



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J

HIGH COURT CRIMINAL CASE NO. 11 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

RNN.....ACCUSED

JUDGMENT

Background and evidence

1. On 24th June, 2017, RN, the accused, and his pregnant girlfriend, AC, visited Robert's parents' home in Kikopey. His mother, MN (PW4) and his father JM (PW5) were at home. According to his parents, Robert had appeared agitated the previous day. He had been speaking incoherently and had been asking to be prayed for. On the night of the 24th June, 2017, Agnes cried a lot, and the disturbed couple spent the night at Mr Muthui's home after Mary prayed for Robert. The couple slept on chairs in the room.

2. On the morning of 25th June, Robert got up and as he opened the door to leave, Mary saw him and asked him where he was going, but he did not give a coherent answer. Worried, she and her husband pursued Robert. He was hostile, aggressive and did not speak to anyone, according to both his father and mother. He ran off saying there were people who wanted to attack him. Mary called her pastor to come and raised the alarm. Some people came to assist and eventually, Robert was restrained, taken to hospital, treated and released

3. Pastor Alex Karuri (PW7) came. He testified that he had followed Robert and found him walking about in a furious rage, talking to himself and throwing his arms about. According to PW7, Robert asked him whether he knew he (Robert) was God and controls the universe. He threatened the pastor to a fight, but the pastor spoke gently to him till they got back home and had calmed down. He agreed to go to hospital, and Pastor Alex was one of the people who escorted him to Trinity Mission hospital where he was treated.

4. On his return, Robert was still agitated. He later demanded the keys for the house from his mother, and ran off wildly and returned home. When he entered the house, he locked the door behind him. Mary then heard screams from inside the house: "Help, help! He has a knife". She then she heard the words: "He has killed".

5. According to his father and Pastor Alex, they reached home running after Robert, found the door locked, and had to break it down. Robert emerged and dashed out with a bloodied knife in hand, and his clothes were also blood-stained. He chased anyone around him, shouting that he would kill anyone who came near, just as he had killed "killed Delilah" or "Queen Sheba" as narrated by his mother and Pastor Alex, respectively. Eventually, Robert returned the knife and the police were called. Agnes was already lying dead in a pool of blood. When the police came, Robert offered himself for arrest, and showed the police the deceased's body and the knife.

6. Robert was arrested and subsequently charged with murder contrary to section 204 of the Penal Code.

7. Corroborating evidence by way of investigations was given by the Police Investigator Chief Inspector Joseph Njunge (PW 8). He also took the deceased's body to the mortuary, and produced the Post mortem report dated 26th June, 2017, as PExhibit 2.

8. The findings of the post mortem, which was conducted by Dr Titus Ngulungu, were as follows:

"External appearance: the body shows numerous multiple stab wounds and slash wounds as follows:

Head: located at the left medial side of eye extending to the forehead; 40 mm

Neck: has 3, measuring 100mm to 20mm. the longest involves the thyroid cartilage, trachea, esophagus and great neck vessels, severing them;

Chest: 2, all penetrating

Abdomen: 4 width 50mm-20mm. the long one shows intestines of the deceased and foetus hanging on it

Limbs: hands right: 3, 40 -20mm; Left, 1 measuring 20mm

The left thigh back: 1, 20mm (stab).

9. Dr Ngulungu concluded his post mortem report with the opinion that:

“the cause of death was massive blood loss following neck vessel injuries due to sharp force trauma to the neck...& multiple stab wounds and term gestation”

10. In his defence, the accused gave sworn testimony (as DW1) and availed one witness, his brother DN (DW2). He said that he was thirty years old, and had a BSc (IT Option) degree from Kenyatta University. He said he and Agnes met in 2013 when they graduated and became friends in 2015. In 2016 they moved in together as man and wife. Robert testified that they had a good relationship. In 2017 he introduced Agnes to his parents and siblings, and she bonded well with his mother.

11. Agnes' contract with IEBC ended on 10th June 2017, and on 20th June, 2017, and Robert developed a restlessness. In the night, he said, he was awoken by a huge figure that placed a leg on his chest, and he had weird dreams. He said that by 21st June he was feeling like the President, or Elijah or Jesus. He said he could not recall the things that were happening.

12. The accused recalled sleeping on the sofa on 24th June, 2017, in his mother's house with his wife. On 25th June, he woke up to sunlight appearing like tubes that were chasing him. He saw Pastor Alex chasing him, overpowering him and taking him to hospital, where he was given tablets. He recalled waking up and being fed some fruit salad by his wife, and thereafter going back to sleep. Eventually he found himself in a police cell, but no one told him why he was there. He said it was not until 11th July, that he was told by his lawyer what he had done and had been charged with murder. On 13th September, he met his mother and wrote her an apology letter.

13. DW2s testimony was that the accused was his younger brother. He said his brother was a cool fellow so he was shocked when he heard of the incident. He said the couple were a happy couple with no disputes; that the accused had never had any condition; that, however, when Robert was small he did some unusual things like crossing the road without much thought. He said he later learnt that the accused had a mental problem after he committed the act.

Analysis and determination

14. The ingredients necessary to prove murder were reiterated in the case of **Anthony Ndegwa Ngari v R [2014] eKLR**, where the Court of Appeal stated them as follows:

That the death of the deceased occurred;

That the accused committed the unlawful act; and

That the accused had malice aforethought.

In this case, the first two ingredients are not in doubt. Thus, the only issue in dispute here is whether the accused had malice aforethought; in particular, the question is whether the accused was or was not sane when he killed his wife.

15. The parties filed written submissions, and highlighted the same. The prosecution case was that the defence case of temporary insanity was not supported by the evidence. To eke that information, there would have to be some history of the accused's mental illness, if any,

16. The law on sanity and insanity is contained in sections 9 to 12 of the Penal Code the starting point is Section 11 which provides that every person is presumed sane and responsible for his actions at all times including when he is alleged to have committed an offence because sanity is the normal and usual condition of mankind. Section 11 of the Penal Code is thus in the following terms:

“11. Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”

17. The presumption of sanity is, however, rebuttable, hence the recognition in criminal law, of the defence of insanity. This is provided for in **Section 12** of the Penal Code, which provides for the application of the defence of insanity in the following terms:

“12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by

disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

18. This section must be read together with section 9 of the Penal Code which provides:

“9. (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.”

19. This is the basis of the generally accepted notion that persons who cannot appreciate the consequences of their actions should not be punished if those actions happen to be criminal acts. Both **section 12** aforesaid and the *McNaughten Rules*, in the old famous **McNaughten’s** case, 1843-10 C & F 200, recognize that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to law. The test as to insanity is strictly on the time when the offence was committed and no other.

20. Of course, it would be virtually impossible to lead direct evidence of the exact mental condition of the accused person at the precise time of the commission of the crime for it is impossible to know the mind of a man. Borrowing from a medieval English Judge, **Brian CJ** in a 1468 case of **Greene vs Queen**, and who in turn reiterated Cicero who famously remarked that:

“The thought of man is not triable, for the devil himself knoweth not the intendment of man”.

21. The defence case is thus founded on the defence propounded by section 12 of the Penal Code. Counsel pointed to the case of **Leonard Mwangemi Munyasia v R [2015]eKLR** in which the Court of Appeal stated:

“Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under section 167 (1) (b) of the Criminal Procedure Code he would be convicted and ordered to be detained during the President’s pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.

22. Counsel argued that the evidence showed that the accused was undoubtedly incoherent on the material day, that he was treated and seemed to improve; that subsequently after the attack on the deceased, he appeared not to be in control of his mind; and that the accused was suffering a mental disease.

23. Counsel further argued that the treatment notes of the accused dated 3rd July, 2017 and 7th July, 2017 disclosed that the accused suffered from a mental problem. I note, however, that the said notes although marked in the exhibits list for identification as DMFI 1 & 2, they were not produced as exhibits by the defence. They therefore do not form part of the evidence produced, and are not in fact on the court file.

24. Pursuant to section 12 of the Penal Code, it is trite that insanity will only be a defence if it is proved that at the time of commission of the offence, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act that he is charged with or was incapable of knowing that it was wrong or contrary to law. The test is strictly on the time when the offence was committed and no other. See **Leonard Mwangemi case supra**.

25. The evidence that will best disclose the state of mind of the accused at the time of commission of the offence is: evidence of his mind-frame leading to the occurrence of the act; what the accused actually did at the material time, and what those around the accused observed contemporaneously with the occurrence of the act.

26. The evidence available on the accused’s state of mind as far as his history is concerned is as follows: Dr Njau, the Psychiatric doctor examined the accused on 28th June, 2017, and made his Report dated 30th June 2017 in which he states:

“On further interrogation, he [the accused] informed me that he has no personal history of mental illness but his father suffered from a mental disorder...

Examination: On mental status assessment, I found him to be mentally sound, he was calm and had no speech or behavioural problems”

So that the accused himself asserted – only three days after he committed the offence he is charged with – that he had no history of mental illness.

27. Other than what he was told by the accused himself, the psychiatrist also directly assessed the accused’s mental state on the same day, 28th June, 2017, and reported as follows:

“I found him to be mentally sound; he was calm and had no speech or behavioural problems. His thoughts and perceptions are essentially normal. He has good memory and judgment and he understands the charges he is facing”

So that at the time the accused was saying he had no history of mental illness, his mental acuity was decidedly not impaired in any way according to the psychiatrist.

28. A probation officer's Pre Bail report dated 25th July, 2017, after the accused was charged, noted the following concerning the accused's health and mental history:

"The accused was known to be of good health both mentally and physically. However, a few days before he committed the offence, he is said to have appeared mentally disturbed and he was behaving wildly...."

The probation report went further to indicate in different categories as follows concerning the accused:

"Community attitude: Before his arrest, it is said he [the accused] was getting on well with members of his community...."

Likelihood of committing another offence: Though he has not been in conflict with the law before, there is general fear even among the accused's relatives

Conclusion and recommendation: Before his arrest the accused was engaged in academic writings...

...most of the respondents were not opposed to the accused being granted bond but they were of the view that it should be delayed for some time to ensure that the accused has fully stabilised. They said that prior to his arrest he was not a troublesome person...."

29. The probation officer recommended as follows:

"However, I would recommend that the granting of bond be delayed for a while to give the two families to come to terms with the reality and help the accused to stabilise mentally and come back to his real self. The accused's parents too expressed their fear that if the accused is bonded before he is fully stable he might be a threat to himself and to those close to him"

30. The accused's own older brother, DW2, testified that the accused:

"...was a cool fellow, academic....."

He never used to have any condition.....there is one person in the family who has mental problems. That is my father".

Thus DW2 was shocked when he heard of the incident involving the accused..

31. The accused's father PW5 testified in cross-examination that:

"Prior to [the] eventful week, he (accused) seemed okay"

His mother, PW4, said in cross examination that:

"we have a history of mental illness including the accused's father and uncle".

However, his mother did not say that the accused himself had a history of mental illness. The accused's sister, PW3 in cross examination testified that the deceased and accused visited her the night before the incident. She said:

"Their relationship was okay. I did not see anything amiss"

It was only on the next day, 25th June 2017, that PW4 witnessed the accused speak incoherently and he was taken to hospital, and thereafter she also saw him behave strangely, just before he committed the offence.

32. From all the above evidence, my overall understanding of the accused's mental state is as follows: From his history it is clear that he was stable, fit and okay. He was academically inclined, and according to the probation report, he had even been helping students do their assignments online for a fee. The accused himself told the psychiatrist that he had no history of mental illness. From his family background and other peoples' views as described in the probation report, the accused also had no history of mental illness or instances of being mentally disturbed. In other words, the accused was just fine before the time of the incident.

33. What was the accused's conduct during the incident? How did he effect the act of killing, and what can be made out from his actions as to his state of mind at that time?

34. The first thing to note is that the defence did not contest the fact that the accused committed the act, but said instead that he was not in control of his mind at the time of the act. The post mortem report shows how he acted, and it may also partly reveal the mind of the accused. That is, that he essentially caused deceased's death through the multiple stab wounds he inflicted on the deceased: one stab on the head; three

on the neck severing the trachea, oesophagus and great neck vessels; two penetrative stabs in the chest; four in the abdomen; three on the right hand; one on the left hand; and one on the thigh.

35. This reveals an almost maniacal stabbing activity. In all, the accused inflicted fifteen serious stabs on the deceased from the time he ran into the house and locked the door as he was being chased by family members seeking to hopefully restrain him, to the moment the door was broken down and he rushed out, having completed the act.

36. It also appears from the evidence of his parents and Pastor Alex, that one or two days before the incident and on the day of the incident itself, the accused appeared incoherent, frantic, agitated and disturbed. He ran around wildly and chased people off. He was even taken to hospital, treated and discharged. His behaviour was noted as strange.

37. It is clear to me that from the day before the incident, the accused was going through a phase of deep and pensive reflection that gave him anxiety and depression. Something in his circumstances gave him cause to be angry, moody, anxious and incoherent. It appeared to be spasmodic, for in one instance he would be calm, and in the next he would be aggressive and wild.

38. The next question that arises is whether, as suggested by defence counsel, the accused had suffered temporary insanity at around the time of the killing. By this defence, the accused is saying that he was briefly insane at the time the crime was committed and was therefore incapable of knowing the nature of his alleged criminal act. Temporary insanity is often claimed as a defense whether or not the accused is mentally stable at the time of trial, which in this case, he was. Nevertheless, it is up to the defense to show that the accused could not have premeditated the illegal act and that he or she was not in his or her right mind.

39. The accused's sworn testimony was that he last remembered being fed fruit salad by his sister, and that:

“Thereafter, I found myself in a police cell. It was dark and I was cuffed. I can't clearly tell what was happening on 8th July, 2017, I came back to my senses – memories came back to me after a time....No one told me why I was in a police cell”.

Counsel submitted that the accused had at that point lost control of his mental faculties and did not even remember what had happened.

40. In cross examination, when asked about his mental status at the time of the incident, he said:

“I had an issue with my mental status. Before the incident. The issue was over quite a long period. I had not sought any help. I have no medical reports on my previous mental status. I don't remember doing that act”

41. From the above, the accused's own testimony is not that he temporarily lost his mental faculties; it is that he had had a mental problem over quite a long period before the incident, and had not sought any medical help. If this was so, though, it appears that the accused's alleged long term mental problem never manifested itself in the presence of any other people, and did not affect anyone or reveal itself in any acts that he was seen to do until the material day. So his evidence is not about temporary insanity, but about his long term mental instability. Either the accused was not telling the truth or he did not know what he was saying in his evidence.

42. In any event, I have already found that there was no evidence of long term mental instability on his part. I continue to hold that view, which is supported by overwhelming evidence. The accused may have felt inside himself that he was not stable over a longer period, but it did not manifest during that period. I am more inclined to believe that either he had a momentary mental lapse or blackout, or that he is not being truthful. Nevertheless, he says he could not remember what happened after he had eaten some fruit salad, before the incident, and until after he was in remand custody thirteen days after the incident.

43. I have carefully and anxiously considered all the available evidence. I am torn between having to make a finding that: the accused behaved as though he were unstable merely to mask a well organised schema to murder the deceased; and that he was in fact temporarily insane at the time of the killing. As I see it, however, the murder scheme is only supported by the fact the deceased, when he ran home on the fateful afternoon, in fact thought to lock the door to the house before he committed the maniacal stabbings, and that when he eventually came out chasing those around away, he declared that he had killed Delilah or Queen Sheba. There is no other evidence of his intent and malice aforethought disclosed in the evidence. There is however evidence that his most mediate actions to the killing, show that he was not in his normal mind: such as his hostility, the wild running around, the incoherence and incongruence of his behaviour; and his forgetfulness.

44. In **Roba Galma Wario v Republic [2015] eKLR** the Court of Appeal at Nairobi had this to say concerning a situation where malice aforethought is unclear:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional”.

45. I am of the considered view that the accused did not have the necessary intent, on a beyond reasonable doubt standard, to murder his wife. There is no evidence of what would have motivated such an act. There is no evidence of his having planned the killing, or of any prior arguments or disagreements with the deceased. All the evidence shows that the accused and deceased had an unstrained relationship. Indeed, there are no evidential pointers suggesting that the accused even had a mind geared towards facilitating the deceased's demise.

Disposition

46. I therefore find that there is no evidential basis for me to conclude that the accused had the mens rea necessary for a finding of a guilty

verdict for the offence of murder. Conversely, I do not find that the accused was guilty but insane, for the defence has also not availed clear and cogent evidence to persuade me that the accused was insane at the time of the killing.

47. Accordingly, I find the accused is guilty of killing the deceased without the motive that amounts to malice resulting in murder. I thus convict the accused of the unlawful act of causing the death of the deceased under the offence of manslaughter under section 202 of the CPC.

48. The accused shall appear for a hearing on sentencing on a date to be agreed with counsel.

Administrative directions

49. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

50. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

51. Orders accordingly.

Dated and Delivered in Nairobi by video conference this 9th Day of April, 2020

Signed

RICHARD MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr Wairegi for the Accused
2. Mr RNN, the Accused
3. Ms Langat for the ODPP,
4. Court Clerk – Quinter Ogutu