



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 8 OF 2014 (MURDER)

REPUBLICPROSECUTION

VERSUS

EDWIN MUCHANGI NJERU.....ACCUSED

J U D G M E N T

1. The accused person faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code to which he pleaded not guilty. The particulars of the charge are that on the 28/03/2014 at Kathece village, Kathanjuri sub-location within Embu County, murdered C W G.
2. The facts of the case are that on 28/03/2014, around 4.30 pm, the deceased then aged 7½ years and who lived at Kathece village with her parents was sent to the shop by her mother PW9. The child took longer than expected prompting PW9 to go looking for her that wet evening. She was nowhere to be found and her parents PW1 and PW9 reported the matter to the police at Runyenjes. Information was received that the accused who is a neighbor of PW1 and PW9 had been seen walking with the child to his house on the material evening.
3. The accused was not in his parent's home where he lived for the two days that followed the incident. On 30/03/2014 he was spotted by neighbours in his parents' home and was arrested. He was handed over to the police at Runyenjes police station through Kathunguri police Post. Investigations of the case commenced and on 31/03/2014, the body of the deceased was recovered in the land of a neighbor of the accused covered with a blanket and some leaves by the police with the assistance of the accused. He was later charged with the offence.
4. The prosecution called thirteen (13) witnesses in this case. The parents of the deceased PW1 and PW9 testified on how their daughter of tender age went missing on 20/03/2014 after being sent to the shops to buy phone credit. Further that they received information from neighbours that the accused was the last to be seen with the deceased alive walking with her on the road and finally to his house within the home of his parents. The body of the deceased was to be recovered three days later dumped in a neighbour's land.
5. The evidence of PW6 and PW7 was that on the material day around 5.30 p.m. they were separately walking on the road from the river where they had gone to fetch water. PW6 told the court how she met with the deceased on the road accompanied by the accused. The two walked with PW6 until they parted near the home of the accused.
6. PW6 further testified that she saw the accused and the deceased go to the home of the accused. She watched them from a nearby maize plantation and saw the deceased seated on a wooden chair outside the accused's house while the accused stood next to her. PW6 informed the family of the deceased what she had seen the following day when she learnt that the deceased had gone missing.
7. PW7 said she met with the accused near his home whom she knew before the incident for they are neighbours. He asked her where C was PW7 told him that C was walking behind with PW6 (Esther).
8. PW2 was among the neighbours who arrested the accused from his home on 30/03/2014 and took him to Kathanjuri police post.
9. PW3 and PW4 were present when the body of the deceased was recovered by the police in the shamba of one Paul Muriithi. It was their testimony that they saw the accused pointing out to the police the place where the body was recovered.
10. PW10 Dr. Moses Maina conducted the postmortem. He found that the deceased had suffered multiple bruises on the face, forehead, chest, upper limbs, thighs and the head. She had three-degree perineal tear that united her vaginal canal, urethra and the rectum. He formed the opinion that the cause of death was asphyxia (lack of oxygen) and excessive bleeding from the perineal tear.
11. PW11 testified that he recorded a confession from the accused at his office in Runyenjes police division. PW11 is the officer who

conducted investigations of the case and charged the accused with the offence.

12. In his defence, the accused denied the offence. He denied seeing the deceased on the material day but recalls how neighbours came looking for the missing girl from his home on the day the arrested him. He says he recorded the confession but was beaten up by the officers while in police custody. He also told the court that since the year 2005, he suffers from mental illness.

13. The issues for determination in this case have been identified as follows:-

a) *Whether the accused caused the death of the deceased.*

b) *Whether the defence of insanity has been established.*

c) *If the defence of lunacy is found not to have been satisfied, whether malice aforethought has been proved on part of the accused.*

14. There is no direct evidence in this case but there exists circumstantial evidence and a confession made by the accused in the course of investigations.

15. The evidence of PW6 was that she was with the accused and the victim C on the road near the home of the accused. The accused had met the deceased when she went to the shops to buy phone credit for her mother. After they parted, PW6 said she saw the accused and the deceased go to the home of the accused. She followed them from the maize plantation and saw them outside the house of the accused.

16. The evidence of PW6 was corroborated by that of PW7 who also met the accused and the deceased on the road.

17. The investigating officer PW11 told the court that while the accused was in custody, he led him together with his officers to the land where he had dumped the body of the deceased. It is important to note that police would not have known the place of dumping in the absence of the accused. Neighbours including PW3 and PW4 were present when the body was recovered. The two witnesses corroborated the evidence of PW11 that it is the accused who showed where the body of the deceased was.

18. The body of the deceased had multiple injuries which were consistent with the cause of death. The accused in his confession which was admitted in evidence without any objection said that he raped the deceased before killing her. The doctor confirmed that the deceased had a large and deep tear which unite three of her organs. The bleeding from this tear was part of the cause of death. Further corroboration was the lack oxygen asphyxia with accused admitting that he held nose and covered the mouth of the victim when he was raping her.

19. The accused was the last person seen with the deceased alive in the evening she went missing. He is the one who helped the police to recover the body.

20. In the case of **NDURYA VS REPUBLIC [2008] KLR 135** was held in regard to circumstantial evidence: -

1. Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did no to dislodge a lingering possibility that the offence may have been committed by a person other than the appellant.

2. In the circumstances of this case, even if there had been sufficient evidence that it was the appellant who had caused the death of the deceased, the court should have considered Section 210 of the Penal Code (which defined the offence of infanticide – where a mother caused the death of her child while the balance of her mind was disturbed by her not having recovered from the effect of childbirth, or the effect of lactation – an offence which was dealt with and punished in the same manner as the offence of manslaughter.)

21. Similarly, in the case of **WAMBUA & 3 OTHERS VS REPUBLIC [2008] KLR 142** the court held: -

1. In order to justify an inference of guilt from circumstantial evidence, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of this inference is always on the prosecution which is required to establish its case beyond reasonable doubt.

2. It is also necessary, before drawing the inference of the accused's guilt from circumstantial evidence, to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

22. The court in the **Wambua** case relied on the case of **KIPKERING ARAP KOSKEI & ANOTHER [1949] XVI EACA 135** in which the Court of Appeal made similar findings.

23. In my view, the circumstantial evidence herein is so strong and reliable and sufficient to prove *actus reus* on part of the accused even in the absence of the confession.

24. It is my considered opinion that the evidence in this case excludes co-existing circumstances which would have weakened or destroyed the inference that the accused person, to the exclusion of all other persons inflicted the injuries that caused the death of the deceased. All the

evidence on record point to no other person but the accused that he caused the death of the deceased.

25. In his defence the accused person pleaded the defence of insanity which is provided for under Section 12 of the Penal Code 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. The Criminal Procedure Code guides the court on how to proceed where the defence of insanity has been established.

26. The Criminal Procedure Code guides the court on how to proceed where the defence of insanity has been established.

27. Section 166 provides: -

(1) 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.

(2) 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.

28. It is trite law that the burden lies on the accused to prove on the balance of probabilities that he was insane before and at the time he committed the offence.

29. It was held in the case of **MARI VS REPUBLIC [1985] KLR 710** that: -

The burden on the accused to prove insanity is not as heavy as the one on the prosecution. The burden is discharged by proving on a balance of probabilities that it seemed more likely that due to mental disease the accused did not know what he was doing at the material time or that what he was doing was wrong, and so could not have formed the intent to kill the deceased.

30. During the investigation of this case, the accused was taken to PW8 Dr. Joseph Thuo, a psychiatrist at Embu Level 5 hospital for mental assessment. In his report dated 7/04/2014 and produced in court in evidence, Dr. Thuo said that the accused had a history of hallucinations, poor coordination, was and mentally unstable. He found the accused unfit to plead and referred him for treatment.

31. PW13 Dr. Georgina Kamunge of Mathari Mental hospital said the accused was admitted in the hospital on 16/06/2014 for observation and found to be mentally sound. A certificate of mental capability was issued.

32. The accused was arraigned in court on 9/04/2014 when the prosecution informed the court that he was not mentally fit to plead. On 7/05/2014, the court committed the accused to Mathare Mental hospital where he was admitted for treatment.

33. It was on 20/11/2014 that the court informed the court that the accused was mentally fit to plead relying on the certificate of capability signed by Dr. Kamunge. The trial commenced thereafter and proceeded to conclusion.

34. Dr. Thuo examined him and certified his mental condition on 7/04/2014 which was about ten (10) days after the alleged offence. The accused Thuo examined him and certified his mental condition on 7/04/2014 which was about ten (10) days after the alleged offence. pleaded the defence in his sworn statement of offence.

35. From the foregoing facts, I reach the conclusion that the accused at the time of the alleged offence was of unsound mind.

36. I am satisfied that the defence of insanity under Section 12 of the Penal Code has been established as required by the law.

37. It follows that Section 166(2) of the Criminal Procedure Code should be invoked to make a special finding. It is trite law that the special finding under Section 166(2) is neither a conviction or an acquittal but a preventive measure which provides that an accused person is detained in either a mental hospital, a prison or other suitable place for safe custody at the pleasure of the President.

38. In the case of **REPUBLIC VS S.O.M. [2018] eKLR** Judge Majanja declared the remedy of continued detention at the President's pleasure of an accused person for an indeterminate period unconstitutional for reasons that it takes away the discretion of the court. This decision is consistent with the finding of Mativo J. in the case of **A.O.O. & 6 OTHERS VS AG Nairobi Petition NO. 570 of 2015 [2017] eKLR** which declared the provisions of the Penal Code where a child is found guilty of murder is held at the pleasure of the president as unconstitutional.

39. I am in agreement with the decisions in the **S.O.M.** case (supra) and that of **A.O.O.** (supra). The detention at the president's pleasure of an insane person or a child not only deprives a judge judicial discretion but also violates the right to a fair trial under Article 50(3) of the Constitution.

40. The accused had been declared fit to plead at the time this trial commenced and as such another report of a psychiatrist is not necessary

at this stage.

41. On the basis of the above decisions, I hereby direct that the probation officer files a home inquiry report as to suitability for non-custodial sentence.

42. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Mati for State

Mr. Momanyi for accused

Accused present