



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER CRIMINAL CASE NO. 17 OF 2012

REPUBLIC PROSECUTOR

V E R S U S

CGG ACCUSED

JUDGMENT

1. The accused person CGG is charged with murder, contrary to **Section 203 as read with Section 204 of the Penal Code**. It is alleged that on 30/11/2008 at [Particulars Withheld] area in Kirinyaga District within Central Province unlawfully murdered PWG.
2. The accused person first appeared in court to answer the charges on 11/12/08 to answer the charge but it was not until 10/2/09 that he appeared before Justice Kasango at High Court Nyeri. Plea taking was deferred and an order was issued that he be admitted to Nyeri Provincial General Hospital for two weeks for observation and thereafter a Psychiatrist to give a report. Thereafter the court was informed that the accused was on medication and a Psychiatrist report by Doctor Owino recommended that he could not appreciate the charge due to mental disorder. He was therefore not fit to plead.
3. It was not until 4/2/2010 when the accused appeared in court and the plea was taken. The accused pleaded not guilty to the charge.
4. The hearing of the case was delayed further due to the fact that even after the medication which he was given he was still not fit to plead. Due to the fact that the accused was not fit to stand trial, it was not until 12/10/2015 that hearing commenced, nearly Seven years from the date that he first appeared in court.
5. The facts of the case are that on 30/11/08, the deceased PWG was left at home with the accused while other members of the family went to Church. The deceased was a Sister-in-law to the accused. Later when the family came back from Church PW-1- a sister to the accused found the lifeless body of the deceased in a maize plantation. The matter was reported to the Village-in-Charge and the Area Chief. The matter was also reported to the Police who visited the accused's father, BGM (PW-2-) and asked him whether he suspected anybody. PW-2- informed the police that apart from the deceased the only other person who was at home after the members of the family went to church was the accused. Police and members of the public went and broke the door to the house of the accused as he was inside his house asleep and he was woken up. Upon search, a bloodstained panga was recovered from the house having been hidden under the bed. The accused was arrested and escorted to Kutus Police Station. He was rescued from an irate mob which wanted to harm him. According to PW-2- the accused and the deceased had a strained relationship as the accused was jealous of the deceased. The panga which was recovered from the house of accused belonged to him and PW-2- had seen the accused using it before the incident. The police removed the body from the scene. Later a post-mortem was conducted on the body of the deceased by Doctor Wangombe Nderitu (PW-8-). He found that the head was completely separated from body. The body had no other injuries. The cause of death was severance of the spinal cord. He produced the post-mortem form as exhibit -2- in this case. Cause of death was due to severed head. When the police officers visited the scene, the investigating Officer (PW-9-) peeped inside the house of the accused and saw him trying to wipe out blood from the panga by smearing it with ash. The accused was dipping the panga in the fire place where there was ash and removing it. PW-9- recovered the panga from the house and arrested him. PW-10- P. C Tobia Saka formerly of Kerugoya Police Station took the panga (exhibit -1-) to the Government Chemist for analysis. A Government Analyst Albert Kathuri Mwaniki (DW 11) confirmed that the panga Exhibit -1- which was recovered from the house of the accused had same blood stains which matched the blood group of the deceased. The report is exhibit -3-.
6. The accused was examined by Doctor Thuo a Consultant Psychiatrist who found that he had a mental illness. The accused underwent treatment and it was confirmed that he had a chronic mental illness but was mentally fit to stand trial. He was then charged with this offence.
7. When he was called upon to give his defence, the accused opted to give unsworn statement. He told the court that he did not commit the offence. That he arrived after it had happened. He picked her and returned her to her people. ***“She was treated at the mortuary and returned to them”***. Those who go to see him at the prison tell him they still have her. He said he has a mental problem and he takes medicine which gives him problems.
8. The accused called his brother JMG (DW-2-) who told the court that in 1992 the accused suffered a mental break down. He was treated at Kerugoya Hospital and has been on treatment even in 2008. He testified that if the accused committed the offence, he did not know what he

was doing.

9. The defence also called DW-3- John Ireri who is stationed at Kerugoya G. K. Prison. He testified that the accused has been undergoing treatment at Kerugoya County Hospital. He produced the treatment records as Exhibit D2.

10. Doctor Thuo (PW-12) was also recalled by the defence and he produced a P3 form dated 11/12/2008 signed by Doctor Owino a Psychiatrist at Nyeri who he had worked with at Mathare Hospital. Doctor Thuo was familiar with his handwriting and signature and he was aware that he passed away. He testified that Doctor Owino had found that the accused had a mental illness for a period of 21 years at the time he examined him. The Doctor found that he was unfit to plead. He further testified that a person suffering from Schizophrenia may not be able to have a proper Judgment of his actions. He produced the P3 form as **Exhibit 12B**.

11. The defence closed its case and both parties filed submissions. The issues which arise for determination are:-

1. Whether the accused is the one who caused the death of the deceased with malice aforethought.

2. The defence of insanity.

12. The prosecution called Thirteen (13) witnesses. The key witnesses in this matter are PW-1-, PW-2-, PW-9-, 10 & 13 and PW8 the Doctor who performed the post-mortem. The other key witness is PW-II-, the analyst from the Government Chemist. PW-1- who is a sister to the deceased testified that on 30/11/08 she had gone to church in the morning and left her parents behind after the service. She went home alone then decided to go to the maize farm. She saw water pipes which were arranged ready for use and there was no one and decided to find out who was doing irrigation. It is then she discovered the dead body of the deceased. She went home and informed her father (PW-3-) and her mother (PW-3-). The two went to the scene and found the dead body of the deceased with the head completely severed. PW-2- asked his son to call the Chief PW-4-, the Area Chief called the police to the scene. Andrew Githinji Warui (PW-4-) the Assistant Chief testified that on 30/11/2008 at about 2.30 Pm he was called by the Village In Charge who reported to him that a body had been discovered in a farm. He called the Area Chief and also called Kutus Patrol Base. He then proceeded to the scene and saw the body of the woman. The head had been chopped off from the neck and was detached from the body. He testified PW-2- informed him that the accused had threatened the deceased and he suspected he was responsible. PW-4- went to the house of accused and found the door locked. PW-4- found the house of accused was locked from inside. An angry mob broke the door and found the accused inside sleeping on his bed. PW-4- testified that on checking inside they found a panga which had bloodstains but attempts had been made to burn the panga. PW-4- took the panga and gave it to Inspector of Police. The accused was arrested.

13. PW-5- is the Area Chief testified that she received the report of the murder from the Area In-Charge. She reported at Kutus Police Patrol Base and then proceeded to the scene with police officers. She confirmed that indeed somebody had been murdered. She testified that police officers from Kerugoya went to the scene and took photographs. The body was then removed to the mortuary.

14. PW-6- testified that on 30/11/08 MG met him and requested him to accompany him to his home as something had happened. He agreed and went with him to where the body of deceased was. PW-6- then called the Chief and reported to her. PW-7- SM is the accused's brother. He testified that PW-1- informed him what happened and he went to where the body of deceased was. He went and reported to PW-6- the Area in-Charge who then reported to the Chief and the police.

15. PW-8-, Doctor Wangombe Nderitu conducted post mortem on the body of the deceased at Kerugoya District Hospital mortuary on 1/12/08. He testified that the body was identified to him as that of PW a female African aged 27 years. He testified that the head was completely separated from the body. Cause of death was severance of the spinal cord. He filled a death certificate and filled a post-mortem form which he produced in court as Exhibit-2-. He also took a blood sample of the blood of the deceased.

16. PW-9- C.I.P Abdi Kadir Malicha was the Officer in Charge at Kutus Patrol Base on 30/11/08. He testified that he received the report and proceeded to the scene and saw the body. He then went to the house of accused and recovered a panga exhibit -1 which was bloodstained. He arrested the accused and took the body to the mortuary.

17. PW-10- P.C Tobia Saka was the Investigating Officer. He visited the scene and found the OCS Kerugoya at the scene. The accused had been arrested. The panga was handed over to him. Later he prepared an exhibit memo form and escorted the panga to the Government Chemist to confirm the source of blood.

18. PW-11- Albert Kathuru was the Government Analyst who is attached to the Government Chemist. He testified that he examined the bloodstains on the panga exhibit -1- and found that they matched those of the deceased. He produced the report as exhibit -3-.

19. PW-12- Doctor Joseph Thuo a consultant Psychiatrist at Embu General Hospital testified that he examined the accused on 15/5/2014 and found that he had a long standing history of mental illness schizophrenia and was on medication at time of medication. He had been treated in various hospital at Mathari and Nyeri. He had responded well to treatment and had come to realise his condition, he had been able to recall events and so he was able to take a plea and stand trial. He prepared a report which he produced as **exhibit -4-**.

20. This is the evidence which the prosecution relied on in this case. There was no eye witness account as to how the deceased met her death. The accused had previously threatened the deceased owing to jealousy over land. The question is whether the circumstantial evidence is sufficient to base a conviction for the offence charged. The evidence tendered shows that the offence was committed after all the members of the family went to church. It is only the deceased and the accused who were left at home. The deceased was found by PW-4- with her head severed from the rest of the body. This was a clear indication that the attackers intentions was to murder her. Soon after the murder was discovered the accused was suspected as he had a bad relationship with the deceased. The accused was jealous because the deceased had been given a piece of land. The panga which was recovered from the house of accused soon after the murder had some bloodstains which matched the blood of the deceased. I find that the accused had an opportunity to kill the deceased, he had a motive to kill the deceased and

the murder weapon was recovered from his house. There is therefore strong circumstances evidence.

21. Circumstantial evidence can be a basis of a conviction where the evidence tendered irresistibly points towards the guilt of the accused. The prosecution case rested on a circumstantial evidence. In the case of **Erick Odhiambo –v- Republic (2015) eKLR** the Court of Appeal set out three test to guide courts on circumstantial evidence. These are –

- a) **The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.**
- b) **Those circumstances must be of a definite tendency unerringly pointing towards the guilt of the accused.**
- c) **The circumstances taken cumulatively should join a chain so compete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.**

These principles were also laid down in the case of **Joan Chebichi Sawa –v- Republic (2003) eKLR**.

22. The circumstantial evidence must therefore lead to only one inference, that of guilt of the accused. In **Simon Musoke –v- Republic (1958) E.A 915** this principles were reiterated and the court held that –

“ before drawing the inference of the accused’s guilt from circumstantial evidence the court should ensure that there are no other co-existing circumstances which would weaken or destroy the evidence.”

The Court of Appeal in the case of **Mugambi –v- R (2017) eKLR** stated that –

“The parameters for considering such evidence were set out in the locus classicus case of Kipkering Arap Koske –v- Republic (1949) E.A.C.A 135 thus:-

- a) *The inculpatory facts must be incompatible with the innocence of the accused.*
- b) *The facts must be incapable of no other conclusion or explanation except the guilt of the accused.”*

23. I have considered these authorities against the background of the evidence tendered before me in this case. I find that the circumstantial evidence was strong and is of a definite tendency and unerringly points towards the guilt of the accused. The evidence meets the threshold for this court to rely on circumstantial evidence. The circumstantial evidence show that the accused had an opportunity to commit the offence when he was the only person who was left at home with the deceased. The deceased was killed after every person went to church. The body of the deceased was found by PW-1- after she came from church. The deceased was jealous of the deceased for having been given a piece of land. The bloodstained panga exhibit-1- was recovered from his house. PW-2- confirmed that the panga belonged to the to the accused. The panga as per the Government analyst report, exhibit -2- had bloodstains which matched those of the deceased.

24. I have carefully considered the evidence adduced by the prosecution. I find that the circumstantial evidence adduced against the accused was strong. It was strong and of a definite tendency and un erringly pointing towards the guilt of the accused.

25. The defence of the accused was not coherent on what happened to the deceased. This brings me the second issue which is the defence of insanity. The accused in his defence testified that the deceased was his neighbour. He told the court that he has a mental challenge and has been taking medicine. DW-2- who is his brother confirmed that the accused has had a mental illness since 1999 and has been taking medicine. He testified that at one time the accused had gone to his neighbours home and untethered his cow claiming that he had bought it. The prosecution had called Doctor Thuo who confirmed that the accused has had a mental illness, that schizophrenia and he (accused) is impaired from making proper judgment.

26. The defence applied to recall Doctor Thuo, the psychiatrist which was filled upon his arrest. He testified that a P3 form was filled on 11/12/08 by Doctor Owino who is now deceased. The P3 form shows that at the time it was filled the accused had a mental illness for a period of Twenty One (21) years. The Doctor formed the opinion that the accused was not fit to plead.

27. The defence also called DW-3- who produced documents showing that the accused has been undergoing treatment at Kerugoya and Embu Hospital for the period he has been in prison, about Twenty years.

28. The totality of these evidence is that the accused was suffering from a mental illness known as Schizophrenia at the time he committed this offence.

29. The defence counsel Mr. Muchira submits that the prosecution did not prove mensrea against the accused. This is based on the fact that the accused was suffering from a chronic mental illness. He submits that the inference to be drawn from the P3 form filled on 11/12/08 after the offence was committed on 30/11/08 is that the accused was still suffering from Schizophrenia. This is not in dispute as the prosecution has conceded that the accused was suffering from a mental illness at the time he committed the offence.

Section 11 of the Penal Code (cap 63 Laws of Kenya) provides that –

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

Under Section 12 it is provided:-

“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 maybe 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 effect above mentioned in reference to that Act or omission.”

30. The defence submits that the burden of proving insanity lies on the accused but the burden is on a balance of probabilities. He relies on the case of Mbuluke –v- Republic (1971) E.A 479. He urges the court to find that the circumstantial evidence presented proves the charge of murder but the accused mental capacity was compromised due to insanity. That the court find the accused guilty but insane on the basis of the evidence submitted to this court.

31. I have considered the case cited. The Court of Appeal in the case of Leonard Mwangemi Munyasia –v- Republic (2015) eKLR the court stated that –

“if it is shown that the appellant suffered from this condition then under Section 9 & 12 of the Penal Code he could not be held criminally responsible for the murder of the ----- the deceased. -----

Both Section 12 aforesaid and the M/c Naughten Rules recognise 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 the law. The test is strictly on the time when the offence was committed and no other.”

32. In this case, the defence has proved and it has been conceded by the prosecution that the accused was suffering from a mental illness at the time he committed the offence. Insanity is a defence if it is proved that at the time accused committed the offence he was labouring under the disease of the mind.

33. In conclusion I find that:-

1. There was strong circumstantial evidence which proved that the accused is the one who killed the deceased.
2. The accused was at the time he committed the offence labouring under a disease of the mind which had impaired his mind and he could not be able to make a proper judgment of his actions.
3. I therefore find the accused person guilty but insane.
4. Under Section 167 (1) (b) of the Criminal Procedure Code, the accused is convicted but proceed to make an order that he be detained in prison during the President pleasure.

Dated at Kerugoya this 19th day of May 2020.

L. W. GITARI

JUDGE