence has already been given how the head was identified at the Kwale Police Station by the witness PW2 the father. Thereafter the body was examined for purpose of a post mortem report by PW.8 medical doctor who testified that death was due to massive hemorrhage. He was shown the knife found with accused and he said the knife could have been used to sever the head from the body as the cut was through cutlage (soft bone). He also explained that there was an injury at the back of the neck but no other injuries and this he said, shows deceased could have fallen down or was hit by a blunt object, but he was positive that cause of death was from bleeding on severed area.

The prosecution did call the evidence of PW.7 Dr. Maina, Psychiatrist who examined the accused person for the purposes of plea. This doctor confirmed that upon his examination he found the accused in a fit mental state able to understand and to make a plea. However the prosecution was not able to call the investigation officer Insp. Munene who had died before giving evidence. The exhibits were produced by PW.6 who was acquainted with this case.

On the part of the accused who was represented by Mr. Abubakar Advocate he gave unsworn statement and called Dr. Charles Mwangome, a consultant Psychiartist. His (accused) statement is that he did not remember what happened when his brother died. He heard of the death in court when his father PW.2 gave evidence in this case. Accused's witness Dr. Mwangome, examined the accused on 12.3.2002. On history of accused he said he was informed by the accused that the accused had been stabbed in the chest and hospitalized at Coast General Hospital for several days. He could not remember the circumstances leading to his being thus assaulted. Accused also said that in 1994 he burnt his house and lost all his property, but he does not remember why he burnt the house. Accused also said he killed his brother (deceased), but prior to that his relationship with his brother was cordial. However he said he cannot remember why he did so. Accused also gave a story of seeking treatment from traditional medicenman during 1993-1994. He also claimed there was history of insanity in his family – his brother suffered similar problems but he is now well. After hearing all this the Doctor made a report which he produced in his evidence and his opinion is stated as follows:-

- i) He is fit to plead.
- ii) There is a high likelihood that the accused was of unsound mind at the time he committed the crime.

It is to be observed that the prosecution witnesses PW.1, PW.2 and PW.3, his close relatives confirmed that some time the accused had been assaulted and the matter was reported to police. The father PW.2

also stated that the accused was having mental problems and he was attended to at Kaloleni. PW.3 his sister who was residing with accused at Chaani said she had not noticed any abnormality on the accused, her brother, she said "During growing up I cannot say anything about him. I never saw him sick". Also his former employer PW.4 testified that for the 2 years he had been in the employment he had no trouble with him. He did not see anything peculiar with him. But giving evidence he said "I could not fathom this behavior. I put it as an action of a madman". PW.5 who said he was a cousin of the accused testified that he never saw anything abnormal about accused. Notwithstanding the above the defence of the accused is that he was insane when he committed the offence. The defence of insanity is available in circumstances stated under Section 166 CPC thus:-

"Where an act or omission is charged against a person as an offence, and it 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."

In the present case the accused behaved in a manner to suggest that on the night he committed the offence he was not acting like a normal person. The manner in which he cut off his brother's head and put it in a plastic bag and carried it in public transport (he took 30/- from PW.1 for transport) and how he knocked at the door of his ex employer (PW.4) and how he offered the head as a gift, and then the way he explained the matter at the police station in a calm manner in front of authority all this might leave one to think the accused was insane at the material time. However this is to be weighed against medical evidence. Dr. Mwangome the psychiatrist seemed uncertain on cross examination. He said that there is a possibility that the accused is mentally impaired. He could be in a state he could not remember. In his written report he said that there is a high likelihood that the accused was of unsound mind at the time he committed the crime.

In addition there is the evidence of the close members of family including his father. They all said they have never seen him behaving like an insane person except that they could not explain why he burnt his house. As stated earlier the defence of insanity if accepted exempts the accused person from suffering the sentence provided by law for the offence of murder. The accused is then placed in custody awaiting the direction of the President as provided by law.

On the issue of whether the accused is guilty or not it is to be observed that the evidence shows that the accused was alone with the deceased in the house. Accused was found cutting off the head of the deceased thereby severing it from the rest of the body. He definitely took the head and carried it to the home of PW.4 a distance which required public transport and thereafter to the police station. At no time did the accused deny having killed his brother. All he said is that he does not remember what happened on that night.

I find the prosecution evidence overwhelming in the circumstances and that the case against accused has been proved beyond reasonable doubt. However his conduct as stated above and the medical evidence suggests that the accused may have been insane at the time he killed his brother. In the case of **Jama Warsamar –vs- Rex 1950 Vol. 17 EACA Page 122** "there was evidence that the appellant had been moody for some considerable time before the killing. There is evidence that after the killing he stabbed himself, cupped his hands and drank his own blood, that he squeezed the blood out of his clothing and drank it and that he smeared his face with his own blood after going round in narrow circles." There was no motive for the crime. The court found that the accused had discharged his burden of proof on balance of probability as required under Section 12 Penal Code. In the present case the conduct of the accused at the time surrounding the committing the crime and immediately thereafter suggest that he was not sane.

There was also no motive for committing this crime. In the circumstances although I am not bound by assessors opinions I agree with their opinion.

I find the accused guilty and convict him of the act charged but insane at the time and I order that the accused be detained in custody during the pleasure of the President of Republic of Kenya.

Dated this 30th Day of May, 2002.

Right of appeal 14 days.

J.
COMMISSIONER OF ASSIZE

KHAMINWA

Read in presence of Gumo State Counsel Abubakar for accused, Accused person in open court.

J.
COMMISSIONER OF ASSIZE

KHAMINWA