



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: C. MEOLI, J)

CRIMINAL CASE NO. 6 OF 2017

(Formerly Nakuru High Court HCCRC No. 7 of 2013)

REPUBLIC.....PROSECUTOR

-VERSUS-

J K N.....ACCUSED

J U D G M E N T

1. The Accused person was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on 21st July, 2013 within Naivasha Municipality he murdered **P N K**. Although the Accused was first arraigned before the High Court at Nakuru (before **Emukule J**, as he then was) on 6th August 2013, the plea was deferred pending the treatment of the Accused at Mathari Mental Hospital.
2. By the letter dated 27th March 2017, the consultant psychiatrist at Rift Valley Provincial General Hospital confirmed that the Accused was finally fit to plead. He pleaded not guilty on 3rd April 2017 and subsequently the case was transferred to this court.
3. The hearing eventually commenced on 9th October, 2017. The prosecution case was that the Accused person was during the material period a resident of Maraigushu, Naivasha. He lived in a single roomed house with his wife. The couple had several adult children including the deceased **P N K**. The relationship between the Accused and his wife **F W (PW1)** was constantly strained. **PW1** complained that the Accused violent towards her, at one time sustaining a fracture following an assault.
4. In June 2013, **PW1** was forced to leave the matrimonial home following yet another disagreement with the Accused. She was hosted by friends at a place called **Mararo**, some distance from Maraigushu. In the same period the deceased who had been living in Nairobi returned home to Maraigushu and started living with the Accused. The deceased was allegedly suffering from a mental illness at the time.
5. On 21st July 2013 **EWK (PW2)** an adult daughter of the Accused residing in Naivasha received a visit by the Accused. He reported to her that her brother **PN**, the deceased herein, had died. **PW1** was unable to elicit a coherent explanation of the cause of death from the Accused and therefore travelled to Mararo to brief **PW1**. On the next day, 22nd July 2013, **PW1** travelled to Maraigushu in the company of **PW2** and an adult son **S KK (PW3)**. Unknown to them, on the same date at about 10.00am the Accused had also reported to **PIK, PW4** the area chief Maraigushu Sub-location that the deceased had died at home.
6. **PW1, PW2** and **PW3** on arrival at the Maraigushu home found the door latched but not locked. Upon entering the house, they found the body of the deceased lying on a cushion on the floor. It had visible injuries on the head and one eye and appeared swollen. The body had an odour. Just then **PW4** arrived, followed afterwards by the Accused. When questioned by the family, the Accused could not account for the events and became agitated, uttering words to the effect that his one of his interlocutors, **PW2** ought to ask death when he visited as she could also murder her own first born. Police were called to the scene. They came and took away the body and subsequently arrested the Accused.
7. The post mortem examination revealed that the cause of death was the head injury with skull fracture leading to epidural hemorrhage.
8. In his defence, the Accused gave a sworn statement. He stated that he was a resident of Maraigushu. He complained that **PW1** often deserted him and had done so in the material period. He stated that in the said period the deceased came to live with him at Maraigushu and was unwell. He had cared for him, but his condition had deteriorated by the evening of 20th July, 2013 before he died. He informed some neighbors and also his daughter **PW2**, instructing her to notify **PW1**. On the next day he reported to the chief (**PW4**) who visited the home.
9. On the same date his wife and children arrived. The Accused allegedly showed them the drugs the deceased had been using, explaining

that he had given care to the deceased. The police eventually took away the body. He participated in his son's burial arrangements before his arrest. He denied that he murdered the deceased.

10. In submissions at the end of the trial, the defence submitted that the evidence mounted by the prosecution was circumstantial, and that there was no proof that the Accused, with malice aforethought caused the death of the deceased.

11. There is no dispute regarding the relationship between the Accused on one hand, and the deceased, and on the other hand with **PW1**, **PW2** and **PW3**. There is no dispute that in the material period the deceased was sharing a one-roomed house with the Accused at the family home at Maraigushu. Further it is not in dispute that the deceased died in the house shared with the Accused, and in his presence on or about the 20th July 2013; and further that the Accused reported the occurrence to **PW2** and to **PW4** on 21st July, 2013 and 22nd July, 2013 respectively.

12. The court must determine the cause of death of the deceased and whether, with malice aforethought the Accused caused the same.

13. As correctly observed by the defence in submissions, the prosecution evidence against the Accused is circumstantial. The authorities cited by the defence in that respect are on point. In **Musili Tulo -Vs- Republic [2014] eKLR** the Court of Appeal reiterated the need to closely examine circumstantial evidence tending to connect an Accused with the commission of an offence. The object being to ascertain whether the evidence satisfies the age-old principles stipulated in **Republic -Vs- Kipkering Arap Koskei -Vs- Republic [1949] 16 EACA 135** and further in **Simoni Musoke -Vs- Republic [1958] EA 715**. The Court of Appeal in **Tulo's** case restated the principles as follows:

“i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii) Those circumstances should be a definite tendency unerringly pointing towards the guilt of the accused;

iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Accused and incapable of any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of **Musoke -Vs- Republic [1958] EA 715 citing with approval **Teper -Vs- Republic [1952] A.C. 480** thus:**

“It is also necessary before drawing the inference of the Accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which weak or destroy the inference.”

14. Regarding the cause of death, the prosecution witnesses **PW1**, **PW2**, **PW3** and **PW4** described the physical injuries which they noted on the deceased's head as soon as they entered the house. They said the deceased was lying on a cushion on the floor.

15. **Dr. Titus Ngulungu (PW6)** a forensic pathologist testified that his main findings at post mortem was the dehiscence or parting of the coronal suture, namely the feature of the head holding together the two skull portions of the head, with oozing blood. He testified that the dehiscence was an indication of trauma on the skull. His conclusion was that death was due to skull fracture with internal bleeding due to trauma.

16. In his report and evidence, the pathologist noted the fact that the body was in a decerebrate condition, a feature associated with brain injury and loss of oxygen before death, as well as lividity which suggested body was lying on its back at time of death.

17. Although **PW1**, **PW2**, **PW3** and **PW4** are not medical experts, they described injuries to the head and eyes on the deceased. **PW1** particularly stated that the head injury was on the crown of the head and that the site had clotted blood.

18. During cross-examination **Dr. Ngulungu** asserted that the head injuries were on the front and back of the head and resulting dehiscence could not be as a result of a fall which ordinarily one-directional. Moreover that there were no abrasions to suggest a fall.

19. In his evidence, Accused contended that the deceased died from natural causes i.e. sickness and at one point suggesting that the head injuries were inflicted by beer cases loaded onto the police vehicle while the body was on board and being ferried from the home to the mortuary.

20. The professional opinion of the pathologist did not include any illness as the cause of death or post-death injuries, and neither were suggested to him in cross-examination. Clearly, the evidence by **PW1**, **PW2**, **PW3**, **PW4** and **PW6** is consistent as to the cause of death and the various defence suggestions as to the cause of death – fall or illness -hold no water. This evidence displaces the Accused's assertions as to the cause of the deceased's death. I find that the death was caused by head injuries sustained from trauma.

21. The next question is how these injuries were sustained. The Accused admits being present with the deceased on the night he died. On the next morning the Accused admittedly reported the death to **PW2** and could not explain the cause. He reported to the chief, **PW4**, some two days later. The chief **PW4** also stated that the Accused did not give an account of how the death came about. **PW2** stated in her evidence that in his first report to her the Accused did not tell her that the deceased had been sick. There is evidence that after the chief had left the house on 22nd July, 2013, **PW1**, **PW2** and **PW3** continued to question the Accused.

22. According to **PW1** and **PW3** the Accused got agitated, retorting to **PW2's** questioning that:

“Ask death when he visited. Even you can murder your first born as I have.”

23. There is no doubt that the deceased died a violent death whilst sharing a room with the Accused. The Accused's explanation in his defence as to how the death occurred (from sickness) has no basis. Applying the provisions of Section 111 and 119 of the Evidence Act to the facts of this situation, the manner in which the deceased sustained fatal head injuries, is clearly a matter within the special knowledge of the Accused. In all probability, it appears that the Accused inflicted the fatal injuries which cracked the skull of the deceased skull who died while lying down on the cushion. If there was a fight or if another person had assaulted the deceased, the Accused as the only other present person in the house would know. However, the Accused has elected to maintain the improbable position that the deceased died of natural causes after an undisclosed illness. The injuries inflicted on the deceased were severe enough to crack his skull and kill him almost instantly. The evident intention was to cause grievous harm or death.

24. The proven facts in this case unerringly point to the guilty of the Accused as the person who inflicted the fatal injuries on the deceased. Moreover, there are no co-existing circumstances to weaken or destroy such inference.

25. Nonetheless, reviewing the utterances of the Accused to **PW2** regarding the death of his son, and the medical reports on record, the earliest dated 28th August, 2013 and 30th October, 2013 the further report dated 28th November 2014, as well as evidence by **PW1** as to the Accused's violent nature, I make a special finding under Section 166 (1) of the Criminal Procedure Code that the Accused is guilty of the offence charged but was insane at the time of the offence.

Dated and signed at Kiambu, this 27th day of February, 2019.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 14th day of March, 2019.

R. MWONGO

JUDGE

In the presence of:-

Mr. Koima for the State

Miss Kithinji for the Accused

Accused - Joseph Kamau Njenga - present

Court Assistant - Quinter Ogutu