



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 70 OF 2014

REPUBLIC.....PROSECUTOR

-versus-

JULIUS MBAABU M' IMWILI.....ACCUSED

JUDGMENT

Murder

[1] The accused person, namely **JULIUS MBAABU M' IMWILI** was charged with murder contrary to section 203 as read with 204 of the Penal Code, Cap 63 Laws of Kenya. Particulars of the Offence were that, On 21st day of September 2014 at Akiaga Sub location in Tigania East District within Meru County murdered **JOANNA GITURA**.

Elements of Murder.

[2] According to section 203 of the Penal Code: -

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

[3] Thus, to secure a conviction for murder, the prosecution must prove beyond any reasonable doubt the following;

- 1. The death of the deceased and the cause of death;**
- 2. That the accused caused the unlawful act or omission which caused the death; and**
- 3. That the accused had malice aforethought as defined under section 206 of the Penal Code.**

Of the cause and death of the deceased

[4] **Pw6, Dr. Paul Wambugu** carried out a post-mortem examination of the body of the deceased and filled in the results thereof in the Post-mortem Form dated 25/9/2014. The Post-mortem Form was produced in evidence as PEXH. 1 and carries all details of the injuries and death of the deceased. The body of the deceased was identified by **Pw5 Geodfrey Kirathie M' Imwele** a son of the deceased. In his oral testimony, he stated that the deceased had deep cut on the right parietal region and right jaw. Fingers No. 2,3,4 & 5 were chopped off with sharp object. This was the right hand. Upon examination of the body of the deceased, he formed the opinion that the cause of death was massive bleeding due to the deep cuts on the scalp and hands. I therefore find that the prosecution has proved the death of the deceased and the cause of death of the deceased.

Who caused the unlawful act which caused the death?

[5] **PW1 JUSTUS THURANIRA** testified that on 21/9/2014 he was with his younger brother **DICKSON KITHINJI**. At around 7:00 p.m. his uncle (the accused person) came armed with a knife to his grandmothers (deceased's) house. That he started cutting the deceased on the head, shoulders, fingers and right hand. He told the court that they run out and called their aunt, **Susan Mwangurya** and their uncle **Josephat Baaru** who were three minutes away and informed them what had happened. In cross-examination he stated that he was at the time living with their grandmother and was at the door, 1 metre away, when he saw the accused person. He also stated that he had known the accused person since birth and that at the time the accused person used to quarrel with the deceased especially with regard to his maize yields.

[6] **PW2 DK**, a child aged 13 years and upon the conduct of *voire dire* gave evidence which corroborated the testimony of Pw1 when he stated that the accused came to the deceased house armed with a *panga* and slashed the deceased. That they later went and informed their aunt, **Susan Mwangurya** father, **Gervasio Kimathi** and uncles, **Geoffrey Kiraithe & Joseph Baaru**. He also stated that at the time they were in the kitchen, with the deceased and Pw1, the kitchen also had a paraffin lamp. He confirmed to have known the accused for the last nine (9) years and that the accused person had previously argued with the deceased.

[7] **PW3 JOSEPH BAARIU M' IMWERE** testified that that he was at home when Pw1 and Pw2 came and informed him that the accused person had cut their grandmother. That he rushed to the scene and found the deceased being put on a stretcher. And was bleeding a lot. That he assisted in carrying he deceased up to St Stephen church and later on took him to Mikinduri Police station. That on the way the deceased stated; "I have been killed by Mbaabu" "I have been killed by Mbaabu".It was his further testimony that the deceased passed on between Mikinduri and Kagere on their way to Meru hospital. He was informed that the deceased and the accused had quarrelled over maize.

[8] In cross-examination he testified that the accused and the deceased persons did not have bad blood or bad relations and that at one point the accused had been taken to hospital for mental treatment. That the accused person has two (2) children.

[9] **PW4 GERVASIO KIMATHI** also corroborated the testimony of Pw3. He testified that he was summoned by Pw1 and Pw2. He moved quickly and found the deceased had been slashed. With the assistance of villagers, he moved the deceased from the kitchen. He kept vigil at the home and upon receiving reports that the deceased had passed on he arrested the accused with the assistance of three villagers and took him to Akiaga Police camp. He would later on report the matter at Mikinduri Police station.

[10] He identified the accused person at the dock and stated that he is their younger brother in a family of five brothers and three sisters. The deceased was also their mother. He also confirmed that Pw1 and Pw2 lived with the deceased. It was also his testimony that the accused person was not mentally fit and they had on various occasions took him to hospital.

[11] **PW7 PC VICTOR OWANDO** testified that the deceased was brought to the station on 21/9/2014 and at the time she was bleeding profusely from the head and right hand. That the report was booked and he referred the deceased to Meru five Hospital for treatment. That on 22/9/2014 **Joseph Baariu, Pw3** reported that the deceased had been pronounced dead on arrival. That he went to the scene and established that the accused had a confrontation with the deceased. The accused was armed with a panga and had ordered the deceased to give him maize to sell. A quarrel ensued and the deceased violently attacked the deceased and cut her on the head, right side of chin and chopped off her fingers.

[12] He also established that the accused person had chased away the grandsons of the deceased who raised an alarm and the public intervened. He proceeded to Murango Ap post and found the accused person was secured there. He arrested the accused person and took him to Mikinduru Police station. He testified that the panga was not recovered as the accused person had ran away with it. He however stated that in the course of his investigation he recovered the accused persons **I.D. (Pexh 2) and his passbook (Pexh3)**.

[13] In cross-examination he stated that on 23/9/2014 he observed the accused person and noted that he was not mentally sound. He took the accused person for mental assessment at Meru Level 5 hospital. Assessment dated 9/10/17 states that the accused suffered from mental disorder and treatment was initiated by psychiatrist.

[14] **Dw1, the accused person** testified that at the time of the commissioning of the offence he was ill and that he did the act because he was mentally ill. That he came to learn what he did after the treatment. That he is now well.

[15] I have considered the evidence of both the prosecution and the defence. I do note that the cause of death was massive bleeding due to the deep cuts on the scalp and hands. The evidence of Pw1 and Pw2 placed the accused person at the scene of the crime on the fateful day of 21/9/2014. This evidence is corroborated by the evidence of Pw3, Pw4 & Pw7. Pw1 and Pw2 positively identified the accused person committing the act. Pw3 testified to the dying declaration made by the deceased that ostensibly corroborated the evidence of Pw1 and Pw2. The accused person by his own admission stated that he committed the act. The prosecution therefore established beyond reasonable doubt that the accused person caused the unlawful act which caused the death.

Did he do it with Malice aforethought?

[16] In the offence of murder malice aforethought is taken to be the mental element or *mens rea* of the offence; ordinarily, it takes the form of an intention to unlawfully kill which is the express malice or an intention unlawfully to cause grievous bodily harm which is implied malice. Section 206 of the Penal Code Provides:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

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 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.

[17] In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

[18] In this case the accused person used a whip, panga, and brutally and severally cut the deceased. The kind of weapons used and the harm caused by the accused persons clearly shows that the said act would probably cause the death of or grievous harm to the person, and in this case the deceased.

[19] I have also considered the testimony of the prosecution witnesses and the report dated 9/10/2014 by **Dr. Mwikamba Andrea**. The same opined that the deceased had a medical disorder called schizophrenia. In the case of **Leonard Mwangemi Munyasia V Republic, Cr. App. No. 112 Of 2014** the Court of Appeal stated:

“Technical terms such as bipolar disorder, schizophrenia and mild psychosis have been used in evidence to describe the appellant’s state of mind. How do these conditions affect a person’s state of mind” Again, these are questions, which ought to have been answered at the trial by the experts. But according to World Health Organization Publication, the ICD-10, Classification of Mental and Behavioural Disorders, 1992, a patient suffering from psychosis experiences hallucinations and/or delusions that they believe are real, and may behave and communicate in an inappropriate and incoherent fashion. Schizophrenia is a condition of mental disorder which makes a patient have false beliefs, unclear or confused thinking and auditory hallucinations. While bipolar disorder, on the other hand is a brain disorder that causes unusual shifts in mood and energy activity levels. Clearly the condition the appellant suffered have severe effect in a patient’s mind and perception. The condition according to the above literature may be long term, transient and intermittent in nature...The law recognizes, as we have seen, that the society has people like the appellant who may fall in this category of the population, and therefore provides for the procedures to be followed by the court in two instances where the question of insanity arises at the trial.

[20] Section 166 of the Criminal procedure Code provides as follows;

“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.”

See **G W v Republic[1]**.

[21] The evidence adduced show that the accused person committed the unlawful acts which caused the death of the deceased, but he was insane at the time he committed the said unlawful acts. Accordingly, by law I make a special finding to the effect that the accused is guilty but was insane when he did the acts of killing the deceased, **JOANNA GITURA**.

. [22] This verdict is pursuant to **section 166(1) of the Criminal Procedure Code**.

[23] I will not however commit this case to the order of the president as provided for under section 166(2) - (7) of CPC for good reasons. I am aware that this part of section 166 of the CPC has been declared unconstitutional by courts for it was depriving courts of the judicial function in sentencing and arrogating it to the executive. See the decision by Mativo, J in **H.C. Constitutional Petition No. 570 of 2015- A.O.O& 6 Others v Attorney General & Another[2]** in which he held that leaving a convicted person at the President’s pleasure is a violation of the Constitution. I should also add that, a person who has mental disability is a person with disability and in need of help and care. Committal to the order of the president in accordance with section 166 of the CPC works against this right and the noble constitutional imperative of ensuring the realization of the potential of all human beings. Needless to state that such indeterminate sentence will administer great psychological anguish to the convict. These matters are summed up in the words stated in the case of **S v Tcoeib[3]** that;

“It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and the heart of the prisoner is much too faint and unpredictable”

[24] I belong to the school of thought that committal to the order of the president is a violation of Constitution for reasons stated above. The court should have the power and discretion to meet out appropriate sentence in all cases including those falling under special verdict of ‘*guilty but insane*’. In any event, the circumstances of this case do not even fit the prescription under section 166(2) - (7) of the CPC as at the time of his defence, he was well. Accordingly, he shall remain in custody as the court awaits probation officer’s report as well as psychiatric report by Mathari Hospital on his mental status, and appropriate measures, if any, for management of the condition he suffered or suffers from. These reports will enable the court to mete out appropriate sentence on the accused. These reports shall be filed in 21 days. The DR will also assign the matter a date for mention for purposes of confirming the filing of these reports. These orders are subject to inconveniences caused on work method by the restrictions associated with prevention of COVI 19. It is so ordered. Right of appeal explained.

Dated, signed and delivered at Milimani Nairobi this 21st day of APRIL 2020

F. GIKONYO

JUDGE

Representation

1. Nelima for accused
2. DPP Meru for state

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