



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 21 OF 2007

REPUBLIC.....RESPONDENT

VERSUS

NJOMO KAMAU GACHERU.....ACCUSED

JUDGEMENT

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that on the 23rd day of October 2006 at Kamwangi Village in Thika District of the Central Province, murdered **AWG**.
2. He first appeared in court on 12/03/2007 and on 21/03/2007 a plea of not guilty was entered for him and hearing date set for 20/06/2007 when the matter was adjourned. On 1/10/2007 Mutungi J. as he then was ordered for the age assessment of the accused as he appeared not to be over eighteen (18) years by his looks. On 4/03/2018 age assessment report was presented to court and matter fixed for hearing before Muga Apondi J. as he then was.
3. On 11/06/2019 the matter came up for hearing before Ochieng J. on an application by the accused in respect of violation of his constitutional right to be taken to court within fourteen (14) days as was provided for under the retired Constitution and by a Ruling dated 7/07/2009, the Judge declined to declare the proceedings either illegal or null and void and ordered that the trial proceed.
4. On 13/10/2009 the trial commenced before Ochieng J. who heard and recorded the evidence of five (5) prosecution witnesses (**PW1 – PW5**) before proceeding on transfer. On 27/10/2011 directions were taken before Mwilu J. as she then was under **Section 200 (3)** of the **Criminal Procedure Code** for the matter to proceed from where it had reached and on 18/07/2012 the same proceeded for further hearing before Ombijja J. as he then was who heard and recorded the evidence of **PW6, PW7, PW8, PW9** and **PW10** before proceeding on retirement.
5. On 17/07/2016 the matter was fixed before Lesiit J. for further direction under **Section 200** and **201 (1)** of the **Criminal Procedure Code** where directions were issued that the matter proceed further before me and I heard and recorded the evidence of **PW11** and **PW12** and put the accused on his defence.
6. The accused was thereafter admitted at Mathare Referral and was so admitted until 18/06/2019 when a medical report was produced before me confirming that he was fit to take his defence. The accused in exercising his constitutional right under **Article 50 (1) (i)** opted to remain silent and offer no evidence in his defence on 19/09/2019.
7. It must be stated for record purposes that I did not have an opportunity of hearing and seeing ten (10) prosecution witnesses but having complied with the provisions of **Section 200** as read with **Section 201 (1)** of the **Criminal Procedure Code**, read and analyzed the recorded proceedings before Justices Ochieng, Apondi and Ombija for the purpose of this Judgement.

PROSECUTION CASE

8. The prosecution case was based on the evidence of **PW1 EW** a minor aged nine (9) years old who testified on oath that on 23rd October 2016 she was coming from school with the deceased who was her friend when they met the accused who was cutting grass using a *panga*. The accused who was known to them followed them and when they got to a place where there was nobody, cut the deceased with the *panga*. She ran to Mama Owen whom she informed of what had happened. In cross-examination she stated that when she saw the accused cut the deceased she ran away. She was clear in her evidence that was the first time in her life to see someone being killed.
9. **PW2 BELDINA NYAMBURA MAHUDU** corroborated **PW1's** evidence and confirmed that she was known as "Mama Owen" and stated that when she was told that the deceased had been cut, she rushed to the scene and found her lying down with blood oozing from the

back of her neck. She called another lady known as “Mama Kinyanjui” who was her neighbour to the scene who screamed and attracted many people to the scene. She confirmed having not known the accused but later on learnt that he was a neighbour of the victim.

10. PW3 STEPHEN WANDERI WAKOMU stated that he was at home on 23/10/2006 when the accused appeared from the upper side of his home running holding a *panga*. When he saw him he turned around and entered the home of his neighbour **Joseph Kimiri Wamururi**. He then heard people screaming saying that he had cut a child. He attempted to pursue the accused but did not catch up with him. He proceeded to the scene where he identified the deceased. In cross-examination he confirmed that he knew the accused who was his friend and the deceased.

11. PW4 JOSEPH KIMIRI WAMURURI stated that he was at his *shamba* at 1.00 p.m. when he saw the accused running holding a *panga* without anyone chasing him. He asked him what was wrong and he did not respond. He then heard ladies screaming asking for the accused to be apprehended. They told him that the accused had slashed a school child. He proceeded to the scene where he identified the body of the deceased.

12. PW5 NICHOLAS KIGO NDUNGU stated that on the material day at 3.00 p.m. he met people looking for the accused in the forest and bushes and he joined the search. He later heard that he had been arrested in Kariu Area. On 27/10/2006 he identified the body of the deceased at Thika Mortuary for purposes of post-mortem examination. **PW6 ANTONY GITAIGA KABARU** stated that he heard screams coming from the direction of his home at 1.30 pm. He then ran towards the direction of the screams where he noticed the deceased who was his daughter lying on a murram road. He then asked **PW1** what had happened and she told him that the accused who was his brother-in-law had cut her. He confirmed not having quarreled with the accused before the incidence.

13. PW7 NICHOLAS KINYANJUI GITAU stated that he had seen the accused in his father’s farm with a *panga* in his hand. After twenty minutes he heard screams from the direction of the accused father’s compound and ran towards the said direction only to find the body of the deceased lying down. He heard people say that the accused had cut her. **PW8 AGNES WAMBUI CHEGE** stated that she saw the accused chasing **PW1** with the deceased lying down bleeding at the back of her head. When she saw the accused looking at her direction she locked herself inside her house.

14. PW9 CHARLES KIRAGU a psychiatrist nursing officer on 30/11/2006 examined the accused and found him fit to stand trial. He confirmed his age as eighteen (18) years. **PW10 CHARLES WAITHANJI GITHAIGA** conducted post-mortem examination on the body of the deceased who had a deep cut on the back of her head going into the spinal code. As a result of the said examination he formed an opinion that the cause of death was pulmonary arrest due to cut wound on the spinal code.

15. PW11 IP BENJAMIN WAMBUA stated that he received a report of murder where the accused had been arrested by members of the public. On 27/10/2006 he proceeded to Thika District Hospital where post-mortem was conducted on the body of the deceased and on 30/10/2006 escorted the accused to Gatundu Hospital for mental assessment. He recorded statements from witnesses. As a result of his investigations he formed an opinion that there was a grudge between the accused and the mother of the deceased who were staying in the same compound. He confirmed that there was a land dispute between them. In cross-examination he confirmed that the age of the accused was assessed at eighteen (18) years and not fourteen (14) years. He stated that the accused was arrested by members of the public with the *panga* which was not recovered from the members of the public.

16. PW12 PC PAUL GAKOI booked the accused who was brought by members of the public on allegation of having murdered one female pupil. He re-arrested the accused. He was later on taken to Gatundu Police Station by **PC FRANCIS MULWA**.

DEFENCE CASE

17. When the accused was placed on his defence on 16/02/2017 the court was informed that the same had become abusive and was therefore referred to Mathare National Hospital for mental evaluation where he was admitted for treatment. On 7/02/2018 a report was presented to court to the effect that he was not fit to take the defence and on 13/06/2018 a further medical report was placed before the court confirming that the accused may not recover. The court made an order that he be examined further and a medical report produced to court and on 11/07/2019 a more comprehensive report was placed before the court indicating that he was now fit to undertake his defence under **Section 164** of the **Criminal Procedure Code**. The matter was fixed for defence hearing at which the accused opted to exercise his right to remain silent. The parties opted not to make any final submissions.

ANALYSIS AND DETERMINATION

18. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code** the prosecution is required to prove beyond reasonable doubt the following elements of the offence:-

a) The fact and cause of death.

b) That the death was caused by unlawful act of omission or commission on the part of the accused person.

c) That it was committed with malice aforethought - mens rea on the part of the accused as defined in Section 206 of the Penal Code.

19. The fact and cause of death of the deceased is not disputed. All the prosecution witnesses confirmed the fact of her death with the cause thereof being confirmed through the evidence of **PW10 CHARLES WAITHANJI GITHAIGA** to be transection of the cervical spinal cord/haemorrhage leading to CI pulmonary arrest caused by a sharp object. It therefore follows that the fact and cause of death was proved beyond any reasonable doubt.

20. On whether the said death was caused by unlawful act of commission on the part of the accused person, the same was placed at the scene by **PW1** a minor aged nine (9) years at the time of testimony and six (6) years at the time of the commission of the offence. She knew the accused well. The attack happened in broad daylight and the accused was identified through recognition. She saw the accused cut the deceased and reported to **PW2** immediately who proceeded to the scene and found the deceased lying down with blood oozing from the back of her neck. **PW3 STEPHEN WANDERI WAKOMU** saw the accused immediately the alarm was raised, running holding a panga. This evidence was corroborated by that of **PW4** who also saw him running holding a panga, whom he asked what was wrong but declined to respond. He met those who were running after the accused and proceeded to the scene where he found the body of the deceased lying down.

21. The accused was further placed at the scene by **PW5 NICHOLAS KIGO NDUNGU** who had earlier seen him with a panga in his hand in his father's *shamba*, he shortly thereafter heard screams from the direction of the accused father's home and when he responded to the screams found the deceased lying on the ground between his house and the accused father's home. **PW8** saw the accused chasing **PW1** with the deceased lying down. The accused was well known to the witnesses and I therefore find that there was no possibility of mistaken identity. It therefore follows that the death of the deceased was caused by unlawful act on the part of the accused persons.

22. The only issue in dispute in this matter is whether the said death was caused by malice aforethought as defined in **Section 206** of the **Penal Code** thus:-

“Malice aforethought shall be deemed to be established by evidence proving one or more of the following circumstances:-

(a) An intention to cause death 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, by a wish that it may not be caused.

(c) Intention to commit a felony.”

23. I have looked at the nature of injuries inflicted upon the deceased which was a cut on the neck. In the case of **REPUBLIC v TUBERE S/O OCHEN [1945] 12 EACA 63** the court stated as follows:-

“To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of the injuries inflicted, the conduct of the accused before, during and after the incident.”

24. There is further evidence of the Investigating Officer which established that there was an issue of land dispute between the accused and the mother of the deceased which created the motive of the offence. I have looked at the evidence tendered and the nature of injuries inflicted upon the deceased and find that the accused had the necessary malice aforethought. Immediately after cutting the deceased the same ran away from the scene thereby portraying a guilty mind.

25. The final issue for determination which was not raised by either the prosecution or the defence is whether the accused had the necessary mental element at the time of the commission of the offence in view of the history of his admission at Mathare Mental Referral. The law on insanity is provided for in **Section 11** which states that every person shall be presumed to be of sound mind. **Section 12** of the **Penal Code** provides as follows:-

“A person shall not be criminally responsible for an act or omission if at the time of doing the act or making the omission he was 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.”

26. The issue for the court's determination is whether there was any material placed before the court to show that the accused was suffering from any disease of mind that affected his mind at the time of committing the offence which made him incapable of knowing what he was doing? The only document presented before the court was the medical report of Dr. Wamukhoma Victoria where it was indicated that the accused was diagnosed with schizophrenia in the year 2017. At the time of examination the accused stated that he killed the deceased because he wanted her family which was occupying his land to leave. He had no history of previous mental treatment. The next report dated 4/06/2019 by Dr. Wairoto confirms that he was admitted at forensic ward from 8th May 2018 to 12th September 2018.

27. There was no evidence that at the time of the commission of the offence the accused was labouring under such a defect of reason from a disease of mind of as not to know what he was doing. According to **PW1** when he met them on the way, it was clear that he was looking for the deceased. After cutting the deceased he ran away and went into hiding. He had the necessary motive of committing the offence so as to get the accused's parents out of their land. At the close of the prosecution case no evidence was given as required under **Section 166 (1)** of the **Criminal Procedure Code** and the accused did not appear to the court that he was insane at the time of the commission of the offence the fact that he was subsequently diagnosed with schizophrenia notwithstanding legal insanity is not the same as medical insanity.

28. In the final analysis I am satisfied that the prosecution proved all the elements of the charge of murder beyond any reasonable doubt and consequently find the accused person guilty and convict him of the murder of **AWG** contrary to **Section 203** of the **Penal Code**.

Dated, signed and delivered at Nairobi this 19th day of November, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Ms. Gikonyo for the State

Mr. Kariu for the Accused

Accused present

Court assistant- Karwitha