



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 46 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

ANTONY MAIKUMA MAKKHANU.....ACCUSED

JUDGMENT

1. The accused person herein, **Antony Maikuma Makhanu**, was arraigned before the Court on a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the Laws of Kenya. The particulars thereof were that on the **29 October 2007** at Lunai Village in Vinyenya Location of Lugari District within Western Province of Kenya, he murdered **Martin Makhanu Waswa**. He could not immediately take plea because, upon initial examination by **Dr. John Wechabe Wekesa**, he was found to be mentally unstable. Thus, a more detailed report by a psychiatrist was called for by the Court.

2. The court record shows that it was not until **3 February 2009** that a Medical Report and Opinion of **Dr. Omar Aly**, then the Chief Psychiatrist at Moi Teaching and Referral Hospital, was filed. The report indicated that the accused was not fit to plead to the charge of murder or to stand trial. **Dr. Aly's** recommendation was therefore that he be admitted at a psychiatric hospital for further management of his condition. Accordingly, an order was made by the Court (**Hon. M. Ibrahim, J.** as he then was) that the accused be sent and admitted to **Mathari Hospital** in Nairobi with immediate effect for treatment. It was further ordered that a status report be filed in court within 5 months of the accused's admission.

3. The court record further shows that, by a letter dated **3 November 2012**, it was intimated to the Director of Public Prosecutions by the Medical Superintendent in charge of **Mathari Hospital** that the accused had become capable of making his defence. Thus, arrangements were made for his transfer to Eldoret for to stand trial. His plea of not guilty was accordingly taken on **19 March 2013** and the matter scheduled for hearing on **12 June 2013**. Hearing however did not commence in earnest until one year later, on **12 June 2014**; but was hampered by the transfer of the trial Judge, **Hon. G. Ngenye, J.**, after three witnesses had testified. Thereafter, **Hon. Githua, J.** heard the rest of the Prosecution Witnesses as well as the Defence Statement of the accused. By the time I took over the matter, only one Defence Witness was remaining; namely **Dr. Omar Aly** of Moi Teaching and Referral Hospital. Ultimately, Counsel for the Defence chose to dispense with the evidence of **Dr. Aly**, opting instead to rely on his report which was filed herein on **16 January 2009**.

4. What then, was the evidence presented herein against the accused? The first Prosecution Witness was **Grace Namuita Waswa**, the mother of the accused. She testified on **12 June 2014** and told the Court that she was at home on **29 October 2007** at about 7.00 p.m. She was in her house with the deceased, **Martin Makhanu Waswa**, who was also her son. It was her testimony that the deceased noted that the accused's trouser zip was open and advised him to go to his house and zip up; and further told him that he was not wanted in their mother's house. She added that the deceased then left for his house and returned soon thereafter with a jembe, with which he hit the deceased severally on the head and neck. She rushed to look for her husband but by the time they went back to the scene, the deceased was already dead and his body was lying near the door with his head completely shattered into pieces.

5. **PW1** explained that the accused had by then dropped out of university after two years of course work; and that when they took him to hospital they were told he had a mental sickness. She also mentioned that the accused's condition worsened in **1997**, and that he had to be taken to **Uasin Gishu District Hospital** for treatment. In cross-examination by Mr. **Chepkwony** for the accused, **PW1** conceded that, even at the time of this incident, the accused was not well mentally and that it was wrong to keep him at home, instead of having him confined in a medical institution. She also mentioned that the murder weapon, the jembe, was recovered from the house of the accused and was handed over to the Police.

6. **Richard Makhanu Waswa (PW2)**, the father of the accused, testified along similar lines as **PW1** and confirmed that, on **29 October 2007** at about 7.00 p.m., he was in the house of his second wife, **Pamela Nanjala**, when **PW1** went there running and crying for his intervention; and that she reported to him that their sons were fighting and might kill each other; but on rushing to **PW1's** house, he found one the sons, **Martin Waswa**, already dead with his head completely severed from the rest of his body. He added that the head had been cut into small pieces. He then went to the house of the accused and found the blood-stained jembe that he had used to kill his brother and took it

away. He caused the incident to be reported by the Village Elder, **John Wahisi (PW3)**, who was one of the first responders at the scene; and that he asked him to report the matter to the Chief and the Police. He confirmed that the Police visited the scene, collected the body and took it to Kitale District Mortuary. He also confirmed that he was one of the people who identified the body of the deceased to the doctor who performed postmortem.

7. **PW2** also mentioned that the deceased was a very good son; and that he was the accused's follower. He further told the Court that the accused had been admitted to Kenyatta University but had been expelled for drug abuse. He conceded in cross-examination that the behavior of the accused was that of a mad person; and that he would stop people on the road and borrow money from them; even attempting to rob some of them. He added that the accused had been undergoing treatment for his condition and that he was on medication at the time of the incident.

8. **John Wekesa Fisi (PW3)** confirmed that he was the Village Elder the area, and that on **29 October 2007** at about 8.00 p.m., he was at home when he heard people making noise at the home of his neighbor, **Richard Makhanu (PW2)**. He told the Court that, on going to the scene, he found people gathered in shock and there was a dead body lying in a pool of blood without a head. He asked to be told whose body it was and learnt that the body was that of **Martin Waswa**, the deceased herein, who was also known as **Medical Waswa**. He accordingly went to the AP Camp, reported the incident and recorded his statement. **PW3** also mentioned that it was within his own knowledge that the accused had a mental illness and that he was expelled from the university for that reason.

9. The Prosecution also called **Cpl. Richard Nyakora**, a Police Officer then attached to **Matunda Police Station**, as **PW4**. He told the Court that, on **7 November 2007**, he received instructions to accompany **Richard Makhanu (PW2)** and **Nelson Simiyu**, the relatives of the deceased herein, to Kitale District Hospital Mortuary for purposes of postmortem examination. He confirmed that he was in attendance when the postmortem was conducted; and that the body was identified by **PW2** and one **Nelson Simiyu**.

10. **Christine Matindi (PW5)**, a Government Analyst based at the Government Chemist, Nairobi, testified on **25 November 2015** on behalf of **Henry Kiptoo Sang** and produced the report dated **31 October 2008** as the **Prosecution's Exhibit No. 4** along with the Exhibit Memo Form prepared by **PC Partick Mutua**. The items sent for analysis comprised of blood samples of the deceased and the accused as well as bloodstained clothes obtained from the accused. **PW5** testified that, after analyzing the exhibits, **Mr. Sang** came to the conclusion that the pair of long trousers belonging to the accused, marked C1 was heavily stained with blood of human origin; and that the shirt marked C2 was moderately stained with blood of human origin. She further testified that DNA profiles generated from the items were tabulated and the result was that the DNA profile generated from the pair of long trousers (C1) and shirt (marked C2) matched the DNA profiles generated from the blood samples of the deceased. Thus, it was the Analyst's conclusion that the blood of the deceased was found on the clothes attributed to the accused person.

11. **PW6, Wilborne Kipkemboi Letich**, told the Court that, at around 10.00 a.m. on **30 October 2007**, he was at **Kamagut Trading Centre** along the Eldoret-Kitale Road when a person who identified himself as a Police Officer from **Lumakanda Police Station** approached him and requested him, along with others, to assist in arresting a certain individual who was walking by the roadside wearing bloodstained clothes. He explained that the Police Officer mentioned to them that the person was a murder suspect. He obliged and assisted the Police Officer to arrest the person with the help of another person known as **Stanley**, who had since died. **PW6** identified the accused herein as the person they arrested that day. He also identified the bloodstained pair of pink trousers and cream/grey shirt the accused was wearing at the time of his arrest.

12. **Sgt. Julius Kemboi, PW7** herein, gave evidence to the effect that, at around 9.00 p.m. on **29 October 2007**, he was at **Matunda Police Station** when the OCS asked him to accompany him, along with other Police Officers, to a murder scene at **Vinyenya Village**. That on arrival at the scene, they were shown the headless body of the deceased; and that it was lying in a pool of blood, about 6 metres from the main house belonging to the deceased's parents. He added that the report they received from the father of the deceased was that the deceased had been hit on the head by his brother the accused, using a jembe; and that the accused had escaped. He testified that they recovered a bloodstained jembe from a house which the deceased's parents said belonged to the accused. **PW7** produced the said jembe as an exhibit in this case and it was marked the **Prosecution's Exhibit No. 1**.

13. **PW7** confirmed that they removed the body from the scene and took it to **Kitale District Hospital** to await postmortem. Then, on the **30 October 2007**, while on his way to **Eldoret**, he saw the accused walking by the roadside. At that time, he did not know that he was the culprit in this case; but that he was suspicious of him for the reason that he was wearing heavily bloodstained clothes. He accordingly enlisted the support and help of members of the public and arrested him; and that after interrogating him, the accused told him that he came from **Vinyenya**, but refused to disclose his name. He escorted him to **Matunda Police Station**. **PW7** also stated that when he arrested the accused, he noted that he was somehow mentally disturbed. He, likewise, identified the pair of pinkish trousers the accused was wearing at the time of his arrest (**the Prosecution's Exhibit No. 2**).

14. The last Prosecution Witness was **Dr. Okumu Moses (PW8)**, of Kitale County & Referral Hospital. He testified on behalf of **Dr. Mogui** who performed postmortem on the body of the deceased, **Martin Makhanu Waswa**. He testified that the postmortem was conducted on **7 November 2007**, about one week from the date of death. On the basis of the findings of **Dr. Mogui, PW8** told the Court that the deceased's head was completely beaten, and that part of the cranium and brain matter were missing. Internally, nothing abnormal was detected on the respiratory or cardiovascular system. **Dr. Mogui** accordingly formed the opinion that the cause of death was severe head injury secondary to trauma by a blunt object. **PW8** produced the postmortem form that was duly filled and signed by **Dr. Mogui** as the **Prosecution's Exhibit No. 3**.

15. Upon being placed on his defence, the accused told the Court, in an unsworn statement of defence, that he could only account for himself from **2011** when he found himself in **Mathare Mental Hospital**. That the doctor in charge of his care told him that he had been admitted in that hospital from the year **2006**, but he had no such recollection. He further stated that he remained in hospital until **19 November 2012** when he was discharged and handed over to prison officers from **Eldoret G.K. Prison**; and that after two months, he was produced in court on the allegation that he had killed his brother, **Martin**. He stated that he was unaware that he had killed his brother; and that he must have been mentally ill at the time. Counsel had indicated that they would call **Dr. Omar Aly** of Moi Teaching and Referral Hospital, but eventually opted to rely on his medical report instead, after vain attempts to get hold of the said doctor.

16. The charge herein was laid under **Section 203** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. It provides that:

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

17. Accordingly, it was incumbent on the Prosecution to prove the following ingredients beyond reasonable doubt:

- [a] the fact of death of the deceased, **Martin Makhanu Waswa**;
- [b] that the death was attributable to an unlawful act by the accused; and,
- [c] malice aforethought on the part of the accused person.

18. Hence, in **Republic vs. Andrew Omwenga [2009] eKLR**, these ingredients were explicated thus:

“...for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-

(a) The death of the deceased and the cause of that death.

(b) That the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought.”

19. There is credible and uncontroverted evidence herein to show that the deceased was at home with his mother, **PW1**, when the accused went there. The deceased advised the accused to zip up his unzipped trousers and thereafter advised him to go to his house. Apparently, this angered the accused; for, according to **PW1**, the accused went to his house but soon returned to her house while armed with a jembe which he hid behind his back; and that he proceeded to repeatedly strike the deceased with the jembe to the extent that his head was completely severed and shattered. The evidence of **PW1** was well corroborated by the evidence of her husband and father of both the accused and the deceased, **PW2**. He told the Court that he rushed to the scene when his wife drew his attention to the fight between the accused and the deceased. His testimony was that, by the time he got to the scene, the deceased was already dead, and was lying in a pool of blood, with his head completely severed from the rest of the body.

20. The evidence of the parents of the deceased was corroborated by the evidence of **Dr. Okumu Moses (PW8)**, of Kitale County & Referral Hospital, who testified on behalf of **Dr. Mogui** and produced the postmortem report prepared and signed by **Dr. Mogui** as the **Prosecution’s Exhibit No. 3** herein. He testified that the postmortem was conducted on **7 November 2007**, about one week from the date of death; and that the findings of **Dr. Mogui** was that the deceased’s head was completely beaten, and part of the cranium and brain matter were missing. Nothing abnormal was detected from the internal examination of the body. Consequently, **Dr. Mogui** formed the opinion that the cause of the deceased’s death was severe head injury secondary to trauma by a blunt object.

21. There is therefore credible evidence to prove, not only that the deceased died on **29 October 2007**, but also that he died as a result of severe head injury after having been assaulted. Thus, the fact of death of the deceased, **Martin Makhanu Waswa** and the fact that his death was caused by an unlawful act, have been established beyond reasonable doubt. In addition to the evidence of **PW1** and **PW2** that the deceased was assaulted by his brother the accused, the Prosecution called the Village Elder, **PW3** as well as **PW6** and the investigating officer, **PW7**. **PW7** was on his way to Eldoret when he saw the accused walking beside the road wearing bloodstained clothes. He enlisted the support of **PW6** and another member of the public to have the accused arrested. Upon questioning him, the accused disclosed that he was from **Vinyenya Village**; although **PW7** could not, at that point in time, make any connection between the accused and the death of the deceased. Nevertheless, he was suspicious of him for the reason that he was walking around wearing bloodstained clothes. Thus, the accused was linked to the offence by his parents, who gave credible first-hand evidence connecting the accused with the death of his brother, the deceased.

22. The bloodstained clothes that the accused was found wearing were taken to the Government Analyst for examination along with blood samples obtained from the deceased and the accused. The report of the Government Analyst was produced herein by **PW5** and was marked the **Prosecution’s Exhibit No. 4**. **PW6** testified that the conclusion reached by the Analyst, **Mr. Sang**, was that the pair of long trousers marked C1, which was heavily stained with blood of human origin; and the shirt marked C2, which was moderately stained with blood of human origin, and which were both attributed to the accused person, were both analyzed. She further testified that DNA profiles generated from the items were tabulated and the result was that the DNA profile generated from the pair of long trousers (C1) and shirt (marked C2) matched the DNA profiles generated from the blood samples of the deceased. Thus, it was the Analyst’s conclusion that the blood of the deceased was found on the clothes attributed to the accused person.

23. Accordingly, the prosecution has offered uncontroverted evidence to prove beyond reasonable doubt that the accused caused the death of the deceased by an unlawful act. Thus, the only question to pose is whether the at the time of commission of the unlawful act the accused had the requisite malice aforethought. For purposes of **Section 203** of the **Penal Code**, malice aforethought is defined in **Section 206** of the **Penal Code** thus:

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.

24. From the testimony of **PW1** who witnessed the incident, the accused did not have any particular reason to kill his brother. She, however explained that the deceased was at the material time suffering from some form of mental illness for which he was undergoing treatment at the time. This evidence was corroborated by the evidence of her husband, **PW2**, as well as the Village Elder, **PW3**. The Police Officer who arrested the accused, **PW7**, also formed the impression that the accused was mentally unstable; not only because he was walking around in heavily bloodstained clothes, but also from questioning and interacting with the accused.

25. The court record also shows that when the accused was arraigned for plea, the initial medical examination by **Dr. Wekesa** showed that the accused required further assessment preferably by the Consultant Psychiatrist owing to the nature of the incident and the manner of his comportment. Thus, a more detailed report dated **12 January 2009** compiled by **Dr. Omar Aly**, the then Chief Psychiatrist at Moi Teaching and Referral Hospital, was filed herein on **16 January 2009**. That report shows that the accused had had a long history of drug abuse and that he had signs of schizophrenia, a severe mental illness which affected his thought processes. It was further the finding of **Dr. Aly** that, due to severe disruptions in the accused's thought processes, he was incapable of forming intent or mens rea, as his actions were impulsive, often carried out based on false beliefs. It was for that reason that that **Dr. Aly** recommended that the accused be admitted in a psychiatric hospital for further management of his condition.

26. It is manifest therefore that the accused was suffering from a mental illness at the time he committed the offence that he is charged with herein and was therefore incapable of understanding the full implications of what he was doing. It is for this reason that the law recognizes in **Section 12** of the Penal Code that:

“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 ...”

27. Granted that the issue of the accused's insanity predominated the trial, it was upon the Prosecution to displace the same; which was not done. To the contrary, most of the Prosecution witnesses confirmed to the Court that indeed the accused was of unsound mind at the time he committed the offence. This is manifest in the evidence of the accused's parents, **PW1 and PW2**; the Village Elder, **PW3**, as well as the investigating officer, **PW7**. The foregoing being the case, **Section 166(1)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** stipulates 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.”

28. Indeed, in **Leonard Mwangemi Munyasia vs. Republic** [2015] eKLR, the Court of Appeal held that:

“... it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.”

29. It is in the light of the foregoing that I find that although there is proof beyond reasonable doubt that the accused murdered the deceased herein, he was at the time laboring under a disease of the mind and was consequently incapable of forming the requisite mens rea for the offence. Consequently, I hereby enter a special finding, pursuant to **Section 166(1)** of the **Criminal Procedure Code**, that the accused is guilty of the offence of murder contrary to **Section 203** of the **Penal Code**, but was insane at the time he murdered his brother, **Martin Makhanu Waswa** on the **29 October 2009**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF DECEMBER, 2019

OLGA SEWE

JUDGE