



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 72 OF 2012

REPUBLIC.....PROSECUTOR

VS

P K.....ACCUSED

JUDGMENT

The accused P K was charged with the offence of murder contrary to S. 203 as read with section 204 of the penal code.

Particulars are that P K on the 15th day of October 2012 at Nkanda Sub location Antuambui location in Igembe North Subcounty within Meru County murdered B M. When accused was presented for Mental Assessment Dr. Thuno by a Report dated 12.11.2012 concluded that he has a mental abnormality and requires treatment and that he was not fit to stand trial.

Similar report by Dr. Thuo on 8.1.2013 and lastly by Report dated 29.3.2017 Dr Muikamba Andrea of Meru TRH said that accused person had been followed up for mental disorder since 2015 and he had now fully recovered and is of sound mind and currently fit to plead with Regular follow up on psychiatric clinic required.

Hearing was then fixed and on 7.11.2017 PW1 the mother of accused as well as the deceased testified he said the deceased was aged 4 years old on 15.10.2012 when he met his death she had prepared him for school and when she left him outside the house and went to get his jacket she heard the child let out a cry and when she rushed out she found he had been cut on the head. That she picked child with left hand and accused who had cut the child cut her right hand. She said the deceased died on the way to hospital

That she raised alarm and P M and Patrick Mwitwi responded and took child to hospital. She said she had fallen outside the house and she was taken to nearby hospital by members of the public. She said she had not differed with accused on the material day and he didn't know why accused cut his brother and also cut her. She said accused had been abusing alcohol and bhang. She said accused didn't have mental sickness since childhood and never been taken to a mental institution.

She said she saw accused standing while armed with a panga on the material morning but didn't know his intentions as he was not drunk. She said he had smoked bhang on Sunday and she didn't know if he was still under influence of bhang. She said the deceased and accused were friendly to each other as brother. She said accused person was cut at night by miraa thieves in his own farm and he stayed in hospital for 3 months.

PW2 said he was in miraa farm at PW1 shown in the morning of 15.10.2012 when he saw accused cut the deceased on the head with a panga and he picked a stone and threw it at him to restrain him but he cut the child again by the time he went round and reached the scene and held him from the back. He said even as restrained him he was still struggling to cut the mother and he cut her twice on the right hand. PW2 raised alarm and people came and helped him restrain accused who was tied.

He said incident happened in the morning and he clearly saw accused cut the deceased. He said Zawadi came and rushed child to hospital while he and Patrick tied the accused and escorted him in company of members of public to Maua police station and they were referred back to Laare Police station and they recorded statements. He said he snatched panga from the accused and he identified it in court – Ex P1.

PW2 assisted pin down the accused and snatched panga from him after which they escorted him to police station. He identified the panga snatched from deceased Exp1

PW4 said he rushed to scene and found accused had cut deceased and PW2 was struggling with him he helped snatch panga and went to look for a car to take injured to hospital. He said he found PW1 holding the child who was bleeding profusely from the head and he took him to hospital Maua Methodist hospital but child died on the way. They made a report at Laare police station. He said he knew accused since he was born as they are neighbours.

He said accused is his cousin and he didn't know why he cut the deceased. He said accused used to drink but he didn't confirm if was drunk

on the material morning. He said he was not aware of a dispute between the accused and other family members. He said accused was found stealing miraa and his leg was cut but he didn't know who cut his leg. He said they learnt he was in hospital and that is when they found his leg had been amputated.

PW5 the father of deceased was not at home which the accused his elder son cut the deceased on the head. He got information while in Maua. He proceeded to Laare Police Station where accused had been taken. He said he proceeded to Maua Methodist Hospital Mortuary as the deceased had already died. He said he had not differed with accused and he didn't know why he cut the brother.

He said accused was of sound mind but had used alcohol and bhang. He said he was not aware he had been admitted at a mental hospital. He said since birth the accused had never had mental illness.

PW7 P. C. Sammy Otwana Investigated the offence and preferred charge of murder against the accused person. He said he went to scene in company of IP Okada Paul. That the suspect was already in custody having been apprehended by members of the public. They proceeded to Maua Methodist Hospital mortuary where body of deceased was and PM was conducted.

On 22.10.2012 –Exp2. He said panga used to inflict injuries was recovered and he kept it as exhibit – Ex P1. He said accused person his mother PW1 twice, when she was trying to prevent him from cutting the deceased further and she was the treated and P3 form filled – Ex P3.

He said accused didn't give a reason as to why he killed his younger brother. The Investigating Officer said he Learnt accused was abusing drugs taking a lot of drugs. He said during interrogation accused could sometimes talk and sometimes he could not and just responded "I don't know" That he didn't say anything related to killing his brother.

PW8 Dr Kisilu produced PM, Report made by Dr. Njeru in which he concluded that the deceased death was caused by cardio pulmonary arrest due to bleeding from cuts caused by a sharp object. He said there were 2 major cuts that went through the skull and brain tissue and that adjacent to the cuts were clotted blood and brain was distorted.

When placed on defence accused in sworn statement said he didn't know charge against him. He said he didn't know the deceased and that he was not his brother. He said he didn't cut the deceased. He said he was taken to Mathari some years back but he was not told why. He said he was not taking any medicine.

In cross examination he said he was well except he had not eaten. He said they had uji, but were not given bread. He said for lunch the normally eat ugali or rice but he had not had his lunch. He said the previous day they had rice and beans.

He said he didn't have a friend in prison. He confirmed Rael was his mother and that his father was Benson. He gave name of his sister as Faith Karui. He said he had 3 sisters. He said they are 3 brothers, himself and 2 others.

He said B M is not known to him and is not his brother. He again says it is true he is the one who cut B and his mother.

An order was made so he could go for follow up mental treatment. In submissions defence counsel stated that accused had put up a defence of insanity and that by reason of unsound mind he was incapable of knowing the nature of the act or incapable of knowing that it was contrary to the law. It was submitted that there was no evidence to rebut the defence of insanity.

It was argued that effect of insanity prevents a person from criminal liability. It was argued that accused persons calmness on arrest were clearly indicative of abnormal behaviours that raises question a mental status of the accused. The defence submitted that ingredient of malice aforethought had not been proved.

The prosecution didn't and were not required to file submissions as it is only accused who gave his defence and didn't call any witnesses.

From the evidence on record, the court is to determine the following issues:-

1. Fact of death
2. That death was caused by the unlawful action/commission and/or omission of the accused
3. That the unlawful commission and/or omission and/or omission was actuated by accused persons malice aforethought.
4. Whether accused person had mental capacity to commit the offence of his free will.

The fact of deceased persons death was proved by all prosecution witness and particularly.

PW8 Dr. James Kisilu who produced post mortem report done by Dr Njeru in which cause of death was established to shock due to bleeding from a cut on the head by a sharp object.

The deceased persons mother PW1, P M – PW2, PW4 Zawadi Mwiti said they saw accused cut his 4 year old brother on the head and in the course of PW1 trying to restrain him from inflicting more cuts he also cut his mother twice on the hand. PW2 held him from behind and was assisted by others who responded to alarm to disarm him.

Was the action of accused actuated by malice? PW1 the mother of accused said accused used to consume alcohol and bhang openly. She said accused had never had mental sickness. Since when he was born she said on the material morning she on the material morning she saw accused standing while holding a panga. She said accused had smoked bhang on Sunday but was not drunk on the material morning of the offence. She said she didn't know if he was still under influence of bhang/alcohol. She said the deceased and accused were friendly to each other as brothers and when he committed offence she suspected he was still under influence of alcohol or bhang.

PW1 said accused persons amputated leg was done due to his criminal nature. She also said accused was cut at night by miraa thieves. She said accused persons leg was amputated at Chogoria hospital where he was admitted for 3 months following attack in his miraa farm.

PW5 the father to the accused and the deceased said that accused was of sound mind but had used alcohol and bhang. He said he was not aware accused had been admitted at Mathari TRH because of mental illness.

The Investigating officer PW7 said in the course of investigations he established that accused was taking a lot of drugs and he didn't give a reason why he cut his 4 year old brother. He said accused person during interrogation could sometimes talk and sometimes kept quiet.

He said accused didn't say he had killed his brother or anyone. When accused was 1st presented to consultant psychiatrist Dr. Thuo he examined him and wrote a report dated 12th November 2012 in which he said the accused had a mental abnormality and required treatment and was therefore not fit to stand trial. When arraigned in court as 8.11.2012 the court noted that he was not responding to his name and was referred for mental examination.

On 21.1.2013 a report was filed showing accused was not fit to stand trial. He was therefore committed to Mathari TRH for treatment and management until he is fit to stand trial. Accused was returned to court from Mathari on 13th December 2016 and on 11.1.2017 it was ordered that accused undergoes a mental re-examination.

The final Report by Dr. Mwikamba dated 29.3.2017 was to the effect accused had been followed up for mental disorder since 2015 and that he had now fully recovered and he is of sound mind and fit to plead. He recommended regular follow up in a psychiatric clinic.

The net effect of the evidence of PW1 and PW5 the mother and father of accused respectively is that he had abused alcohol and bhang and initial report by psychiatrist was that he had mental abnormality which in the view of this court most likely led him to commit the offence herein.

According to PW1 accused and the deceased were very friendly to each other and even the parents suspected he was under the influence of alcohol because they had not quarrelled with the accused prior to suddenly turning violent against his 4 years old brother.

This court finds that he is guilty but was insane at the time of committing offence and was not in a position to make informed decisions. The accused will of the pursuant to S.166 (2) C.P.C be detained at a mental institution by a committal order by President. Cabinet Secretary to make Report to the President and the order to be reported to the President for an order of commitment under S.166 (2) & (3) & (4) CPC.

HON. A.ONG'INJO

JUDGE

8.11.2018

Before Adwera J

Kinoti – Court Assistant

Mrs Mwathi for state

Accused – Present in person

Mr MutUma Advocate for accused.

Court

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 8TH DAY OF NOVEMBER 2018.

HON. A.ONG'INJO

JUDGE