REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 65 OF 2014

REPUBLIC...PROSECUTOR

-VERSUS-

JESICA AKINYI OYUGI.. ACCUSED

JUDGMENT

1. When **JESICA AKINYI OYUGI,** the accused person herein, was arraigned before this Court ***(Majanja, J.)*** on 10/09/2014 on an information of the murder of her son one **JOHN ODWAR OYUGI** (hereinafter referred to as **'the deceased'**) on 21/08/2014, the prosecution indicated to the Court that the accused person was not fit to plead. That position was pursuant to an examination conducted on the accused person on 25/08/2014.

2. The Court then made an order that the accused person be escorted to the Kisii Level 5 Hospital for further examination. Whereas I have not been able to see a further medical report pursuant to the order made on 10/09/2014, it seems that the issue was settled and the plea was taken on 23/09/2014. The accused person denied the information and the matter was set for hearing.

3. A total of six witnesses testified in support of the prosecution's case. **PAUL OKOTH OYUGI** was the husband to the accused person and the father of the deceased. He testified as **PW1**. The PW1's brother one **JACTON ADEK OYUGI** testified as **PW3** whereas **PW2** was one **ABEL OCHIENG OCHIEL. DR. VICTOR AWINDA OMOLLO** testified as **PW4** and produced the Post Mortem Report on the examination of the deceased's body which examination had been conducted by his colleague one **DR. VIVIAN CHEBOIYWO**. The Investigating Officer **No. 79589 Cpl. JAMES NZIOKA** testified as **PW5** while **No. 80072 Cpl. BENSON INGOSI** from the Crime Scene Support Office testified as **PW6**. The **P3 Form** dated 04/09/2014 in respect to the accused person was produced by the consent of the parties and without calling the maker.

4. The prosecution's case is fairly straight forward. In the morning of 21/08/2014 PW1 left the accused person at their home together with the deceased as he went to the nearby local shop to get some snacks for breakfast. As he was still at the shop PW1 was called by PW3 and informed that the accused person had left their home carrying the deceased. PW3 decided to so inform PW1 since as a brother and who stayed in the same homestead, he was aware that the couple had had problems and that the accused person had on several occasions left for her parents' home and that infact the accused person had returned just two weeks ago.

5. PW1 hurriedly returned home and followed the route which, according to PW3, the accused person had followed. PW1 managed to catch a glimpse of the accused person from a distance of about 200 feet away and as he tried to quicken his steps as to catch up with her, the accused person disappeared into a bush. PW1 then lost track of the accused person and began asking the people he met on the way of the

whereabouts of the accused person. He eventually reached Owinjo Secondary School whereat he was joined by PW3 who had decided to follow him from a distance. PW1 and PW3 agreed to take different routes in their search for the accused person and the deceased. PW1 proceeded towards a nearby hill whereas PW3 went the other side. PW1 then met PW2 who was cutting stones and asked him if he had seen a woman carrying a child. As PW2 did not know PW1 and their area had recently witnessed spates of thefts of stock he decided to rush up the hill as to secure his goats which he had earlier on tethered there. PW1 went towards the other direction of the hill.

6. As PW2 went up the hill and towards the bushes where his goats were, he saw a woman running away from one of the bushes. PW2 did not recognize the woman but rushed to the bush where the woman had come from and on reaching their he found a boy child lying on the ground facing up with a cloth tied on his neck with a rope. PW2 tried following the woman but she vanished into the bushes towards the top of the hill. He then raised alarm and people quickly responded and gathered up the hill. As the people were gathering up, PW2 decided to rush towards the direction which PW1 had taken so as to update him of the development. PW2 found PW1 and so informed him of what had transpired. The two rushed to the scene where PW1 found his son lying on the ground breathless. PW3 also arrived at the scene shortly.

7. A search for the accused person was organized by those who had gathered at the scene and after a while the accused person was found hiding in the bushes up the hill. She was taken to where the deceased was and was questioned accordingly. The police later on arrived at the scene and collected the deceased, PW1 and the accused person and proceeded to Macalder Police Station where the accused person was placed in custody as the body of the deceased was taken to Migori District Hospital Mortuary for preservation and post mortem examination.

8. The post mortem examination conducted revealed that the cause of the death of the deceased was strangulation. Before the said post mortem examination PW6 took photographs of the deceased while at the mortuary which photographs he processed and produced them in Court. PW5 took the accused person for mental assessment and later arraigned her before Court.

9. At the close of the prosecution's case the accused person was placed on her defence. She opted to give a sworn statement without calling any witnesses. She denied committing the offence and stated that the name **JOHN ODWAR OYUGI** was her father's and not her son's name. According to her the son was known as **KENNEDY ADHOCH**. She complained that she had been asking PW1 of the whereabouts of her son without getting any explanation until when her mother told her the son had died. She even denied that her son had died.

10. The accused person explained that she had been suffering from mental disorders for a while and had for long been attended to Doctors at the Aga Khan Hospital in Kisumu and has been on drugs throughout. She produced copies of medical notes and prescriptions as well in support of the matter.

11. At the close of the defence case the matter was left to the Court for determination.

12. It is on the foregone evidence that this Court is called upon to render this judgment. I have carefully considered the evidence on record as well as the exhibits. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients:

> ***(a) Proof of the fact and the cause of death of the deceased;***
>
> ***(b) 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;***
>
> ***(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the*** *'mens rea'* ***of the offence.***

I will consider each of the ingredients separately.

13. As to the proof of the fact and cause of death of the deceased, it is not in dispute that the deceased in this matter died. That position was confirmed by PW1, PW2, PW3,PW4, PW5 and PW6. The first limb is hence answered in the affirmative.

14. As to the cause of the death of the deceased, PW4 produced a Post Mortem Report which gave the possible cause of death of the deceased to have been out of strangulation. As there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

15. Turning to the second ingredient, there is no direct evidence connecting the accused person with the death of the deceased. What comes out is only circumstantial evidence. As such I must therefore closely examine the evidence on record, not only as my normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

> ***(i) The circumstances from which an inference of guilt is sought to be drawn, must be congently and firmly established;***
>
> ***(ii)The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***
>
> ***(iii)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.***

16. The foregone principles were set out in the *locus classicus* case of ***R -vs- Kipkering arap Koske & Another 16 EACA 135*** and have repeatedly been used in subsequent cases including the Court of Appeal cases of ***GMI -vs- Republic (2013) eKLR***, ***Musii Tulo Vs. Republic (2014) eKLR*** among many others.

17. The Court of Appeal in the case of ***Musii Tulo*** **(supra)** in expounding the above principles expressed itself as follows:-

> ***" 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus:-***
>
> *'It is also necessary before drawing he inference of accused's guiltyfrom circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'*

18. I have cautiously considered the evidence on record. PW1, PW2 and PW3 gave evidence which when taken cumulatively leave no room to the inference that the accused person was the one who caused the death of the deceased by way strangulation. I am satisfied and so find that there are no other co-existing circumstances which would weaken or destroy that inference. The question which now begs an answer is whether the accused person so caused the death of the deceased by an unlawful act or omission. Closely linked with that issue is the issue of the accused person's defence of insanity that she was suffering from a mental disorder at the time of the incident.

19. I have considered various decisions of the Court of Appeal on the subject of the defence of insanity and I think that of **Leonard Mwangemi Munyasia vs. Republic (2015) eKLR** best fits this case. The decision went into a great length in discussing various aspects of the defence of insanity and how trial Courts are to handle the issue. With tremendous respect to my Lordships, I will reproduce a substantial part of that decision as follows:

> ***"To begin with and as a matter of general rule, the law presumes that every person is sane and responsible for his actions at all times including when he is alleged to have committed an***

offence because sanity is the normal and usual condition of mankind. Section 11 of the Penal Code provides thus:-

"Every person is presume to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

The presumption of sanity is, from the above provision, rebuttable, hence the recognition in criminal law, of the defence of insanity. Section 12 of the Penal Code on the hand provides for the application of the defence of insanity 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 incapbale 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 produced upon his mind one or other of the effects above mentioned in reference to that act or omission."

Finally, on the applicable law, Section 9 to which we have also made reference provides that:-

"9.(1) Subject to the express provisions of this Code relating to negligence acts and omission, a person is not criminally responsible for an act or omission , which occurs independently of the exercise of his will, or for an event which occurs by accident."

We reiterate that this is the basis of the generally accepted notion that persons who cannot appreciate the consequence of the actions should not be punished if those actions happened to be criminal acts.

The law on the defence of insanity was refined in 1843 following the trial of Daniel McNaughten, who, operating under the delusion that Sir, Robert Peel, Prime Minister, wanted to kill him, set on a mission to kill the Prime Minster first. Executing this intention, McNaughten in an attempt to assassinate the Prime Minister shot his secretary, Edward Drummond and killed him instead. McNaughten's trail at the old Bailey was high profile attracting two solicitors, four barristers and nine medical experts. Medical evidence in the trial indicated that McNaughten was psychotic, suffering from what would today be described as paranoia and delusion. Consequently, the court acquitted him by reason of insanity. This provoked considerable public furor followed by debate in the House of Lords culminating with a direction penal justice of the Queens Bench Division by presided By Chief Justice of Common Pleas, Sir Nicholas Tindal to craft new rules on the defence of insanity based on a series of hypothetical questions framed by the House. The principles developed by the panel have come to be known as the McNaughten Rules. That marked the beginning of forensic psychology. Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease f 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 he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under Section 167 (1) (b) of the Criminal Procedure Code he would be convicted and ordered to be detained during the President's pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.

Both Section 12 aforesaid and the McNaughten Rules recognize that insanity will only be a defence if its proved that at the time of the commission of the offence charged, the accused person, by reason of unsoundness of mind, was either incapbale of knowing the nature of the act his charged with or was incapble of knowing that it was wrong or contrary to law. The test is strictly on the time when the offence was committed and no other. Yet it would be virtually impossible to lead direct evidence of the exact mental condition of the accused person at the time of the commission of the crime. Borrowing from a medieval English Judge, Brian CJ IN a

1468 case of Green vs, Queen, and who in turn reiterated Cicero who famously remarked that:-

> *"The thought of man is not triable, for the devil himself knoweth not the intendement of man,"*

We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus 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.

What must be avoided and what this court has warned against in the two decisions relied on by the appellant's advocate in this appeal, is the likehood 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, top 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 cas4es 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 incapble 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 t*he 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 Section 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."*

20. I have once again considered all the evidence touching on the accused person's mental status. There is evidence that indeed the accused person had been attending Mental Clinics at the Aga Khan Hospital in Kisumu and that she had been on serious drugs like *Risperidone, Astane, Fluoxetine, Ozitons, Prodep, Trihexyphenioyl* among others. A receipt of drugs purchased from the said hospital as late as 31/10/2016 for the accused person further confirms the position. It was produced as Defence Exhibit 5.

21. When the accused was arraigned before Court on 10/09/2014 the prosecution indicated to the Court that the accused person was not fit to plead. That position was pursuant to an examination conducted on the accused person on 25/08/2014 which was barely three days post the incident. The P3 Form is also very clear on the accused person's mental status. This Court has also been observing the accused person in Court and I have noted that at times she would act abnormally but it was claimed to be the effect of the drugs she was on.

22. By taking the foregone evidence as a whole, this Court is convinced beyond any doubt that the accused person had been suffering from a long term mental disorder at the time of committing the act that led to the death of the deceased. The accused person was hence legally insane when she committed the act.

23. Therefore given that the foregone does not satisfy the second ingredient of the offence of murder, this

Court returns the finding that that ingredient has not been proved. Consequently, the information of murder cannot stand. The accused person **JESICA AKINYI OYUGI** is therefore **NOT GUILTY** of the murder of **JOHN ODWAR OYUGI.**

24. That then brings us to the provisions of **Section 166(1)** of the **Criminal Procedure Code** which states that:

> ***"Where a person for whose appearance or arrest a court is empowered to issue summons or warrant is confined in prison within the local limits of the jurisdiction of that court, the court may issue an order to the officer in charge of the prison requiring him to bring the prisoner in proper custody, at a time to be named in the order, before the court."***

25. Having so found, this Court hereby makes a special finding that the accused person herein **JESICA AKINYI OYUGI is guilty of the act of strangulating her son JOHN ODWAR OYUGI but that she was legally insane when she committed that act**.

26. The accused person shall henceforth be held at the Migori G.K. Prison pending the President's further orders.

27. Those are the orders of this Court.

DELIVERED, DATED and **SIGNED at MIGORI this 22nd day of February 2017.**

A. C. MRIMA

JUDGE