



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO.28 OF 2007

REPUBLICPROSECUTOR

VERSUS

W C.....ACCUSED

JUDGMENT

INTRODUCTION

W C, the accused herein was charged with two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 20th February, 2007 at *[particulars withheld]* village in Baringo North District within Baringo County murdered D J D and J D respectively.

THE EVIDENCE

The prosecution lined up a total of seven witnesses. **PW1**, L K testified that on 27th February, 2007 he heard screams and rushed to the scene where he found many people gathered. Three people were lying on the ground as the accused stood by them holding a panga. He testified that the accused wanted to attack him too but wrestled with him and with the assistance of one Ambrose, he managed to snatch the panga from him. He then tied him down with ropes.

In cross-examination he stated that he had known the accused as a normal person.

PW2, J K A testified that on 20th February, 2007 he heard screams from the home of D C, he rushed there and found the accused with a panga while a woman who was the owner of the home plus two children were lying on the floor. The two children were already dead. The accused put down the panga and PW2 arrested and tied him with ropes.

In cross-examination, he stated that he was aware that the accused suffered from a mental illness.

PW3, F A K testified that he witnessed the postmortem exercise on the bodies of the deceased persons although he did not recall their names. He knew that they were aged six and three respectively.

PW4, C D testified that on 22nd February, 2007 he heard a woman screaming and he rushed to the scene. On arrival he found W, the accused person holding a panga and had just cut two children who were lying on the ground. He found the mother of the children too lying on the ground with her back cut and bleeding and could not talk.

In cross-examination, he stated that he knew the accused since childhood and was aware that he

occasionally became mentally ill.

PW5, C R testified that the accused was her son. She testified that on 20th February, 2007 the accused went to the home of the deceased children to borrow food and when he was not given the food he cut the children who suffered fatal injuries. She further testified that the deceased had a mental illness and was so sick at the time he killed the children.

PW6, D D testified that the accused went to her home and started cutting the iron sheets into pieces using a jembe. He thereafter removed a panga and hit J (2nd deceased) on the face. She ran to rescue J but she too was cut on the head. She fell down and the accused further cut her on the shoulder. At the time, she was carrying the child C who was also cut by the deceased. Both children suffered fatal injuries. She testified that the accused was her brother-in-law whom she had known for a long time but she was not aware that he suffered from a mental illness.

PW7, Dr. John Mbithi conducted the postmortem on the bodies of the deceased persons and produced their postmortem reports. He also examined the accused on the 19th March, 2007 when he directed that he be seen by a psychiatrist. He saw the accused when he was unkept and looked mentally disturbed. He was disoriented with pressure speech (talking a lot). He noted that the accused's judgment and concentration were poor. According to PW7, a psychiatrist one Dr. Omar Ali who examined the accused observed that he had a history of psychiatric illness namely schizophrenia and at that time was declared not fit to plead. He produced the medical examination reports in respect of the accused as exhibits.

As regards the postmortem reports he formed the opinion that both deceased children died of massive intercranial hemorrhage secondary to cut wounds. **DEFENCE CASE**

The accused gave an unsworn statement of defence in which he denied committing the offences. He tendered an alibi in which he stated that on the material date he was nowhere near the home where the murders occurred but was later informed by some people that he had killed somebody. At the time the accused gave his defence the court noted that the accused appeared not responsive to the issues at hand and could not comprehend what went on.

EVALUATION OF EVIDENCE

It is now the court's duty to determine first, as to the fact of the death of the deceased persons and their causes, two, whether it is the accused who caused those deaths and three, whether, if he caused the deaths he had malice aforethought.

There is no doubt as to the fact of the death of the deceased persons. The two children were cut to death in the presence of their mother PW6. PW1, 2 and 4 also went to the scene and confirmed that the deceased persons had been cut with a panga and were lying dead. At the time PW1 went to the scene he found the accused armed with a panga which together with a Mr. Ambrose snatched from him and wrestled him to the ground and disarmed him. His evidence was echoed by PW2 and 4. PW6 who was the key witness saw her children being hacked to death by the accused. There is obviously no doubt that it is the accused person who inflicted the fatal injuries on the deceased persons. PW7 on the other hand added weight on the testimonies of the aforesaid witnesses as he confirmed that both deceased persons died of intercranial hemorrhage secondary to cut wounds.

I now determine whether the accused had malice aforethought.

According to PW2, he knew the accused suffered from a mental illness. The same was echoed by PW4 who testified that he knew the accused since childhood and was aware that he occasionally suffered from a mental illness. PW5 the accused's mother confirmed that the accused had a mental illness and that at the time he killed the deceased persons he was mentally sick. The evidence of PW2, 4 and 5 was vindicated by that of PW7 the doctor who gave the history that indeed the accused suffered from a mental illness and produced medical examination report in that respect. In the report marked as exhibit 3(b) it was indicated that he suffered severe psychiatric illness known as schizophrenia and at that time was found not fit to

plead. From exhibit 3(a) dated 19th March, 2007 he was also found not fit to plead. After undergoing treatment at the Moi Teaching and Referral Hospital he was found fit to plead vide a Medical Report dated 30th November, 2011.

From the evidence of those witnesses, it is doubtful as to whether the accused person had the malice aforethought when he assaulted the deceased persons as defined under Section 206 of the Penal Code of the following words:-

“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 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.**

In as much as the accused may have been ranging in a heat of passion and/or anger after being denied food in the home of the deceased persons it cannot be ruled out that he was insane as testified by PW2, 4 and 5 and further confirmed medically so by PW7. As such, it is my view that the question as to whether the accused was possessed of *mens rea* (intention or guilty mind) and committed the *actus reus* (cause of action of striking the deceased persons) with the intention to kill could not arise. See **Republic –Vs- MwecheOmwenga (2009) e KLR in which Maraga, J (as he then was)** defined the offence of murder which must constitute the element of malice aforethought. It is my view as provided by Section 12 of the Penal Code that at the time the accused killed the deceased children he was incapable of understanding what he was doing. The said section provides 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 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 references to that act or omission.”

Guided by Section 166(1) of the Criminal Procedure Code which provides that:-

“Where an act or omission is charged against 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 his 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”,

I hereby make a finding that the accused is guilty of the offences of murder in respect of the two counts as charged under Section 203 as read with Section 204 of the Penal Code and convict him accordingly but that he was insane at the time of the commission of the offence. Accordingly, pursuant to Sub-Section (2) of Section 166 he shall be held at the pleasure of the president. In the meantime since I am not at the station where this trial emanated I shall leave it to the Resident Judge in charge of Eldoret High Court to make an order for committal of the accused to an appropriate institution pursuant to the said Sub-Section 2. Other procedures as provided by Sub-Section (2) to (7) shall be followed up by the said Resident Judge or any other judge sitting at Eldoret High Court.

It is so ordered.

DATED and **SIGNED** this 3rd day of July, 2015.

G. W. NGENYE – MACHARIA

JUDGE

DELIVERED at **ELDORET** this 7th day of July, 2015

BY: G. K. KIMONDO

JUDGE

In the presence of:-

Mr. Omboto for Mr. Okara for the accused.

Miss Karanja for the state.