



REPUBLIC OF KENYA

HIGH COURT

AT NAIROBI

CRIMINAL CASE NO. 31 OF 2012

LESIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

PKI.....ACCUSED

JUDGMENT

1. The accused **PKI** is charged with one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are:

‘On the night of the 2nd day of January 2012 at Mathare Kosovo slums, within Nairobi County murdered HW.’

2. The prosecution called a total of 9 witnesses to prove its case against the accused. The accused on the other hand, gave an unsworn statement and then called his mother as his witness.

3. In brief the case against the accused is that he had a relationship with PW2 since 2010. In November, 2011 PW2 delivered a baby girl, sired by the accused. On 1st January 2012 the accused went to PW2’s house at 10 a.m. He demanded the clinic card for the baby and photos taken of it. When none were forthcoming he told PW2 that he would be back.

4. At 9 p.m. the accused returned to PW2’s house armed with a machete. He held the baby by the throat but when PW2’s sister PW3 went out of the house screaming, the accused released the child and ran after her. Eventually the accused went away.

5. At 1 a.m. same night the accused returned to PW2’s house. The accused hit the door open with a stone. He then hit the electric bulb which was on inside the house and the lights went off. PW2 saw that the accused had a torch. He used it to attack the baby by hitting her with a machete on the head, chopping off a section of her head. He then cut PW2 multiple times on the head, hands and legs. After that he abducted PW3, his step-daughter, took her to his house where he defiled her before running away for several weeks.

6. The accused in his defence stated that he could neither admit nor deny the evidence adduced by the prosecution. He stated that he was sick at the time of the incident and could not remember anything that happened. He said that he came to realization in his hospital bed at Mathare Hospital. That is where a doctor told him that he had been sick for many years but that after treatment he had fully recovered to face trial.

7. DW2 was the mother of the accused. She told the court that she only heard that her son had had a big fight with his second wife, one Njambi over a bar business. Regarding accused mental health she testified that in 2011 the accused changed and started saying that he would send a plane to collect timber from their home in Muranga and deliver it in Nairobi she said that after some months she learnt that the accused had been admitted at Kenyatta Hospital after which he was transferred to Mathare Mental Hospital.

8. DW2 testified that mental illness ran in her family. She said that her father had mental illness and so did her first son. The accused was her third born child. DW2 said that for her father and elder son, they had been healed through performance of cultural rites by elders.

9. The accused faces one charge of the murder of his daughter with PW2. The charge of murder is defined under **section 203** of the **Penal Code** as follows:

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

10. It is important to note that the burden of proof lies with the prosecution to prove the charge against the accused beyond any reasonable doubt. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. In **Anthony Ndegwa Ngari Vs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows;

I. Proof of the fact of the cause of death of the deceased.

II. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the `actus reus' of the offence;

III. Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the `mens rea' of the offence.

11. Malice aforethought is an essential element of the offence of murder under **section 203** of the **Penal Code**. What constitutes malice aforethought is set out under **section 206** of the **Penal Code** as follows:

“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.”

12. After the close of the case each of the counsels, Ms. Onunga, Learned Prosecution Counsel and Mr. Tunya, Learned defence counsel filed written submissions which they relied on. Mr. Tunya's written submission had no relationship with the oral submissions he urged in court. I will deal with his written submissions as I analyze the entire evidence. Aside from that, from Mr. Tunya made a three-sentence oral submission in which he urged court to:

a. Find that the accused was suffering from mental illness at the time of this incident.

b. Accept accused case that he does not contest that his baby died and that his actions were the ones which caused her death.

c. Reject the mental status. Report by Dr. Kamau. Dr. Kamau found accused fit to plead. Counsel urged that Dr. Kamau was ill equipped and ill trained to form a correct conclusion of accused mental status.

13. Having considered the evidence adduced before court by both the prosecution and the defence, and having considered submissions by both counsels to the parties, I find several issues are not in dispute.

14. The defence both in defence and final submissions does not contest;

a. That the deceased was murdered

b. That the accused own acts on the material day led to the severe injuries on the deceased and PW2 and as a result the deceased succumbed and died.

c. It is not disputed that PW2 and accused were husband and wife but did not live in the same house partly because the accused had another wife.

d. It is not disputed that PW3 was the daughter of PW2 by another person, not the accused.

15. The defence indicated in the oral submissions and the defence case that the accused was not challenging that he caused the deceased death by his own actions. The defence gave the reason for not contesting that evidence as the fact the accused was suffering from mental illness at the time. Yet in the final written submissions several issues were raised which seems to be a shift from the initial direction taken.

16. What the defence has done in this case is to approbate and reprobate at the same time. At one time they admit the accused caused the death of the deceased. At another time they challenge the credibility of the key witness. Since that is the method the defence has used, then the court has to consider all the issues arising in the case.

17. With the above in mind, having settled what is not in dispute, the following are the issues for determination:

a. Whether the prosecution has proved that the actions of the accused were actuated by malice aforethought, and alongside

that whether PW2 was a credible witness.

b. Whether failure to produce the murder weapon is fatal to the prosecution case.

c. Whether the prosecution has proved that at the accused committed this offence he had formed the necessary malice aforethought to commit the offence of murder.

d. Whether the prosecution had proved the motive for this offence.

e. Whether the accused was suffering from mental illness at the time of this incident.

18. Regarding the issue whether the prosecution has proved that the actions of the accused were actuated by malice aforethought and whether PW2 was a credible witness; Ms. Onunga in her written submission urged the court to find that the prosecution had proved that the accused had formed malice aforethought to cause the deceased death for the following reasons:

I. That the prosecution had proved that the accused had the intention to cause death or grievous harm and had prepared to commit murder for reason he inflicted serious multiple injuries on the deceased and PW2 after arming himself with a sword and forcefully gaining entry into PW2's house.

II. Concealing the murder weapon after committing the offence first by locking PW3 in his house and taking off with the murder weapon.

19. Mr. Tunya for the defence in his written submissions challenged the evidence of PW2 claiming she had either lied or contradicted herself. He sets out the alleged contradictions comparing the evidence of PW2 with her statement to the police and the affidavit opposing bail filed in opposition to accused release on bail. Three issues were argued, one that PW2 had lied that she was not living with the accused because she was sharing her house with PW3 her teenage daughter; two that PW2 had lied that she had changed her residence citing fear for her life; and three, that PW2 was not credible because in the affidavit opposing bail, she cited accused was drunk at the time of the incident yet in her testimony she did not make any such statement.

20. That comparison is an afterthought for the simple reason it was being raised for the first time in the final written submissions. Furthermore, these issues were not highlighted in the oral submissions by the defence in the very least, at least to give the prosecution an opportunity to answer the allegations leveled against PW2.

21. More importantly however is the fact that the alleged contradiction about PW2's change of residence is a triviality which is of no material significance to the case, as it related to the period after the offence was committed and while the accused was at large having escaped from Mathare Hospital. If PW2 opposed bail citing that ground, that was her right to do so. It was her perception that she was in danger and granting accused bail would make the situation worse. It is important to note that both PW2 and PW3 in their evidence stated that they had shifted from Kosovo to Kayole following the incident. In fact this witness and her daughter PW3 were on Witness Protection at the time they testified in court. I find the challenge on PW2 about her safety has no merit.

22. Counsel urged that PW2 lied that she was not living in same house with the accused because she was living with her teenage daughter. Counsel submitted that the sharing of the house with her daughter was never the reason not to live with the accused. PW2 was not cross-examined over this alleged contradiction. There was sufficient corroboration from PW3 and 4 that the accused and PW2 never lived together, but merely visited each other's houses. That also explains why the incident took place at PW2's house and not that of the accused. The evidence of PW2 was factual and sufficiently corroborated. The allegations of contradiction cited by the defence do not hold any water.

23. The other issue raised by the defence was concerning the failure by PW2 to disclose the accused state of mind at the time of the incident. It was the defence submission that in her affidavit PW2 had stated that accused was drunk at the time of the attack. However, in her evidence in court PW2 did not make mention of accused being drunk.

24. I have considered the issue of intoxication under the backdrop of **section 13(4)** which stipulates as follows:

4 "intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

25. The issue of accused intoxication was not raised at all during the trial, whether during the prosecution or the defence case. It has featured for the first time in the written and final submissions by the defence. **Section 13** of the **Penal Code** gives the defence the burden to prove the defence of intoxication within the parameters of that provision. No such attempt was made. I find the issue of intoxication was not invoked at all at the trial. Secondly, I find that the same cannot be invoked at this late stage of the case. It ought to have been established in evidence as contemplated under the relevant law. It was clearly an afterthought. I find nothing turns on this issue.

26. Regarding the issue whether the prosecution has proved that at the accused committed this offence he had formed the necessary malice aforethought to commit the offence of murder. Ms. Onunga urged that the prosecution had successfully placed the accused at the scene of murder through the evidence of PW2 and 3. Counsel urged that the accused conduct before and after the commission of the crime whereby he threatened PW2 to return and assault her and the baby was executed the same night. Counsel urged that accused actions were unlawful and deliberate and were proof that he had planned to commit the offence. Counsel urged the court to find that accused actions were actuated by malice.

27. On the issue of malice it was stated in **Nyamweru s/o Kinyaboya v Reginam(1953) 20 EACA 192** (Sir Barclay Philip, Sir Newham

“that the use of a lethal weapon may indicate a malicious intent, but the same is however not conclusive of the existence of such intent, for a person may be so drunk as to be utterly unable to form any intention at all and yet may be guilty of great violence. The accused had been convicted of the murder of his wife. He was in an advanced state of intoxication when he killed her with a knife. His conviction was reduced to manslaughter on appeal.”

28. In this case it was a machete like instrument which was used. PW2 described it while in addition PW3 drew it. It was a long blade with holes on the blade side, about a foot and a half long. The two witnesses described it as heavy. PW3 washed it so she could tell its weight. The object of the attack included a child of one and a half months. Obviously, the use of the heavy and sharp weapon of choice speaks to malice, and the intention to cause grievous harm or death is very clear. There is however the issue of whether malice may have been negated by the accused state of mind at the time of incident.

29. **On the issue of motive** learned prosecution counsel urged that the same was proved beyond any reasonable doubt. Counsel urged that the prosecution had established that accused was bitter towards PW2 after she reported him to his mother DW2 for attempting to rape PW3. Counsel urged that his action on the material day was that of revenge and that it was the reason there was use of force which, counsel urged was a way to revenge or pay back an old score.

30. The submission by counsel of an incident where the accused was reported by PW2 to his mother, DW2 was not mentioned in the evidence of PW2. DW2 was even worse because in her evidence she stated that she had only heard that her son the accused had married another woman but he had not met her. The issue of a report was testified to by PW4, the sister of PW2. I find that since it is not clear whether PW2 ever met DW2, whether formerly or otherwise, that alleged misunderstanding or alleged report made against the accused by PW2 cannot stand.

31. **The other issue was whether failure to produce the murder weapon is fatal to the prosecution case.** The defence submissions raised issue with the murder weapon. Initially the defence line of submission was that PW2 and 3, mother and daughter described the murder weapon in their evidence. It was submitted that the description did not tally and that therefore there was no such a weapon.

32. The record of proceedings is clear of two things. First that both PW2 and 3 described the murder weapon, to the extent of sketching it in court. Their description of it tallied, and that was noted in the proceedings. Furthermore, PW3 told court that after accused abducted her and took her to his house, he forced her to wash the weapon. The accused left with the weapon after defiling PW3 before locking her in the house. I have no doubt in my mind that the murder weapon existed and that it was clearly described in evidence by both PW2 and 3.

33. The evidence of the pathologist was also clear that in his opinion, the injuries sustained by the deceased were caused by a heavy sharp object. That description was in tandem with the evidence of PW2 and 3.

34. In *EKAI V. REPUBLIC (1981) KLR 569* where it held:

“failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon.”

35. *KARANI V. REPUBLIC (2010) 1 KLR 73*. At page 79, the Court delivered itself as follows:

“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.”

36. The Court took a similar approach in *RAMADHAN KOMBE V REPUBLIC Mombasa CR.A NO. 168 OF 2002* where it stated:

“In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the post mortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant’s defence. We have no hesitation in rejecting this submission.”

37. In the instant case, the weapon was not recovered. Is that fatal to the prosecution case. I find that the prosecution has proved that the accused went away with the weapon, and had ample time to dispose of it. I find that the prosecution has established that the accused went with the weapon and he is the only one who can explain its whereabouts. Failure on the part of the prosecution to recover the weapon is not fatal to their case. The court is satisfied that the weapon that was used was well described, and secondly that it is the accused who went away with it. Failure to produce it in evidence is not fatal to the prosecution case.

38. **Regarding whether the accused was suffering from mental illness at the time of this incident.** The accused alleged mental illness has been highly contested by the prosecution. On the issue of the defence of insanity, Ms. Onunga submitted that the defence was not available to the accused. Counsel urged that the accused attack on the deceased and PW2 was well planned, organized and systematic. Counsel urged that accused words to PW3 that none of what had happened could have taken place had PW2 not been so stubborn was proof he was fully aware of his actions.

39. Ms. Onunga urged that accused caused drama in court when he was arraigned before Kibera Court. That when accused was taken for mental assessment on the court's orders, Dr. Kamau found him fit to plead. Counsel urged court to find accused was not suffering from insanity as he now claims.

40. Mr. Tunya for the defence has urged the court to ignore the report of Dr. Kamau the Police Surgeon on grounds he is not well equipped to make a proper mental assessment.

41. The prosecution has tabled several reports on the accused mental status. From the court record the accused was arraigned in court on the 19th April, 2012. He was placed under treatment at Mathare Mental Hospital soon thereafter. He then escaped from Mathare on 30th January, 2013. He was re-arrested and returned to prison and then presented to court on 31st October, 2013. He was continued on mental illness medication.

42. Pursuant to a court order, on the 22nd April, 2015 a three-member Board consisting of three Consultant Psychiatrists was formed to access the mental status of the accused. After the assessment, the members filed a report with the court dated April 22, 2015. Their findings were that the accused was suffering from a Psychotic disorder possibly secondary to Retroviral disease, Diabetes Mellitus and Hypertension. They recommended that the accused be admitted at Mathare Mental Hospital for treatment.

43. After the admission in Hospital as recommended, the court was eventually served with a report dated 2nd November, 2017 stating that the accused had recovered and was Fit to Plead. Plea was taken afresh on the same day. The trial was finally commenced on the 19th February, 2018.

44. From that little history, it is clear to the court that at the time the accused was arraigned in court in April, 2012, Dr. Kamau of Police Surgery had examined and found him Fit to Plead. That position soon changed necessitating accused admission at Mathare Hospital between 2012 and 2017.

45. What is important to the court is to determine whether at the time he committed this offence the accused was suffering from mental illness.

46. I considered the evidence of witnesses at the time of this incident on this question of mental condition. PW4, a sister of PW2 was present on two occasions when the accused visited PW2 on the material day. Her evidence corroborates that of PW2 and 3 regarding the incident of 9pm and 1am. When asked about accused behavior PW4 testified that the accused highly respected her and was polite to her prior to the incident in question.

47. PW2 repeated similar sentiments that the accused behavior on the material day was unusual. PW2 explained further and said that when the accused visited her at 10 am on the material day, and on the subsequent visits on the same day, he made demands that were strange and which she could not understand. PW2 testified that the accused was demanding the clinic card for the baby and photographs of her. The child was only one and a half months old. She said that the accused had been a good and polite person until she gave birth to the baby. She said that soon after she got the baby the accused totally changed. The first sign was the attempt to defile PW3. Then a month and a half later he committed the offence in issue as well as defiled his step daughter, that same day.

48. PW3 on her part said that she regarded the accused as her father and even referred to him as dad. She said that he changed on 10th November, 2011 after the deceased was born

49. The accused called his own mother to testify in his defence. Her evidence was that the accused had been of normal mental status until 2011. The mother of the accused stated that in 2011 the accused visited her at home and started saying how he would collect firewood using an aero plane. She said that eventually she learnt of the incident that led to his arrest but had no details. She confirmed what the three-member board stated in the report that she provided the information required for accused mental assessment.

50. The parting shot by accused mother was that mental illness ran in the family since her father and elder son also suffered from it. She said that the only way to heal the accused, like his kin before him was to take him to elders for cultural rites.

51. I have considered the evidence by both the prosecution and defence witnesses. I find that the evidence tends to show that at the time of the incident the accused may have been suffering from mental illness. He was behaving very strangely, and surprised every member of the family causing great fear and concern to them.

52. For defense of insanity to stand, the accused must satisfy the grounds set out under the McNaughten rule in **McNaughten Case (1843) 10 C1 & Fin 200**. The test is purely cognitive and the defence must show whether the accused understood his actions or understood that his actions were wrong. The M'Naughten Rules require that the following three tests should be proved:

‘That an individual suffers from a “defect of reason,

That it was caused by a “disease of the mind”,

That as a result, he or she does not know the “nature and quality” of the act or that it is wrong.’

53. In **Richard Kaitany Chemagong v Republic; Criminal Appeal No 150 of 1983** the Court of Appeal had sought to distinguish a malfunctioning of the mind from non-functioning of the mind due to epilepsy and held:

“There was ample evidence that the defendant was acting unconsciously and involuntarily when he inflicted the injury, but cause of his condition was psychomotor epilepsy. Where the effect of a disease was so to impair the mental faculties of reason, memory and understanding that the sufferer did not know the nature and quality of his act or, if he did, did not know he was doing what was wrong, it was a ‘disease of the mind’ within the meaning of the Mc’Naghten Rules in *Mc’Naghten’s Case* (1843) 10 C1 & Fin 200, even if the effect was transient or intermittent. On the evidence the defendant was therefore ‘insane’ at the time of his act, and the only possible verdict was that provided for by the Act of 1883 as amended.”

54. It’s now trite law that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing what was wrong.

55. I find ample evidence in this case to enable this court to rule that the accused was suffering from the disease of the mind. The doctors who examined him in 2015 diagnosed the condition as a *psychotic disorder*. I find that the evidence before court establishes that the accused may have been mentally unsound at the time of the incident due to a disease of the mind, so as to not to know the nature and quality of his actions or that those actions were wrong. The only way to conclude on this matter is the one provided under **section 166** of the **Criminal Procedure Code**.

56. **Section 166(1)** of the **Criminal Procedure Code** provides:

“166(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 the 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.

57. I have come to the conclusion that the only finding I can make in this case is that the accused is guilty of **murder** contrary to **section 203** of the **Penal Code** as charged in this case but was **insane** at the time that he committed the offence charged. That is my finding.

DATED AT NAIROBI THIS 13th DAY OF DECEMBER, 2018.

LESIT, J.

JUDGE