



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 18 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

KIHU ANTHONY MBUGUA.....ACCUSED

JUDGEMENT

1. The accused **KIHU ANTHONY MBUGUA** 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 10th day of March, 2012 at Kangemi Dagoreti Division within Nairobi County murdered **ROBERT KIHU GANDU**.

2. He made his first appearance in court on 13/03/2012 before Ombija J. as he then was. On 30/3/2012 he took his plea when a plea of not guilty was entered. After several mentions on 24/10/2012 the Judge (Ombija J.) ordered that the accused be examined by a consultant psychiatric at Kenyatta National Hospital and a report thereon presented in court. On 4/2/2013 Korir J. ordered that the accused be escorted to Kenyatta National Hospital accompanied by two named relatives for psychiatric evaluation. After several mentions on the medical report on 26/6/2013 the court discharged Mr. Ndungu Advocate then on record for the accused person and ordered the medical report on the accused to be produced in court.

3. On 26/9/2013 a Mr. Gombe Advocate appeared on behalf of the accused and a report from Mathari Referral Hospital to the effect that the accused was not fit to stand trial presented to court. On 28/11/2013 the matter was fixed for mention before Muchemi J. when Ms. Mwaniki for the state informed the court that the accused had been admitted at Mathari Mental Hospital for further treatment which order was further extended on 17/07/2014. On 16/3/2015 the accused appeared before Lesiit J. when the court was informed that the accused was now fit to stand trial and on 24/3/2015 the same took plea when a further plea of not guilty was recorded.

4. On 23/06/2015 Mr. Gombe Advocate withdrew from representing the accused and on 1/07/2015 Mr. Nyangito Advocate was appointed to represent the accused. On 20/01/2016 the trial of the accused commenced before me. From the background as set out herein, it is clear that this court (Wakiaga J.) did not take part in the inquiry as to the mental capacity of the accused to stand trial and subsequent orders made thereon but at the commencement of the trial had in the court file a medical report dated 12/02/2015 signed by Dr. Jumba J. consultant psychiatrist confirming that the accused was fit to stand trial.

PROSECUTION CASE

5. The prosecution case was that the deceased a widower aged about 64 years at the time of his death was living with his two children, the accused and daughter Fiona **PW3**, his two other daughters having been married and moved out of the home. On the material day **PW1 CICILIA NYAWIRA GATARI** who had been a tenant of the deceased for eighteen (18) years had on the previous day agreed with him that he was going to pay for electricity of her rental premises, passed through the house of the deceased and noticed that his lights were on. She called him on phone which went unanswered. She then decided to call **PW2** his daughter and gave her the information.

6. **PW2 MAUREEN WANJIKU KIHU** upon receiving the information from **PW1** instructed **PW3 FIONA WAMAITHA** to proceed to their house to confirm the information. It was her evidence that she had on the previous day seen the accused together with the deceased in their house and when she went to the house upon confirmation by **PW3** that the lights and the T.V. was on and their father was lying down on the floor, she called her husband **PW4** who reported to the police on whose assistance the door was opened and the body found in a pool of blood. The accused who had been seen at the house the previous day was missing and his phone which went unanswered was found in a flower pot at the scene.

7. **PW3 FIONA WAMAITHA** testified that she had left the house on 8th in the absence of the deceased for **PW2's** house but returned on 9th to do cleaning where she found the accused and the deceased. It was her evidence that the accused asked her for money which she told him she did not have and that the relationship between the accused and the deceased became frosty after the death of their mother as the deceased

did not give him money insisting that he had to fend for himself.

8. PW4 PETER KARANJA a son-in-law of the deceased and the husband of **PW2** made a report to the police with information that they suspected that the deceased had committed suicide and with the assistance of the police broke into the house where the body was found in a pool of blood with injuries on the head. **PW7 PC RICHARD KALI** visited this scene and recovered the clothes which were identified as belonging to the accused with blood stains. There were blood stains on the wall and ceiling board. He recovered blood stained T-shirt in the accused bed while the trouser was found on the ceiling. It was his evidence that the exit door from the accused bed room was locked from outside while the other doors were locked from inside.

9. PW10 INSP. EZEKIEL OUDO accompanied **PW7** to the scene and called scene of crime personnel who took photographs and participated in the recovery of the items identified as belonging to the accused. He later received information that the accused had been seen at Ongata Rongai from where he was arrested. When he interrogated the accused he refused to talk in the absence of his Advocate. It was his evidence on cross-examination that upon visiting the scene he did not see any sign of breakage from outside before their arrival to the scene. He stated that the deceased was living with the accused and his last born daughter who had left to visit her sister thereby leaving only two people in the house.

DEFENCE CASE

10. When put on his defence the accused opted to remain silent in exercise of his constitutional right under Article 50 (2) (i) of the Constitution of Kenya 2010 and decided not to testify during the proceedings.

SUBMISSIONS

11. On behalf of the prosecution it was submitted that the prosecution had established that the accused was at the scene of the incident on the night of 9th and 10th March 2012 as supported by the evidence of **PW2** who had seen him last on 9th March 2012 at midday and around 6.00p.m. within the plot. His blood stained clothes were thereafter recovered hidden in the ceiling of the deceased house which clothes were positively identified as his. The accused immediately disappeared from the scene squarely placing him as the perpetrator of the offence.

12. On behalf of the accused it was submitted that whereas the prosecution proved the fact of death, they failed to prove that it is the accused who caused the said death as none of the prosecution witnesses placed the accused at the scene of the crime at the material time. It was submitted that if the accused caused the death then he is not criminally liable for the offence of murder due to psychiatric conditions known as schizophrenia and therefore did not have the necessary *mens rea* in support of which the following cases were submitted and *actus reus*:-

a) **REPUBLIC v MOHAMMED DADI KOKANE & 7 OTHERS [2014] eKLR.**

b) **REPUBLIC v NICHOLAS NGUGI BANGWA [2015] eKLR.**

13. It was submitted that in order to prove *mens rea* the prosecution must prove that the accused pre-mediated, planned and finally executed the plan. It was submitted that none of the prosecution witnesses testified to this act including **PW3** who lived with the accused and the deceased.

ANALYSIS AND DETERMINATION

14. From the definition of the offence of murder under **Section 203** of the **Penal Code**, the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence:-

a) *The fact and cause of death of the deceased.*

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

c) *That the said act of omission or commission was one with malice aforethought as defined in Section 206 of the Penal Code.*

15. What constitutes proof beyond reasonable doubt was stated by the Supreme Court of India in its judgement in the case of **YOGESH SINGH v MAHABEER SINGH & OTHERS AIR 2016 SC 5160** which I find very useful as follows:-

“It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubts. However, the burden on the prosecution is only to establish its case beyond all reasonable doubt and not all doubts. Here, it is worthwhile to reproduce the observations made by Venkatachaliah, J., in State of U.P. Vs. Krishna Gopal and Anr., (1988) 4 SCC 302:

“25. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

(Emphasis added)

26. The concept of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice.”

16. The fact and cause of death of the deceased is not in doubt. All prosecution witnesses confirmed that the deceased died and was thereafter buried never to rise from the grave as at the time of this Judgement. The cause of death was proved through the evidence of **PW8 DR. DOROTHY NJERU** the government pathologist whose evidence and postmortem report confirmed that the cause of death was head injury due to sharp force trauma (chop wounds) with chronic lung disease.

17. The only issue for determination by the court is whether the said death was caused by unlawful act on the part of the accused person with malice aforethought. As submitted by the defence there was no eye witness called by the prosecution linking the accused with the death of the deceased. The prosecution case therefore as rightly pointed is solely based on circumstantial evidence which I shall analyze herein under.

18. In a case where there is no direct evidence to show as to what precise manner the victim came to be killed, the court has to discharge its onerous duty of determining whether the death was caused by the felonious act of some other person and if so, what offence, if any had been committed by such a person. It is not sufficient in such a case to say that since there is no direct evidence to connect any one with the felonious act the guilt cannot be fixed. It is precisely in such cases that it is the duty of the court to examine the probabilities in the light of the indirect evidence of the injuries on the deceased, the nature and conditions of the place where the incident took place, the articles found there, the motive for the crime and the other surrounding circumstances proved. See **Will’s Treatise on circumstantial evidence**.

19. In **MAHMOOD v STATE OF UP [1976] 1 SCC 542**, the Supreme Court of India observed that a case dependent wholly on circumstantial evidence, the court must be satisfied:-

“(a) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt;

(b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and

(c) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him.”

20. These principles have been captured in Kenya through the cases of **REPUBLIC v KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135, ABANGA alias ONYANGO v REPUBLIC CR. APP. NO. 32 OF 1990 (UR)** and **SAWE v REPUBLIC** to wit:-

“(a) the circumstances from which the inference of guilt is to be drawn must be cogently and firmly established.

(b) those circumstances should be a definite tendency unerringly pointing towards the guilt of the accused;

(c) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

21. Whereas men may tell a lie, women may tell a lie, circumstances do not tell a lie. The fact that the accused and the deceased were living together in one house together with his younger sister **PW3** is not in dispute. It was **PW3’s** evidence that on the 9th of March 2012 she left the deceased together with the accused at home while going to visit **PW2** after cleaning the house. **PW2** also confirmed that on the 9th she saw the accused watching T.V. in the deceased house. That was the last time the deceased was seen alive as when **PW1** passed through the house on the 10th of March 2012 she found the lights in the house on and T.V. on and when she called him on phone he did not answer causing her to call **PW2**.

22. When the police were called to the scene they carried out a search where the blood stained clothes of the accused were found in his bedroom and one hidden in the ceiling of the house. The accused who had last been seen in the house was missing and the house was locked from inside save for the exit door from his bedroom which was locked from outside. The accused cell phone was found in the house while he was traced to Ongata Rongai from where he was arrested. Later on a panga which was identified as belonging to the deceased was recovered hidden in the ceiling of the house covered with dry blood by **PW6** who had rented the house while doing general cleanliness. According to the police officers who visited the scene being **PW7** and **PW9** there was no sign of breakage into the deceased house.

23. These circumstantial evidence stated herein above point exclusively to the accused person as the person who caused the death of the deceased as the prosecution had placed him with the deceased at the same house and as the last person to have been seen with the deceased while he was alive. This therefore placed the accused with the statutory burden to discharge the rebuttable presumption stated in **Section 111 (1) and 119 of the Evidence Act** which provides as follows:-

“S.111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether

in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“S.119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

24. The accused having been placed as the last person to be seen with the deceased was in law required to offer some explanation as to how the deceased met his death as was stated in the Supreme Court of Nigeria case of **HARUNA v ATTORNEY GENERAL OF THE FEDERATION 2012 ENWLR 1306:-**

“The law requires a person last seen with the deceased whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased, onus is on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased.”

25. It is settled that it is the duty of the accused person to give explanation as to how the deceased met his death. In the absence of any explanation by the accused as to how the deceased met his death surely and certainly the court is perfectly justified in drawing the inference that he killed the deceased. The accused in this case when called upon to defend himself did not give any answer. I therefore find and hold that the prosecution has proved beyond reasonable doubt that the death of the deceased was caused by unlawful act on the part of the accused person.

26. I have further taken into account the evidence of **PW3** that upon the death of their mother the accused used to ask and demand for money from the deceased who like any loving African father wanted him to be independent and would remind him to fend for himself which did not please the accused. It is **PW3's** evidence that on the 9th of March 2012 when she met the accused at their house he had asked her for money which she did not have. It was **PW2's** evidence that the deceased mother used to give the accused money and that the rental houses in the compound belonged to their mother which the accused felt he was entitled to and would therefore threaten and abuse the deceased. This to my mind would have provided the accused with the motive to kill his father.

27. The final issue is whether the said death was caused with malice aforethought which is part of the *mens rea* for the offence defined under **Section 206** as follows:-

“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) An intention to commit a felony.”

28. It was submitted by the accused that if indeed he caused the death of the deceased then he is not criminally liable for the offence of murder due to a psychiatrist condition known as schizophrenia. However, it must be stated that this issue was not raised by the accused during the trial, it only found its way at end of the trial through submissions. However the issue of the accused mental capacity to stand trial was subjected to the court's inquiry and was found fit to stand trial and tried accordingly.

29. **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.”

Section 12 of the **Penal Code** provides for a defence of insanity in the following manner:-

“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.”

30. The issue of insanity was discussed by the Court of Appeal at Mombasa in **CRIMINAL APPEAL NO. 112 of 2014, LEONARD MWANGEMI MUNYASIA V REPUBLIC** reported in [2015] eKLR as follows:-

“What must be avoided . . . is the likelihood of sentencing to death a person with a mental disorder. Therefore, it is the duty of

trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person's history or antecedent, to inquire specifically into the question. Indeed, it would serve as a good practice, like it is in England, to call evidence based on the opinion of an expert in such cases in terms of Section 48 of Evidence Act to explain the state of mind. It is the duty of both the investigating officer and the defence, to have the accused person subjected to a medical examination to establish whether he suffered from the disease of the mind that affected his mind and made him incapable of understanding his action. In addition, and in order to ascertain the accused person's state of mind at the time of the offence, the expert opinion of a forensic psychologist, may also be sought. The field of forensic psychology has become a popular field of psychology in Kenya, yet their expertise is hardly sought in criminal trials.

In the famous case of Richard Kaitany Chemagong v. R. Criminal Appeal No. 150 of 1983 the appellant, during his trial made no mention of his mental illness, but upon application by the defence he was examined by a psychiatrist who found that although he was, at the time of examination normal, he had a history of mental illness for which he had been admitted in a mental hospital. For this and other reasons, the court found that the appellant was legally insane. What we are emphasizing here by reiterating what this Court said in Julius Wariomba (supra) in addition to the provisions of Sections 162 and 166 of the Criminal Procedure Code is that it is the duty of the trial court to ensure that the accused person's mental status at the time he is alleged to have committed the offence is established, if that question becomes relevant."

(Emphasis added)

31. As stated herein the issues of the accused mental status as at the time of the commission of the offence was never an issue and neither was there any evidence adduced thereon save that the issue of his mental capacity to stand trial was inquired into by the court and the same was found fit to stand trial. There is however in the court file a letter dated 23rd October 2012 by the accused Advocate on record in which he sought that the accused be taken to Mathare Hospital for checkups and treatment and to that letter is attached medical records and notes allegedly authored by the accused confirming that the accused was diagnosed of schizophrenia and one of his complaints was that he was being bewitched by his father.

32. To prove legal insanity as opposed to medical insanity it must be proved that at the time of the commission of the offence the accused by reason of unsoundness of mind was incapable of knowing the nature of the act or that it was even wrong or contrary to law. It is for the accused to show that he fell under the above exception to the standard of a prudent man by oral, documentary or circumstantial evidence. As stated herein above save for the letter from the accused Advocate and the document therein and the fact that before his trial commenced the accused was treated at Mathari Hospital, there was no any other evidence placed before the court to establish conclusively that he was insane at the time of the commission of the offence. The medical documents aforesaid does not indicate that the accused suffered from such mental disability which incapacitated him to know the nature of the act that he had committed.

33. This therefore leaves the court with circumstantial evidence tendered, that is to say, after the commission of the offence the accused deliberately hid the murder weapon and his blood stained clothes in the ceiling of the deceased house, he then left the murder scene and went to his relatives in Rongai from where he was arrested thereby showing a desire to concealment and effort to avoid detection confirming consciousness of guilt.

34. Having taken into account the evidence on record it is clear and I find that the accused was capable of knowing the nature of the act he committed and the consequence thereof on the date of incident and his conduct thereafter negate any notion that he was mentally insane and having taken into account the nature of the injuries inflicted upon the deceased, I find that hold that the said death was caused by the accused with malice aforethought.

35. In view of the matters stated herein I find and hold that the prosecution proved beyond any reasonable doubt all the ingredients of the offence of murder and therefore find the accused guilty of the murder of his father **ROBERT KIHU GANDU** on 10/3/2012 and convict the same accordingly and it is hereby ordered.

Dated, delivered and signed at Nairobi this 16th day of October, 2018.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Ms. Wegulu for the State

Miss Odembo for Nyangito for the accused person

Accused person present

Court assistant Karwitha