



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MURDER NO. 2 OF 2013

DAVID IRUNGU CHOMBA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The accused person is charged with murder contrary to Section 203 as read with **Section 204 of the Penal Code Cap 63 Laws of Kenya**.
2. It is alleged that on 17/2/2013 at Kamiji sub-location Muthithi Location Mwea Division the accused unlawfully murdered Olive Wanjiku Kinyeki.
3. The accused David Irungu Chomba denied the charge.
4. The brief facts of the case are that the deceased in this case was a niece of the accused, that is a daughter of his brother. On 17/2/2013 the deceased then aged three years was playing outside the house. PW-1- Benson Kinyeki Chomba heard a bang like something had fallen. PW-1- is the deceased's father and a brother to the accused. PW-1- went to check what was happening and saw the accused cutting the deceased using a panga. The deceased was screaming. On checking on the deceased, PW-1- realized she was already dead. PW-1- saw the accused cut the deceased at the back of the head. PW-1- screamed. The accused ran away with the panga and surrendered at Makutano Police Station. Police went to the scene and removed the body of the deceased. It was preserved at Kibugi Funeral Home and later a postmortem was done. The Doctor formed the opinion that the cause of death was severe head injury caused by sharp object.
5. The postmortem form was produced as exhibit -1-. The accused was examined by Doctor Thuo J. N. a Consultant Psychiatrist at Embu Provincial Hospital on 19/2/13. The doctor formed the opinion that the accused was suffering from a mental illness and requires treatment in a maximum security hospital Mathari. He was not mentally fit to stand trial.
6. The accused was committed to Mathari Mental Hospital by an order of this court. Later on 13/3/2014 the court was informed that the accused was treated and a certificate of capability to make a defence under **Section 163(1) of the Criminal Procedure Code** was filed in court.
7. The trial proceeded and the prosecution called seven witnesses. The accused then gave his unsworn defence and he stated that he could not remember what happened.
8. The facts of the case are not in dispute. PW-1- adduced direct evidence as witnessed the accused assault the deceased with a panga. The testimony of PW-1- was corroborated by the testimony of PW-2- Salome Wanjiku who is the mother of accused. The evidence was also corroborated by PW-3- Alice Muthoni Kinyeki. The prosecution proved that it is the accused who fatally wounded the deceased.
9. PW-6- Sgt Emmanuel Kiprop testified that on 17/2/13 he was at Makutano Police Station when the body of deceased was taken and it was reported that the accused had cut her with a panga killing her instantly. Before he could go to the scene he spotted the accused running towards the Police Station while being pursued by members of public. PW-3- rescued the accused and placed him in the cell. PW-5- & -9- testified that they received the report and visited the scene. They were from Sagana Police Station.
10. The evidence tendered by the prosecution proves that the deceased met her death through the unlawful acts by the accused.
11. The accused person is facing a charge of murder. The burden of proof lies squarely with the prosecution to prove the charge against the accused person on the required standard of proof beyond any reasonable doubt. The prosecution needed to adduce evidence to establish the ingredients of the offence; which are that the accused person is the one who inflicted the injuries on the deceased and that the injuries led to

her death, and further that at the time he inflicted the injuries on the deceased, he had formed the necessary intention to either cause death or grievous harm on the deceased.

Mens Rea

Section 203 of the Penal Code:-

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

Section 204 of the Penal Code

“Any person convicted of murder shall be sentenced to death.”

Section 206 of the Penal Code:-

“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.”

12. From the evidence tendered, the accused committed the offence while suffering from a mental illness requiring treatment.

The provisions of 166 of the Criminal Procedure Code applies.

Section 166 of the Criminal Procedure Code provides:

i) “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.

ii) When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.”

Republic v Christopher Njoroge Mumbi [2018] eKLR

The Court held;

My finding is that there is a high possibility that at the time of the commission of these offences, the accused was not of sound mind.

The totality of the evidence and the reports by PW1 and PW2 (Exhibit 1 and 2) attest to that. I further find that this is a case falling for determination under Section 166 of the Criminal Procedure Code which provides;.....

I therefore make a special finding to the effect that the accused is guilty of the offence of murder as charged in both counts but was insane when he committed the offences. I further direct that the accused be detained at the pleasure of the President pursuant to Section 166 (2) Criminal Procedure Code.

Republic v S C K [2017] eKLR

The Court held;

In the case REPUBLIC - V – PHILEMON CHEMA [2014] eKLR it was held:

“To establish the defence of insanity, the court must clearly be satisfied that when the accused committed the act of which he is

indicated, he was:

(i) suffering from a disease which affected his mind, and by reason thereof,

(ii) He was incapable of understanding what he is doing or knowing that he ought not to do the act or make the omission of the intention to do so..."

.....In view of the evidence tendered this court makes a special finding to the effect that S is guilty of murder as charged but that he was insane when he committed that murder. That finding is in accordance with Section 166 (1) of the Criminal Procedure Code, Cap 75.....

I hereby direct the Deputy Registrar of this court to report this case for the order of the H. E. the President. In the meanwhile S C K shall be kept in custody at Nanyuki G K Prison.

12. In this case PW-1-, 2 & 3 testified that they could not explain the behavior of the accused that particular morning. The Consultant Psychiatrist Doctor Thuo who examined the accused two days after he committed the offence confirmed that the accused was a sick person with a mental illness requiring immediate treatment. The evidence tendered proved beyond any reasonable doubts that the accused is the one who caused the death of deceased by inflicting severe injuries on her head. The accused raised a defence that he was mentally sick and relied on the medical report by Doctor Thou. The defence of insanity when raised, the court must be satisfied that the accused was suffering from a disease which affected his mind and was therefore incapable of acting reasonably or normally and to understand what he was doing, what he ought to do and what he ought not to do.

13. The accused stated that he does not know that he killed the deceased. He was in no state to know what he was doing and that he ought not do it.

14. I find that the evidence tendered proved that the accused is guilty of murder as charged but he was insane at the time he committed the offence. I therefore order that pursuant to **Section 166 of the Criminal Procedure Code**, the accused will be detained at the President Pleasure. The accused shall be detained at Kerugoya G. K. Prison. The Deputy Registrar to report the order to H. E. The President.

Dated at Kerugoya this 6th day of June 2019.

L. W. GITARI

JUDGE