



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 1 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

MMM.....ACCUSED

JUDGMENT

1. **MMM** the accused faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that the accused on 3rd January 2018 at around 17.00 hrs in Kilala location within Makueni County, murdered FNN.

2. He denied the charge and the prosecution called a total of ten (10) witnesses to establish its case.

3. The evidence adduced is to the effect that PW8 (RN) a minor then aged 5 years was in the shamba with his grandmother FN (*the deceased*) grazing cattle on the material day. While there the accused whom PW8 knew came and knocked down the deceased and cut her with a jembe on the face. She screamed but he just cut her.

4. PW8 ran away leaving the accused behind while the deceased was lying down. The accused also ran away. In cross examination he said the incident occurred at about 7.00pm but it was not dark. He was aware that the accused had a mental problem. He identified the jembe (EXB1) as the murder weapon. PW8 testified after a *voire dire* examination where the court directed that he gives unsworn evidence. He was cross examined by the defence counsel.

5. **PW1 MMN** was home on 3rd January 2018 5.00pm – 5.30 pm when her mother (deceased) and PW8 left to get cows. While at the river fetching water she heard screams from the shamba. She ran there and found the deceased on the ground with three (3) cuts on the face. She did not find PW8 at the scene. She screamed and people including her sisters came. Later police officers came and the body of the deceased was taken away.

6. It is PW8 who informed them of what had happened and how the accused had attacked the deceased. PW8 is a cousin to PW1 as he is their uncle's son. The accused was later arrested.

PW3 JNa son of the deceased was only told of the incident. He did not witness nor do anything relating to this.

7. **PW4 Joseph Kioko** and some youths went to the home of FM where the accused was hiding after killing the deceased. CM confirmed the accused's presence there. The accused opened the door after being talked to by C (PW5), and he was thereafter arrested after surrendering. Police later arrived and took him away together with the jembe (EXB1) he had come with. The witness knew the accused well and confirmed that he had a history of mental illness.

8. **PW5 CKW** was home on 3rd January 2018 at 6.06 pm when she heard her children screaming saying the accused who is mentally challenged had come and locked himself in their room. PW5 called the accused's father who advised them not to open for him as he had committed an offence. She later pleaded with the accused to open the door and he did so. Police came and took him together with the jembe he had hidden in the flowers.

9. **PW7 GMK** is the accused's father. He was informed by his child N of a fight between the accused and deceased on 3rd January 2018 at 5.00 pm. He proceeded to the scene where he found the deceased lying down and there were many people present but the accused was not there. He later learnt of his arrest, and he did confirm that the accused became mentally ill while in Form 3 and was placed on medication. He added that his son had a problem with the deceased.

10. **PW2 AMM and PW6 HK** identified the deceased's body for post mortem. **PW9 Dr. Alex Makau** produced the post mortem report (EXB2) on behalf of Dr. Loiposha with the consent of the defence. He stated that the deceased had three (3) visible deep cut wounds on the head, face and below the nose. The cause of death was the severe head injury as a result of a blunt object hitting it.

11. **PW10 no. 44654 Cpl John Koech** visited the scene at 6.30pm on 3rd January 2018. They found the deceased's body which had 2 deep cuts on the forehead. He interrogated those present who mentioned the accused as the culprit. He was later arrested and the murder weapon (Jembe EXB 1) recovered. PW10 produced the photos (EXB4b-e) and certificate (EXB4a) with the consent of the defence. He testified of having confirmed from the accused's father (PW7) that the accused had a history of mental illness.
12. In cross examination he said the jembe (EXB1) was clean and so no forensic examination was done on it.
13. The accused when placed on his defence elected to remain silent.
14. The prosecution elected to rely on the evidence on record and so did not file any submissions at the close of the defence case.
15. Learned counsel for the accused Mr. Hassan in his written submissions has called for the accused's acquittal under **Section 306(1) of the Criminal Procedure Code** since the prosecution did not prove the ingredients of the offence of murder.
16. He has argued that *mens rea* or intention to commit the offence was not proved. That there is proof that the accused had a mental illness since he was in form 3. His actions during trial did not depict a person in his right state of mind. That the mental re-assessment report dated 3rd August 2020 by Dr. Masila Joseph showed that the accused had a mental illness and he was placed on treatment for 3 months.

Analysis and determination

17. The accused is facing a charge of murder which is defined under **Section 203 of the penal code** as:

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

18. There is no dispute that the deceased herein died on 3rd January 2018 as a result of injuries inflicted on her head and face as testified by the witnesses. The post mortem report (EXB2) has shown the cause of death to have been the severe head injury caused by a sharp object.
19. The evidence on record shows that the accused and deceased were related. PW1 explained that she is a daughter to the deceased, and that the accused's father is their uncle, meaning PW7 was either a brother to the mother or father of PW1. PW8 who was with his grandmother (*deceased*) at the shamba is a son of PW1's sister.
20. PW8 then aged 5 years said the time of incident was 7.00 pm and it was not yet dark. However, the evidence by PW1, PW3 – PW5, PW7 and PW10 confirms that the incident occurred much earlier. PW10 said the office received the report at 6.30 pm. Being a minor PW8 may not have given the correct time and that's understandable. The fact is that the incident occurred in broad daylight.
21. PW8 who knew the accused well explained to the court what happened and he also informed PW1 (his aunt) of the same. The young boy despite his age knew that the accused had a mental problem. This goes further to confirm that the boy knew the accused well.
22. The accused's conduct of running away with the jembe and hiding at PW5's home confirms the evidence of PW8. Though the jembe was not blood stained that in itself does not mean it's not the murder weapon. PW8 had seen it and identified it (EXB1). Secondly after the incident the accused took off with the jembe. Nobody knows what he did to it before he landed at PW5's home. The jembe (EXB1) was under his total control.
23. He had no reason to be in possession of the jembe (EXB1) and go into hiding with it if he had not been involved in the injury to the deceased. The said injury is what led to the death of the deceased.
24. I am therefore satisfied that the accused has been well identified as the person who killed the deceased.
25. The next issue is whether he had the intention to kill. In other words has *mens rea* been established?
26. **Section 206 of the Penal Code** defines malice aforethought as follows:

“(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

27. In the case of **Republic vs Tubere s/o Ochen [1945] 12 EACA 63** the Court of Appeal stated thus:

“To determine whether malice aforethought has been established the court has to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of the injuries inflicted, the conduct of the accused before, during and after the incident.”

28. In this case the weapon used was a jembe (EXB1), the part of the body targeted was the head and face and the injuries inflicted were deep and severe. The result was obviously fatal. Accused took off after the incident and hid himself but readily surrendered when an opportunity presented itself.

29. The evidence before this court clearly shows that the accused had a history of mental illness. The first mental assessment report dated 15th January 2018 found the accused not fit to stand trial. The report shows that the accused has had a history of this challenge since he was 20 years old. He was placed on medication.

30. A certificate under Section 163(1) of the Criminal Procedure Code dated 29th May 2018 was later filed showing he was fit to stand trial. It was received by this court on 29th April 2019. Hearing commenced on 15th July 2019 and we proceeded very well until the prosecution closed its case on 26th July 2019.

31. Trouble started after the accused was placed on his defence and provisions of **Section 306(2) Criminal Procedure Code** explained to him. This was in October 2019. The accused started exhibiting funny behavior in court and uttering strange things. The court ordered that he be taken for medical attention. This took quite a bit of time, until 2nd November 2020 when a positive report was filed. He was still on medication and showing signs of instability.

32. The medical documents/treatment notes filed in court reveal that the accused’s history of mental health stretches back to 2013. From the evidence of PW8 the accused just came to where the deceased was and attacked him without any provocation.

33. His conduct after the incident confirms he was not in his right senses. He most likely was under an attack. This was coupled with the fact as confirmed by the father that he had a problem with the deceased. After considering all the above I have come to the conclusion that the accused was not in the right state of mind to know what he was doing when he committed this offence.

34. **Section 166(1)** of the **Criminal Procedure Code** provides:

“(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.”

35. In line with the above provision I find that the accused caused the death of the deceased but at that moment he was suffering from an illness of the mind. I accordingly enter a special finding under **Section 166 of the Criminal Procedure Code** that the accused is guilty as charged but insane.

SIGNED AND DATED THIS 19TH DAY OF MAY, 2021 AT MILIMANI, NAIROBI BY:

H. I. ONG’UDI

JUDGE

DELIVERED THIS 16TH DAY OF JUNE, 2021 IN OPEN COURT AT MAKUENI BY:

GEORGE DULU

JUDGE