



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 3 OF 1999**

**REPUBLIC.....PROSECUTOR**

**=V E R S U S=**

**AMANI DAVID DENA.....ACCUSED**

**J U D G M E N T**

The charge facing the Accused person in this case is Murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap.63 Laws of Kenya. Under Section 203:

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

The particulars of the charge

**“AMANI DAVID DENA:**

***On the 2 nd day of November, 1992 at about 6 a.m. at Kinani Village Kaloleni Location within Kilifi District of the Coast Province, murdered SALAMA DENA”.***

Only 6 witnesses were called to prove that charge. They may be briefly reviewed to keep them and their evidence in focus: **PW.1: IP. MICHAEL MUREITHI MWANIKI** (IP. Mwaniki) who was a Police Sergeant in November 1992 and was manning the Kaloleni Police Post on 2.11.92 when at 7 a.m. the Accused reported there. He visited the scene. He also arranged for the body of the deceased to be removed to Coast General Hospital.

**PW.2: DAVID DENA:** (Dena)

The aged father of the Accused who was present at the home on 2.11.92.

**PW.3: SARAH SAIDIA w/o DAVID DENA:** (Sarah)

The mother of the Accused who was also present at home with her husband PW.2

**.PW.4: C.I. ANDREW MKONGOLA:** (CI.Mkongola)

At the time an Inspector of Police at Mariakani who recorded a Charge and Cautionary Statement from the Accused on 17.11.92.

**PW.5: DR. LAWRENCE NGONE:** (Dr. Ngone)

The Pathologist who performed the post-mortem on the deceased's body.

**PW.6: DR. ERICK JAMES MAINA:** (Dr. Maina)

The Psychiatrist at Coast General Hospital who examined the Accused to determine his fitness to plead to the charge and his mental capacity.

There is no difficulty in coming to the conclusion that one **Salama Dena** died and that she died due to severe haemorrhage due to multiple cut wounds on the neck region. Her body was found by Sarah (PW.3) lying on a bed inside the Accused's house in a pool of blood. Sarah noticed that there was a deep cut on the neck. She called her husband Dena (PW.2) who at the time was heading to their shamba and Dena saw the body with the injuries and blood. He went to the Police to report. It is the same body which was found by IP Mwaniki (PW.1) who had it collected and taken to Coast General Hospital mortuary. There it was identified by Dena for postmortem by the Pathologist Dr. Ngone (PW.5) before it was handed over to the family for burial. Dr. Ngone noticed that the body had externally, a deep lacerated cut wound on the right side of the neck which involved the carotid and jugular veins. On the right mandibular region she had another deep cut. There was a third cut wound below the second one. She had lost a lot of blood and the body was pale. No other injuries were noted. The cut wounds he noted were from slashing not cutting or stabbing and the type of weapon used in his opinion would be a panga.

The harder part is to decide who caused the slash wounds which led to death and if it was the Accused person whether he did so of malice aforethought.

There is no direct evidence to prove that it is the Accused person, and none other, that caused the death of the deceased. What there is on record is circumstantial evidence.

The Accused who was married to the deceased lived in the same compound with his parents, Dena and Sarah at Kizurini Village, Kaloleni. He had an elder brother living in the same compound but the brother was mentally retarded. Three other sons and two daughters were not staying with them at the time.

According to Dena and Sarah, the Accused lived peacefully with his wife and they never quarrelled. They were together on 1.11.1992 and the four had food together before going to bed at about 9 p.m. The two looked normal.

The following morning at about 8 a.m. Dena and Sarah woke up to go to the shamba. They found the Accused and his wife had not woken up and Dena left Sarah to go and wake them up as he proceeded towards the shamba. Sarah knocked the door of the Accused's house but there was no answer. She pushed it and it opened. On going inside she saw the body of the deceased lying in a pool of blood on the bed. She also saw a knife and panga near the bedroom door, both blood-stained. She rushed and called her husband back and he witnessed the same thing. The panga belonged to Dena and he had earlier given it to the Accused to repair his house. The knife belonged to the Accused. Both were produced in court as evidence but were only marked for identification as MFI.1 and MFI.2. The expectation, and the ruling made by the court, was that they would be produced by the Officer who took them into his custody or the Investigating Officer once a proper basis is laid. They were not. The law is that unless items are properly produced as exhibits in court, they do not form part of the evidence to be considered by the court.

CI. Mwaniki (PW.1) stated that he was the Investigating Officer and was the one who visited the scene, collected the two items and drew up a sketch plan marked as MFI.3. In cross-examination however, he shamelessly admitted that he was lying to the court since the two items were collected by another Police Officer who has since allegedly died and that it was the same Police Officer who drew the sketch plan. On that admission the credibility of CI. Mwaniki as a witness on other aspects of the case is cast in doubt.

He testified that he was the Officer on duty at Kaloleni Police Post on 2.11.92 when the Accused arrived there at 7 a.m. The Accused told him that he had a quarrel with his wife and had stabbed her with a knife and then cut her neck with a panga. He had known the Accused before since he was a Police

Officer with the General Service Unit (G.S.U.) and had reported to him on an earlier occasion that he had quarrelled with his wife. He left the Accused at the Police Post and went to the scene.

Of course the alleged confession made by the Accused to CI. Mwaniki is not admissible in law as evidence. That is because CI. Mwaniki was only a Seargeant in the Police Force at the time and the alleged confession would be in contravention of Section 28(b) of the Evidence Act. The evidence is not admissible and is therefore ignored.

When arrangements were made for the Accused to record his statement he was taken before CI. Mkongola, then an Inspector of Police at Mariakani. In the Charge and Cautionary Statement produced as Exhibit 4, the Accused made no reply to the Charge. He said nothing.

Finally, there is the evidence of Dr. Maina (PW.6). He has a Bachelor of Surgery and Medicine Degree and a Masters Degree in Psychiatry. He examined the Accused on 19.11.92 at the Coast General Hospital and also interviewed the Police Officer who had custody of him and some other relatives. He found out that the Accused had a history of mental illness for many years and had been treated traditionally. Three of his siblings also had mental breakdowns and one was chronic with a complete breakdown of his mental functions.

He found the Accused had dreams and voices directing him to commit some acts but was unable to differentiate dreams from reality. The Doctor formed the opinion that the Accused was schizophrenic which is a severe mental illness driving one to think that he would be harmed by others and to have hallucinations. He made a written report stating that the Accused was not fit to plead and recommended that the Accused be treated. The report was produced as Exhibit 6.

All that was evidence adduced by the prosecution. But the Accused also testified and his evidence must be considered in the totality of the evidence adduced in the case. It was an unsworn statement which was an option in law available to the Accused and must therefore be weighed accordingly.

His recollection was totally blank from the date he is alleged to have committed the offence until he found himself in the hands of Dr. Maina. He stated that he was working with the Police Force as a General Service Unit (G.S.U.) officer.. He then fell mentally sick. So sick that he deserted the force with the gun issued to him. He did not know what happened thereafter until he was arrested and returned to work. He was then dismissed from the force and returned home to his parents and wife. That was shortly before his wife's death. He was under medication to contain his mental condition and various medicines were prescribed including ATEN, SERENARCES, LATATINE and Injections of IMODICATE. He became conscious after the medication and was then brought to court.

The defence boils down to this; that the Accused was insane so as not to be responsible for his acts or omissions at the time when the act was done or omission made.

Mr. Obara Learned Counsel for him called for the acquittal of the Accused because the essential elements of the offence which include a voluntary act and malice aforethought, whether implied or express, were not proved. Only the fact of death was proved. The evidence of Police Officer CI. Mwaniki should be disregarded since he was a confessed liar. That leaves the evidence of the parents who testified that the Accused and his wife lived happily and never quarrelled. There was therefore no motive for the Accused to kill the deceased. They had a family talk and dinner before going to bed the evening before the deceased's body was discovered. The murder weapons were not produced in evidence.

Mr. Obara further submitted that the prosecution itself proved that the Accused was suffering from hallucinations and schizophrenia. He was insane and could not therefore form any intent.

Finally, he submitted that there was opportunity for any other person to have committed the offence and that possibility was not discounted by the prosecution. That is because there was evidence of other mentally distorted brothers of the Accused one of whom was staying in the compound. It was not shown that the offence could not have been committed by someone else.

On her part Ms. Kwena simply relied on the evidence adduced which in her view proved the case beyond doubt.

On that evidence the three Assessors gave their opinions and I am indebted to them for their patience in the trial and for their considered opinions although they are not binding on me.

Assessor **ELIZABETH KIRETI** was of the opinion that the fact of death was proved and that all the circumstances surrounding the death irresistibly led to the Accused as the person responsible. It was only the deceased and the Accused who lived in their house and their parents so testified. The Assessor was of the view however, that the Accused was mentally unstable and was supported by prosecution evidence and his own evidence in defence on that. She returned a verdict of guilty but insane.

Assessor **SALOME MWASHIGADI** reached the same verdict and relied on Dr. Maina's Psychiatric report.

Finally, Assessor **ALEXANDER MATHERO** who found it proved beyond reasonable doubt through circumstantial evidence that it was the Accused who caused the death. The deceased and the Accused stayed alone in their house and were seen going to bed by their parents. There was no break-in or alarm during the night. He however believed the Psychiatrist's report confirming the Accused's mental illness. He too returned a verdict of guilty but insane.

The Assessors' opinion was therefore unanimous that the Accused was guilty of the offence charged but was insane at the time.

I respectfully agree with that opinion as I am of similar persuasion. I find on the evidence that the fact of death and the cause of it were proved beyond reasonable doubt. I have no reason to doubt the opinion of the Pathologist PW.5 Dr. Ngome who was professionally qualified. I also accept the evidence of PW.2 and PW.3 the Accused's parents who were the last to see the Accused and the deceased go to bed in their house and the first to discover the dead body of the deceased. Even discounting the confessionary evidence as I must and the evidence of the killer weapon which was only introduced but not produced in court, the circumstantial evidence irresistibly point to the Accused's guilt. He himself did not know what transpired after he went to bed until he spoke to Dr. Maina PW.6. He raised the probability that he may well have been suffering from a disease of the mind which he disclosed he was still under medication to control. It had already resulted in the loss of his employment as a Police Officer (G.S.U.). The prosecution itself indeed reinforced that probability through the evidence of Dr. Maina which is reproduced above. Dr. Maina went further and recommended treatment before he could examine him further. There is no evidence that the Accused has been returned to Dr. Maina.

This is a case clearly falling under Section 166 of the Criminal Procedure Code. It provides:

***“166. (1) 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.”***

Accordingly I make a special finding that the Accused is guilty as charged but was insane when he did the act. The case is reported for the order of the President.

Meanwhile, the Accused shall be detained at Shimo-La-Tewa Prison and given Psychiatric treatment until the President orders otherwise. Orders accordingly.

**Dated this 4th day of July, 2001.**

**P.N. WAKI**

**JUDGE**