



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

HCCRC NO 104 OF 2013

JUDGEMENT

LESIIT J

REPUBLIC.....PROSECUTOR

VERSUS

GEOFFREY WANJALA WECHULE...ACCUSED

1. The accused person **Geoffrey Wanjala Wechule** has been charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars are that:

“On the 20th day of October, 2013 at Kawangware Gatina Area within Nairobi County, murdered Jane Kadogo Mutiso.

2. The prosecution called a total of 11 witnesses.

3. PW1 a neighbour who lived with her family right opposite to the accused person stated that on 20th October, 2013 at around 8.00pm, she became curious after she heard a woman crying at the accused house. PW1 went ahead to check accused house and peeped through a hole in the iron sheet wall on the rear side. PW1 heard the accused whom she knew as “GUKA” (grandfather) tell a lady to kneel down and seek forgiveness for her sins from old men. PW1 saw a woman kneeling down in front of the accused person. PW1 stated that the woman and accused person were both naked. The children were seated inside the house. PW1 returned to her house and after some few minutes, she noticed that the accused place had gone silent. She went back to peep again through the holes. This time round PW1 saw the accused person holding a knife in his hand which he got from his child. PW1 stated that accused was telling the woman to close her eyes but she could not see her.

4. PW1 went back to her parents’ house. She saw the accused leave his house with his two children and lock his door with a padlock. PW1 noticed that the woman she had seen in the accused house was not in the company of the accused and children as they locked the door. PW1 then told her mother PW2 what she had seen. Together with PW2, PW1 went to the accused house and through the window on the front side of the house, they flashed a torch inside the house and saw the legs of a lady. PW1 and PW2 called the watchman to the plot, PW3 who came and confirmed to them that they were human legs.

5. PW3 called the landlord’s son PW5 who came with a crowbar and a hammer which they used to break into the accused house. On getting inside the house, PW3 saw the naked headless body of a woman lying

on its back with the shoulders lying against the wall. On further search of the room, PW3 saw the head of the deceased inside a basket that was next to a gourd and some twigs nearby. PW3 noticed a knife next to the deceased body and some paraphernalia material that he deemed to be that of a witch doctor on the corners of the house. PW5 left the scene and proceeded to Muthangari Police Station where he reported the incident and took the police officers to the scene the same night. PW5 identified P.Exhibit 4 as the knife he saw next to the deceased body. He identified the gourd, twigs and other paraphenaria as Exh.1, 2 & 3.

6. PW4 stated that on 21st October, 2013 he received a call from his neighbour who informed him that his child one Jane Kadogo Mutiso deceased herein was seriously sick. On 25th October, 2013, PW4 identified the deceased body at City Mortuary to the doctor who performed the post mortem.

7. PW6 stated that on 20th October, 2013 at around 7.30pm, the accused person who was his neighbour and whom he knew as "GUKA" called him on his cell phone and asked him to go and pick him up at Legio Maria place. PW6 took a motorbike and proceeded to the agreed place. PW6 stated that on arrival at Legio Maria, he met the accused with a woman and he ferried the two of them to the accused house.

8. PW7 DR. Georgina Wangui Kamunge stated that on 12th November, 2013 she evaluated the accused and the father and a daughter to the accused. PW7 came to the finding that the accused was of normal mental state and was fit to plead. PW7 further stated that she learnt from the accused father's report that the accused had had mental disturbances when he was 12 years old and had undergone some traditional healing then, after which they never reoccurred again. PW7 produced the accused mental assessment report as P.Exhibit 5.

9. PW8 was the scenes of crime officer. He stated that 22nd October, 2013 he was called by one Corporal Shukri from Muthangari seeking his services as a scene of crimes officer. PW8 proceeded to the scene at Kawangware where he saw a woman's body which had been be-headed and stabbed in the stomach. The head of the deceased was placed in a basket and besides the deceased body PW8 noticed a knife that had blood stains. PW8 produced a bundle of photographs as P.Exhibit7 and a report dated 25th October, 2013 as P.Exhibit 8.

10. PW9 was a government analyst who stated that on 25th October, 2013 the government analyst office received a Knife in a khaki envelope and a blood sample in a bottle labelled deceased. PW9 analysed the items and did a DNA profile on them. PW9 came up with the findings that the DNA profile generated from the blood stains on the knife matched that of the deceased DNA. PW9 produced his report dated 14th July, 2015 as P.Exhibit 9

11. PW10 was the investigating officer in this case. PW10 stated that on 21st October, 2013 he was instructed by the DCIO Mr. Ondoro to take over a murder case which had been reported at Muthangari Police station. PW10 stated that he proceeded to Muthangari Police Station where he met Sergeant Kiia who handed over to him a knife which had blood stains, a small guard which had seeds and twigs inside and a basket with feathers. PW10 was also handed over the accused person from the station.

12. On 24th October, 2013 PW10 escorted the accused to the police surgeon for mental examination. On 25th October, 2013, PW10 witnessed the post mortem being performed on the deceased body at City Mortuary by Dr Njeru. PW10 took blood sample from Dr Njeru from the deceased for analysis at the Government analyst. PW10 produced the post mortem report compiled by Dr. Njeru by consent of all parties as P.Exhibit 10.

13. PW10 produced an Exhibit Memo that he prepared in respect of the items he forwarded to the government analyst as P.Exhibit 11, a kitchen knife as P.Exhibit 4, a Gourd as P.Exhibit 2, a Basket with feathers and twigs as P.Exhibit 1 and 3 respectively. On 23rd October, 2013, PW10 visited the scene of crime and drew a sketch plan which he produced as P.Exhibit 12.

14. PW11 was the daughter to the accused person who was 13 years old when she testified. The court conducted a Voire Dire and was satisfied that PW11 was possessed of sufficient knowledge and intelligence to testify that she understood meaning of an oath and the duty to tell the truth. PW11 was sworn. PW11 stated that in 2013 she lived with her younger brother and her father the accused who used to work as a traditional healer. On 20th October, 2013 PW11 was in the house with her brother when the father came in the evening accompanied by a woman visitor whom PW11 had never seen before. PW11 stated that while she was asleep the accused called her twice and asked her to give him a knife. PW11 got the knife from the utensils and handed the knife to the accused. PW11 stated that after some time, the accused woke her and her brother and told them to get out. PW11 noticed the woman visitor did not get out as the father got out. PW11 stated that the accused took her and her brother to the bus stage where he asked them to go to their mother in Kibera. PW11 said that they left their father behind. PW11 identified P.Exhibit 4 as the knife she had handed over to the accused.

15. The accused opted to give a sworn defence. He stated that on 20th October, 2010 he had spent the day with the deceased and together they had agreed to spend the night at his house. The accused stated that the deceased stripped naked and soon thereafter they started making love. As they made love, the accused stated that he felt pain in his male member as the deceased was holding it. The accused said that he heard the deceased voice change and all of a sudden he felt nausea. The next thing he could see was a hand approaching him and him holding a Panga which he used to cut the hand. The accused stated that while in the vision, he saw a person's headless body and him holding a head in his hand.

16. On coming back to his senses, the accused stated that he actually found himself holding a human head in his hands which he threw into a basket where his paraphernalia was. He noticed a dead body in his house and he hurriedly instructed his children they should get out of the house. The accused further stated that as they walked with his children, he could not tell where they were headed to and only found himself alone beside a road where a man by the name Ken came and offered to take him to his house.

17. On reaching the plot where his house was, they found a huge crowd. The accused enquired from a woman why the people were outside a house there and she informed him that one "GUKA" had murdered a woman. The accused instructed the same Ken to take him to Muthangari Police Station and on getting there he was arrested and locked up in the cells.

18. The accused finally admitted having killed the deceased but claimed he did it while out of his normal senses which he attributed to his mental history. The accused produced a P3 form which was filled by the doctor who assessed his injuries as D.Exhibit 1. In the Report the doctor described the injuries the accused had sustained as scratches on the penile shaft which he assessed as harm.

19. The learned defence Counsel Mr. Ochako in his submissions urged that although the accused almost admitted to the charge, the accused only came to realize what had happened after he came to his senses. Counsel urged that this was attributable to accused having had a history of mental illness since he was 12 years. Counsel urged that the accused pleaded insanity at the time he committed the offence and as such the accused had not formed the intention to commit the offence. Counsel cited the case of **MARII V REPUBLIC CRIMINAL APPEAL NO. 116 OF 1985.**

20. Learned prosecution Counsel Ms. Wafula in her final submissions urged that what the court ought to determine was whether the accused defence of temporary insanity was not available to the accused. Counsel urged that the accused act of asking for a knife from PW11 indicated he had the mental clarity of what he was doing. Counsel further urged that the accused conduct before, during and after the incident clearly shows a man who was well prepared and aware of his actions. Counsel finally urged that the prosecution witnesses dislodged any evidence of insanity on the accused part and that it could not dislodge the intent to commit murder.

21. I have carefully considered the evidence adduced by the prosecution and the defence, the learned counsels' submissions and their authorities.

22. The accused person faces a charge of murder contrary to **Section 203** of the **Penal Code**. This section

creates the offence of murder and provides as follows:

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

23. Malice aforethought is an essential ingredient in the offence of murder. The circumstances that constitute malice aforethought are 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.

24. The onus and evidential burden of proof lies with the prosecution to prove its case against the accused person beyond any reasonable doubt. The prosecution must prove that it was the accused who caused the death of the deceased by beheading the deceased. The prosecution must also equally prove that at the time the accused be-headed the deceased, he had formed an intention to either cause death or grievous harm to the deceased.

25. Having considered the evidence availed by the prosecution and defence, I find the following issues are not in dispute. It is not in dispute that the accused was a traditional healer. It is not in dispute that the deceased and accused persons were last seen in company of one another in the accused house by PW1 and PW11. The accused does not dispute that he is the one who occasioned the deceased death by beheading her.

26. These two issues are paramount in making a conclusion in this judgement.

I. Whether the prosecution proved malice aforethought and motive to commit murder?

II. Whether the accused defence of insanity is available to him?

27. **Was the accused person suffering from a mental illness at the time he committed the crime.** The law is very clear that all persons are presumed to be sane unless the contrary is proven. **Section 11** of the **Penal Code** stipulates:

“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 the defence of insanity:

Section 12: “ 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”

28. The principles of the defence of insanity was first formulated in McNAGHTEN CASE (1843) 10 Ct. & Fin, 200, 8 ER 718 where the judges held:

“... to establish a defence on the grounds of insanity, it must be clearly proved at the time of committing the act, the party accused was labouring under such a defect of reason from a 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 was wrong.”

29. It is trite law that the burden of establishing insanity rests on the person who pleads the same as a defence. However, it is worth noting that this burden is on a balance of probabilities as was held in the case of GODIYANO BARONGO S/O RUGWIRE V REX (1952)19 EACA 229 thus:

“the burden resting on the accused when attempting to rebut a natural presumption which must prevail unless the contrary is proved will never be so heavy as that which rests on the prosecution to prove the facts which they have to establish and it will not be higher than the burden which rests on a plaintiff or defendant in civil proceeding... it must however, at least establish the possibility of what is sought to be proved.”

30. The accused person in his defence stated that he has had several instances of mental illness. The accused relied on the evidence of the doctor especially where she included the statement of the father to the accused to the effect that the accused had had a mental problem when he was aged 12 years old. Further to that, the defence counsel alluded to accused defence where he stated that there were several instances when the accused had walked naked all the way to Kibera and Uthiru without realising it.

31. The burden of proving the case against the accused person remains throughout on the prosecution. The prosecution adduced a mental assessment report P. Exhibit 5 which indicated that the accused was of normal mental state and fit to plead. The doctor’s report further stated that the father to the accused person alleged to the doctor that the accused had once had mental disturbance which happened when he was 12 years old. The father said after several medical interventions were not fruitful he took the accused to a traditional healer who cured him. The daughter to the accused PW11 on the other hand told the doctor that she had never seen anything unusual with her father when they lived together in Kawangware.

32. The prosecution in its submissions urged that the act by the accused person to ask for a knife from his child and soon thereafter relocating the children from that house was indicative of a man who was well aware of his actions.

33. I have carefully looked at the evidence of the prosecution and the defence. It is quite clear that the accused and deceased person were together in the accused house. The accused claimed that they were having an intimate session when this act happened. The prosecution on the other hand through evidence of PW1 and PW11 discounted any sexual relations was taking place between the accused and deceased. It was the evidence of PW1 that the accused asked for a knife from his daughter who passed it to him under the passia. It is the prosecution case that soon after the accused had committed the offence, he hurriedly woke up his two kids and took them to a bus stop where he ordered them to go to their mother in Kibera.

34. On his way back to the house, accused met a crowd around the plot where he lives. He then decided to go straight to the police to surrender himself.

35. All this circumstances looked at holistically portray a man who knew exactly what he wanted to do when he asked for a knife and on realising that his action was discovered, he departed from his house, relocated his two children in the wee hours of the night and then proceeded to surrender to the police.

36. Malice aforethought is the last other issue that I will determine. In the case of Nzuki – vs- Republic, (1993) KLR 171, the Court of Appeal stated that malice aforethought is a term of art and

emphasized that:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:-

a. The intention to cause death;

b. The intention to cause grievous bodily harm;

c. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman – v- Director of Public Prosecutions, [1975] AC 55”.

37. The accused beheaded the deceased person and slit her stomach. The intention to cause death is quite evident from the asking for a knife from his daughter which he used to behead the deceased. The accused person had only one intention as he committed the act which I find was to bring an end to the deceased person’s life. By beheading the deceased, it is clear that the accused intention was to cause death. The accused should have known that no human can live headless. By beheading deceased his intention was clearly to cause death.

38. The issue is whether insanity as a defence is available to the accused. As noted earlier, the accused was seen by PW1 ordering the deceased to kneel down and seek forgiveness from the old man. The accused ordered the deceased to kneel down in front of his naked body. The accused then asked for a knife from PW11 which PW11 confirmed. Soon thereafter the accused was seen by PW1 leaving the house with his children. PW1 soon thereafter saw the deceased headless body in accused house. The accused said he was in the middle of a sexual act when he saw a vision of a hand and that he cut the hand with a machete he had in his hand. He said it was then he realised he had deceased head in his hand which he quickly placed in a basket.

39. The accused claimed deceased pulled his private part causing him excruciating pain. What the doctor found on accused was scratches whose degree of injury he assessed as harm. I do not believe the sex theory by the accused. No sexual relations were going on between him and the deceased. PW1 and his daughter PW11 have discounted it in their evidence.

40. Further, it is clear from the evidence of PW1 and 11 that the accused asked PW11 for his kitchen knife. That kitchen knife was P.Exh.4. The Government Chemist found that this knife had blood of deceased DNA and so was the one used to behead the deceased. There is further evidence. The fact the deceased had another serious injury on the abdomen, a deep cut which left the deceased intestines exposed. Accused defence that he cut deceased head without knowing what he was doing does not explain why then he stabbed the deceased on the abdomen.

41. Further after stabbing the deceased and beheading her, the accused was seen by PW1 and 2 walking away after locking his house. To both witnesses the accused walked away majestically with a clear state of mind. When shortly later the accused gave himself up to police at Muthangari Police Station upon realising his house was surrounded and he could not gain access, PW10 the police officer who received him found him behaving normally. Few days later when he was taken for Mental Assessment the accused was certified of normal mental status.

42. I find that the accused has not established insanity on a balance of probabilities. I consequently find the accused person guilty of the offence of murder contrary to **Section 203** of the **Penal Code** and convict him accordingly.

DATED AT NAIROBI THIS 8TH DAY OF MARCH, 2017.

LESIT, J.

JUDGE