



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 78 OF 2015

LESIT J

REPUBLIC.....PROSECUTOR

VERSUS

EDWIN NJIHIA WAWERU.....ACCUSED

JUDGEMENT

1. The accused **EDWIN NJIHIA WAWERU** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that:

“On the 1ST day of August, 2015 at Macabs Auto parts shop along Race course road in Nairobi within Nairobi County murdered “VENANZIO NGURE MWANGI”

2. The prosecution called a total of 13 witnesses. In brief the prosecution case is that the deceased and accused were both inside a room at PW1’s spares shop along Kirinyaga road. The deceased a carpenter was working on some shelves inside the room while the accused was partaking coffee in the same room. The accused complained of dust getting into his coffee from the carpentry work the deceased was undertaking. Soon thereafter, members of the public found the deceased lying in a pool of blood having suffered head injuries. The deceased was rushed to hospital but he unfortunately succumbed to the fatal injuries suffered.

3. PW1 the accused cousin stated that on 1st August 2015, he was in the company of the accused at his work place, a spares shop along Kirinyaga road. PW1 testified that he had engaged the deceased herein whom he knew as a carpenter, to work on some shelves inside his shop. PW1 stated that he left for the front shop leaving the deceased in company of the accused who was having coffee.

4. PW1 stated that after a short while, the accused came to him complaining that the deceased was putting dust in his coffee. PW1 informed the accused that he can have his coffee at a different room but the accused declined. This feedback prompted a small confrontation between PW1 and the accused that led to the accused hitting PW1 with a table spoon. PW1 stated that on realizing that the accused had turned violent, he left his shop and went to look for the accused uncle.

5. PW1 testified that on his way back, he met with the accused on the corridor that led to his shop. The accused beckoned him to follow him stating he had something to show him. PW1 stated that he followed the accused and on reaching the room where he had left the accused and deceased, he saw the deceased lying on the floor, looking up whilst holding his head with a lot of blood on the floor. PW1 stated that the accused picked up a hammer from the ground and this prompted him to run away screaming as he thought the accused was to go to attack him.

6. PW2, PW3 and PW4 were all business colleagues of PW1 along Kirinyaga Road. PW2 was the first to respond to PW1 screams and PW4 joined them shortly thereafter. The two stated that PW1 led them to the back room which they knew as his office. On arrival, they found a man seated on the floor, wounded on the head and bleeding profusely. There was also a hammer on the floor.

7. PW3 having joined PW1, PW2, and PW4, stated that they interrogated the accused independently as to what had transpired and that the accused indicated that the deceased had fallen down from up where he was working. PW3 further stated that they were advised by the police officers who responded to their call, not to interfere with the CCTV cameras, neither the footage as they (police) would send an expert who would upload the footage. PW3 stated that the expert from the police played the CCTV footage in PW3’s office in the presence of PW1 and PW4 amongst others. PW3 and PW4 testified that the footage showed the accused person pick a hammer from the deceased, walk behind him and hit him two or three times on the head.

8. PW3 testified that the father of the accused had asked him to be talking to the accused often because he had a history of mental disturbances. He explained that he had noticed that when the accused answered questions posed to him, they depicted a disturbed person reason being he based his answers on his life in the USA yet he lived in Kenya since 2012.
9. PW5 PC Peter Kamau was the first police officer to visit the scene where he found the accused locked up inside PW1's shop. He stated that he arrested the accused and handed him over to PW6 No.42715 Snr. Sgt Fabian Gitonga.
10. PW6 stated that on the fateful date, having been briefed by PW5 about the incidence at PW1's shop, he proceeded to the scene and re-arrested the accused. PW6 also recovered a hammer that had blood on its blunt side, the accused shirt and a pair of shoes which were stained in blood. PW6 stated that he later went to Kenyatta national hospital where the deceased had been taken for medical attention. He noted the deceased had injuries on the head and had succumbed to the same. PW6 stated that an ID bearing the names "**Venacio Ngure Mwangi**" said to belong to the deceased was handed over to him by two men who had escorted the victim to Kenyatta. PW6 finally produced a hammer as P.exhibit 1, accused shirt and pair of shoes as P.exhibit 3 and P.exhibit 4 respectively.
11. PW8 No.54955 CPL Kaberia Itabari attached to DCI Kamukunji stated that on 1st August 2015 at around midday he proceeded to a scene of crime situated along Kirinyaga Road having been requested by his superior. At the scene, PW8 recovered a saw (P.exhibit 2) and received a CCTV DVD from PW1 which he forwarded to the specialists at CID Headquarters for processing. PW8 further stated that he attended a post mortem on the deceased on 3rd August 2015 where PW7 a cousin to the deceased identified the body.
12. PW8 stated that he later forwarded the saw, a hammer, a pair of shoes, a shirt and blood sample of the deceased to the government chemist for analysis. PW8 Produced an exhibit memo form dated 6th August 2015 as P.exhibit 5, exhibit Memo form dated 8th March 2017 as P.exhibit 6 and a DVD recovered from PW1 as P.exhibit 7.
13. PW9 No. 235194 CIP Sane Kigen was attached to Transnational Crimes Unit DCI Headquarters as an expert in crime scene photography. He stated that on 8th March 2017, he received P.exhibit 6 that had forwarded an envelope marked A1 containing a CD with CCTV footage. P.exhibit 6 desired him to device whether the footage in the CD was playing and issue a certificate for the same. PW8 stated that he played the CCTV CD and proceeded to capture images from the footage. He printed a total of 16 photos which he marked 1 to 16 and produced them as P.exhibit 8 together with his report P. Exhibit 9. PW9 played P.exhibit 7 in court and a man in white shirt could be seen picking a hammer and striking the head of a bending man at least 3 times before walking away to another room.
14. PW10 Dr Henry Kiptoo Sang a Government Analyst based at the Government department stated that on 6th August 2016, their lab received a white shirt in khaki envelope marked A, a pair of brown shoes in a khaki envelope marked B, a harmer wrapped in a khaki envelope marked C, a saw wrapped in a newspaper marked D, blood sample in a bottle marked E inscribed the names "**Venacio Mwangi deceased**" and an exhibit memo dated 6th August 2015 from PW8. The memo required PW10 to determine the presence of blood stains in the said items and its relationship to the sample.
15. PW10 stated that after the analysis of all the exhibits and DNA profiling, he formed the opinion that the DNA of blood extracted from P. exhibit 1, 2, 3 and 4, matched that of the blood sample submitted as being of the deceased. He prepared a report dated 21st March 2017 which he produced as P. exhibit 10.
16. PW11 a pathologist and forensic expert from Kenyatta National Hospital stated that he conducted a post mortem on the deceased on the 6th of August 2015. He stated that externally the body had Lacerations on the head, one on the right front of the head measuring 3 x 0.5cm and the other on the left measuring 9 x 0.5cm. He further stated that at the back of the head was a tear/laceration measuring 5x0.5cm as well as a fracture on the skull bone.
17. Internally PW11 noted multiple contusions on the brain and massive bleeding into the brain (subdural haematoma). This caused the brain to weigh 1690 grams as opposed to the normal weight of 1200 grams. PW11 formed the opinion that the cause of death was head injury due to blunt force trauma. He stated that the injuries noted were consistent with the history given. He produced the post mortem report as P.exhibit 11.
18. PW12 Dr Mucheru Wangombe a Consultant Psychiatrist at Mathare Teaching and Referral Hospital assessed the accused on 20th August 2015. He stated that he learnt that the accused had previously suffered from mental illnesses in 2014 and had been treated at Chiromo clinic for substance abuse amongst others. PW12 testified that the accused had been to a Retreat Drug Treatment Centre where he had smashed a television set alleging something wanted to attack him.
19. PW12 testified that on 20th August 2015 when he first assessed the accused, the accused was unkempt, uncooperative and that he noted that all his responses were characterized with "**I don't know**" answer. PW12 explained that he could not make a conclusion at that juncture hence recommending for the accused in-patient treatment and that he be put on Anti-psychotic treatment medication.
20. PW12 further testified that on 21st November 2016, the accused was examined by a colleague one Dr. Mburu who was of the opinion that the accused mental status had improved and was now fit to plead. PW12 produced his report dated 20th August 2015 as P.exhibit12 and Dr. Mburus' report dated 22nd November 2016 as P.exhibit13.
21. PW13 Dr. Kizzie Shako stated that on 4th August 2015, she examined the accused person whom she described as well oriented and composed though suffering from memory lapses. She testified that she learnt of accused history of violence and mental illness. From her assessment, PW13 formed the opinion that the accused was not fit to stand trial and recommended further mental examination at Mathare Mental Hospital. PW13 produced the accused P3 form as P.exhibit 14.

22. The accused gave an unsworn defence and called one witness. He narrated how he started abusing drugs and alcohol after failing to secure a job in Kenya having come back from the USA in 2012. The accused stated that in the year 2013 he was admitted at Chiromo Lane Rehab Centre after the mother had realized that he was extensively addicted to drugs. Thereafter he was transferred to Retreat Rehab Centre where he spent an accumulative period of 6 months being treated for bipolar disorder and psychosis. The accused further stated that upon leaving rehab, he discontinued his medication which led to a relapse and his continued abuse of drugs. The accused admitted that on 1st August 2015 while at PW1's shop where he used to keep himself busy, he killed the deceased.

23. DW2 Dr Pius Kigamwa stated that the accused had been admitted at Chiromo Lane Medical Centre on 21st January 2013 aged 28 years. He stated that the accused involuntary admission had been characterized by abuse of cannabis sativa, abusing alcohol, being socially withdrawn, spending all day watching television, having suffered weight loss, displaying violence, rudeness and instability. He also had insomnia and was cheating/lying. DW2 testified that it had been reported that he smoked cannabis because he was bored, heard voices and harboured paranoid delusions.

24. DW2 explained that he formed the opinion that the accused suffered from substance induced psychosis and anti-social personality disorder. DW2 explained that there is one incident which stood out in the accused case, where on 30th January 2013 while at the centre and watching the T.V. at the centre, he smashed it saying there was smoke intended to harm him. That incident necessitated his return to the psychiatric unit. DW2 further explained that she prescribed anti-psychotic medication and that the accused was put under mood stabilizer and an anti-depressant. She produced her report dated 6th February 2018 as D.exhibit 1.

25. Mr. Munene the defence counsel filed his written submission and which he highlighted in court. He urged the court to consider the accused defence of insanity under **section 12** of the **Penal Code**. Counsel urged that the conduct of the accused person when the crime occurred is related and that the prosecution witnesses PW1, 2 and 6 had noted the odd behaviour of the accused. Counsel further urged that PW8 had intimated that he was unable to take a cautionary statement from the accused person because he appeared abnormal.

26. Counsel urged that given the treatment history of the accused and the fact that the accused was also treated immediately after this incident occurred, the accused could not formulate the necessary *mens rea* for the murder charge as he was suffering from mental illness. Counsel finally urged that with the accused having relapsed as a result of using cannabis, then on a balance of probabilities, the accused was insane on the 1st August 2015 and the court ought to make a special finding of insanity.

27. Ms. Onunga Learned prosecution counsel urged that the prosecution had proved the involvement of the accused in the deceased death. Counsel further urged that the civilian prosecution witnesses had noted an unusual behaviour with the accused and that all the medical expert witnesses alluded to the fact that the accused had suffered from mental illness and that the condition could only be managed by medication. Counsel urged the court to make a special finding under **section 166(1)** of the **Criminal Procedure Code**.

28. The accused is facing a charge of murder contrary to **section 203** of the **Penal Code**. That section provides that:

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

29. Malice aforethought has been defined under **section 206** as follows:

“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;”

30. The burden of proof lies on the prosecution to adduce evidence to prove that it was the accused who occasioned the death of the deceased in this case by inflicting fatal head injuries on the deceased. The prosecution must equally adduce evidence to prove that at the time the accused inflicted the fatal head injuries on the deceased, he had formed the necessary intention to either cause death or grievous harm to the deceased.

31. Having considered the evidence adduced by the parties herein I find these issues not in dispute. It is not in dispute that the accused was alone with the deceased from the time PW1 went to look for the accused uncle up to the moment PW1 discovered the body of the deceased lying in a pool of blood. It is not in dispute that the accused hit the deceased with a hammer on the head. It is not in dispute that the accused had previously exhibited signs of mental lapses and was a heavy consumer of cannabis sativa (bhang).

32. Having carefully considered all the evidence adduced before court and the submissions by all counsels I find that the issues for determination in this case are:

(I) Whether the prosecution has proved malice aforethought as against the accused.

(II) Whether the accused defence of insanity was reasonable and plausible.

33. Even though the prosecution and defence urged the court to enter a special finding in this case under **section 166** of the **Criminal Procedure Code**, what will determine whether such finding can be made is whether or not the prosecution has proved malice aforethought;

and whether or not there is any evidence that can lead the court to find that indeed the accused was not in control of his mind due to illness.

34. **Section 11** of the **Penal Code** provides that;

“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.”

35. **Section 12** of the **Penal Code** deals with the defence of insanity and instances and circumstances under which it can be apply as follows:

“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.”

36. The prosecution has adduced evidence of the events of the fateful day. The accused was irritated by the deceased for reason the deceased in the course of performing his carpentry work for which PW1 had hired him, some dust entered his coffee. The accused is shown to have been unreasonable by declining to move to other rooms which were free and insisted he would sit where the deceased was doing his work. It is as the deceased worked that the accused took a hammer, one of deceased tools, and hit him severally with it right on different parts of the head.

37. These facts are not in dispute. The question then is whether at the time of the incident the accused was in control of his mind, and to what extent. The burden of proof for the defence of insanity lies with the accused who has pleaded it on a balance of probabilities.

38. The prosecution and also the defence have adduced evidence as to the accused state of mind at the time of this incident, and also of the time immediately before and after the incident. The prosecution called PW11 who said that he examined the accused on the 20th August, 2015, 19 days after the incident. He said that he put him on anti-psychotic treatment for bipolar and psychosis disorder. He said that the accused condition was a loss of touch with reality, that he was not in control of himself and could not tell when or how things are. The doctor stated that the condition could not be cured but could only be managed by drugs.

39. The defence called DW2, a doctor who treated the accused at Chiromo Lane Clinic. He said that the accused admitted there on 21st January, 2013 due to substance induced psychosis and anti-social personality disorder. The doctor explained that the accused relapsed several times and had to be admitted for treatment due to inconsistency in taking his medication and abuse of cannabis.

40. The two doctors are in agreement that the accused suffered mental illness for which he was on treatment severally before this incident. Their explanations show that the condition the accused suffered from caused him lack of control of his senses, that he was not capable of knowing where or how things were due to loss of touch with reality.

41. I find that the evidence before court shows that the accused was not in control of his senses and was therefore not capable of knowing what he was doing or that it was wrong at the time of this incident.

42. I find that the defence of insanity is available to the accused. I agree with both counsels that this is a fit case for a special finding under **section 166** of the **Criminal Procedure Code**. Accordingly I enter a special finding of guilty but insane.

DATED AT NAIROBI THIS 16th DAY OF MAY, 2019.

LESIT, J

JUDGE