



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 15 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

POO.....ACCUSED

JUDGMENT

1. **POO** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the night of 22nd day of June 2014, at **Ruambwa** Centre, in **Bunyala** District of **Busia** County, murdered **Cynthia Borino Maina**.
3. The prosecution case was that on 22nd June 2014, the accused went to Greenland Bar at Ruambwa trading Centre. The deceased was his girlfriend. The two had a quarrel. Later at about 8 p.m., the accused returned to the bar and fatally shot the deceased. He also injured other people in the bar.
4. The accused in his defence denied to have killed the deceased. Though he was on duty, he testified that he could not remember what transpired on that day. He found himself at Busia police station the following day at 6 p.m.
5. The issues for determination are:
 - a) Whether the accused fatally shot the deceased;
 - b) Whether the accused was mentally sick on the material day; and
 - c) Whether the offence of murder was established.
6. Elizabeth Juma (PW1), John Bahati Ojiambo (PW2) and Nicholas albert Odieli (PW3) all testified that it was the accused who fatally shot the deceased herein. In her evidence (PW1) she said that she knew that the accused was a lover of the deceased and was a frequent customer in the bar and that she had known him for a period of two months. Her evidence was that he entered the bar through rear door.
7. John Bahati Ojiambo (PW2) testified that while watching a football match, the accused entered into the bar through the rear door. The door was on the side where the T.V screen was. He was facing that door. He told the court that he frequently watched football together with the accused for both were supporters of Manchester United football club. He said there was sufficient light that enabled him to see and recognize the accused. Like Elizabeth Juma (PW1), he said the accused was dressed in Administration Police uniform.
8. Nicholas Albert Odieli (PW3) is a tailor. He testified that he had known the accused from Port Victoria where he used to have a workshop and the accused was his customer. He knew him for over one year. On material night he said he was seated next to the rear door when the accused entered the bar and started shooting at random. Though he gave the name of the bar as Eastland, I am satisfied that his evidence was referring to the incident that occurred in Greenland bar.
9. Chief Inspector Charles Koilege (PW12) is a firearms examiner. He testified that the cartridge cases presented to him (E1-E12) were fired from G3 rifle (exhibit A) whose serial number is j52236. This was the rifle that was issued to the accused on 22nd June 2014 by Corporal George Nyongesa (PW5). I am therefore satisfied that it was the accused who fatally shot the deceased.
10. The accused in his defence contended that he could not remember what transpired after 6 p.m. when he reported on duty on 22nd June 2014. He could however remember the events from 6p.m. on the following day. Medical documents produced showed that when the accused was examined by Dr. Kwoba on 15th July 2014, she found him to be suffering from mental illness. When he was again examined by Dr.

Edwin Nyaura on 30th July 2014, he concluded that he was not fit to plead due to his mental illness.

11. Following the psychiatric assessment, the accused was on 16th October 2014 committed to Mathari Mental Hospital for treatment. A report from Mathari Mental Hospital dated 16th March 2015, indicated that he was now fit to plead.

12. Prior to the report of 16th March 2015 Dr. Mucheru Wang'ombe of Mathari Mental Hospital, on 23rd February 2015, had indicated that the accused was not fit to plead.

13. Dr. Kwoba on 3rd July 2014, indicated that the father of the accused had given a history of abnormal behavior in 2005 and 2008. The same was documented by Dismas Makhoha of Busia District Hospital when he examined the accused on 16th July 2014. Dismas did not indicate his qualifications. We can therefore assume that he was not a doctor. He is the only one who had indicated at that time that the accused was fit to plead.

14. The evidence on record therefore is that when the accused was examined soon after the shooting incident, he was found to suffer from mental illness. The history captured by Dismas Makhoha of Busia District Hospital, was that a maternal uncle of the accused suffered from mental illness. I therefore have sufficient evidence on record to enable me to make a finding that the accused at the time of the incident was suffering from mental illness.

15. The question that begs for an answer is whether the mental illness deprived the accused the capacity to form the necessary mens rea for murder. What is mens rea? The *mens rea* for the offence of murder is malice aforethought. Section 206 of the Penal Code provides:

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 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.

16. There was scanty evidence on the conduct of the accused prior to the shooting incident. The evidence of Elizabeth Juma (PW1) and a co-worker of the deceased was that at about 2 p.m. the accused went to the bar and had a quarrel with the deceased. According to her evidence, the two were lovers. The quarrel lasted for about 5 minutes. Though she said she knew they were quarreling for they spoke loudly, she did not tell the court if she was able to discern what they were quarreling about. This would have helped us to appreciate the mental state of the accused at that time. Unfortunately, we cannot be able to draw any conclusion from the alleged quarrel.

17. At the time of shooting, the evidence on record is that the accused shot at the patrons in the bar, apart from the deceased whom it is alleged had earlier in the day quarreled with. The evidence of John Bahati Ojiambo (PW2) was that the accused after shooting the deceased twice, turned to where he was lying down and shot at him. He then shot at Nicholas Albert Odieli (PW3). In his evidence, this witness said that the accused shot at him where he had taken cover. It is worth noting that these two witnesses who were also victims of the shooting were not a threat to the accused in any way for they were already lying down hiding from him. This gives an impression of a sick man. The alleged quarrel may have been a trigger to somebody suffering from some mental illness.

18. Unless the accused is a very good actor, the incident testified to by Eliud Olunguro (PW7) points to person who is not in touch with reality. He had just killed his girlfriend and had no emotions at all when he went looking for fuel from him for his motor bike. This witness testified that the accused was his friend and he was not able to note any abnormality in his conduct. It is only a sick man who can behave normally after killing and more so, his friend. This conduct coupled with the subsequent psychiatric examinations leave no doubt in my mind that the accused person was mentally ill at the time of the commission of the offence.

19. Logically no person who is mentally sick can have the requisite mens rea to commit an offence. The law of insanity was formulated in 1843 by the House of Lords in the celebrated case of **R v. McNaughten 1843-10 C & F 20** This case laid down three principles namely;

a) Every person is presumed to be sane, until the contrary is established.

b) To establish the defence of insanity, it must be clearly proved that at the time of committing the crime, the person was so insane as not to know the nature and quality of the act he was doing or if he did know it, he did not know that what he was doing was wrong.

c) The test of wrongfulness of the act is in the power to distinguish between right and wrong, not in the abstract or in general, but in regard to the particular act committed.

20. The spirit in McNaughten's Rules is captured in sections 11 & 12 of the Penal Code that states:

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.

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.

21. My finding is that the accused was insane at the time he committed the offence and cannot be held responsible for his action. Section 166(1) of the Criminal Procedure Code provides that:

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.

I therefore make a special finding that the accused is guilty of murder but was insane when he committed the offence. Consequently, he will be detained at Busia G.K prison pending the order of the president. Meanwhile the Deputy Registrar of this court shall write promptly to the President of the Republic of Kenya for an order envisaged under section 166 (2) of the Criminal Procedure Code.

DELIVERED and SIGNED at BUSIA this 18th day of February, 2019

KIARIE WAWERU KIARIE

JUDGE