REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 66 OF 2009

REPUBLIC..... PROSECUTOR

VERSUS

PHILEMON CHEMAS..... ACCUSED

JUDGMENT

1. Philemon Chemas, a father of 8 children, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code *(Cap. 63, Laws of Kenya).*

2. The prosecution alleged that the accused, on 28th day of July 2009 at Kapsuswa village in Koibatek District within Rift Valley Province murdered Magdaline Kabon Chemas. The offence of murder is created by Section 203 -

"any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

3. The ingredients of murder therefore are **firstly –** malice aforethought, and **secondly**, death of a person. To prove malice aforethought, the first ingredient, the prosecution must prove by evidence -

> ***(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, or***
>
> ***(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) … (not in issue).***

4. This Section must also be read along with Section 107 of the Evidence Act *(Cap. 80, Laws of Kenya)* which says -

> ***"S.107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist.***
>
> 2. ***when a person is found to prove the existence of any fact it is said that the burden of proof lies on that person."***

5. An accused person assumes no burden to prove his innocence, and any defence or explanation put forward by the accused person is only to be considered on a balance of probability. The standard of proof placed on the prosecution is to prove the guilty of the accused person beyond reasonable doubt **REPUBLIC VS. GACHANJA [2001] KLR 428.**

6. There are three ingredients of murder which the prosecution must prove beyond reasonable doubt -

(a) the death of a person,

(b) that the accused caused that death through an unlawful act, and

(c) that the accused had malice aforethought.

7. PW3 identified the body for purposes of autopsy. PW5, Dr. Maragi testified and produced an autopsy report *(post-mortem report) (Pexh. 2)* that he carried out an autopsy of the body of one Magdaline Kabon Chamas, and concluded from the injuries to the head of the deceased that she died as a result of cardiopulmonary arrest due to severe head injury. The first ingredient of murder was thus proved.

8. The next question is whether the accused caused the death of the deceased through an unlawful act.

9. It was the corroborative testimony of both PW1 and PW2 that the deceased had visited PW1 and was on her back to her home when after an interval of between 5-10 minutes, they heard the deceased cry out *"woi woi, I am dead"*.The two instinctively run out together one after the other and saw the accused *"cutting the deceased on the head and shoulder with a panga"*. Neither PW1 nor PW2 mentioned where the accused was that evening before attacking the deceased with a panga.

10. PW4, the Investigating Officer who arrived at the scene at about 10.00 p.m. in the night of the incident, confirmed the evidence of PW1 and PW2, the deceased had injuries on the head and shoulder, and that he took the panga recovered by PW2 from under the firewood where the accused had placed it as he escaped from a lynch mob who had gathered at the scene after hearing the many screams.

11. His investigations established that there had been prior to the incident a minor disagreement over a visit by the wife of the accused to relatives in Eldoret which the deceased supported, but was opposed by the accused, as there was nobody left to look after him and the children while the wife was away. And that for the reason he was angry with the mother and *"ambushed"* and killed her by cutting her with a panga.

12. When put to his defence, the accused gave an unsworn statement and denied killing the deceased. He stated that he had been sick since 1990's and that he was treated in private hospitals, and that as a result of the sickness the could not even ride a bicycle, or a motor vehicle, and he could not climb any heights. He stated even as he testified, he was unwell, he was unsteady that "I heard people say, that I hit my mother, I did not cut her."

13. With that unsworn statement, counsel for the accused applied for further mental assessment of the accused which I allowed by order made on 2nd February, 2012.

14. The accused was subjected to further psychiatric examination, and a report dated 28.03.2012 made and filed in court on 29.03.2012, the Doctor found the accused to be –

"mentally stable, he was calm, attentive and he answered questions asked appropriately. He has normal speech, his thoughts are ok his perception internal and external are normal. His judgment is good, he understands the charges he is facing. He has good memory and concentration and he is capable of following the court proceedings. He is also capable of defending himself or instructing his lawyer."

15. In conclusion the Report says -

"Philemon is an adult male who in my opinion is mentally stable and he is fit to plead to the charges he is facing."

16. Following the said further mental assessment report, the accused gave a further unsworn statement on 5.06.2013. He stated that on the material day, he was sick and he did not know whether he committed the act he is charged with, that he had gone to a kiosk and had on his return found the deceased in his house, and that he wanted to graze his animals, and asked his children to get his panga, but the children informed him that his panga had been taken by one of his other children, and that his sister (PW1) gave him her panga, and that the deceased approached him screaming. So he pushed her away with the panga and ..

"almost of a sudden I found myself facing a different direction. Then I gave the panga to one of the children to go and cut grass for the cows, as I went to check for my cell-phone which was charging in the market, and I went to the kiosk running. It was about 6.00 p.m."

17. The accused further stated that after collecting his cell-phone from the market, he returned home, where he stayed until he heard the sound of a motor vehicle which turned out to be the Police who had come to remove the body of the deceased - *"I was sick, I do not remember cutting the deceased."*

THE SUBMISSIONS

18. With that evidence of the prosecution, the unsworn statements of the accused, and the further psychiatric report by the Doctor, the prosecution counsel told the court that they relied on the evidence on the record, the oral direct evidence of PW1 and PW2 that they saw the accused cut the deceased on the head, and the declaration of the deceased that she was dying – which was counsel submitted, admissible under Section 33 of the Evidence Act, and submitted that the prosecution has discharged its burden of proof under Section 107 of the Evidence Act beyond reasonable doubt.

19. On his Mr. Kurgat, Counsel for the accused raised two issues, **firstly** whether the contradictions in witnesses evidence affected the prosecution's case, and **secondly,** whether the accused committed the offence while in the right frame of mind. I shall consider each of these issues in turn.

OF WHETHER THERE WERE ANY CONTRADICTIONS IN EVIDENCE OF WITNESSES AND WHETHER SUCH CONTRADICTIONS AFFECTED THE PROSECUTION'S EVIDENCE

20. It is correct that the Information states in the particulars that the accused killed the deceased on 28th July 2009, whereas the testimony of PW1 states that the accused killed the deceased on 29th July 2009. The other contradiction referred to by counsel for the accused is contained in the evidence of PW1 and PW2. Whereas PW1 asserts that she heard something fall outside PW1's house about 10 minutes after the deceased left her house, PW2 testified that it happened 5 or so minutes after the deceased had left PW1's house. Counsel submitted these contradictions should be resolved in favour of the accused.

21. With respect to counsel for accused, I can see no contradictions at all in the evidence of PW1 and PW2. It is all a question of perception, of both time and event. As to time, both were approximates as none of them kept a time-watch. **Secondly**, the evidence of PW1 was that she first heard as if something had fallen down with a thud, but upon running out to see, actually saw the accused cut the deceased on the head.

22. What PW2 perceived as a cut on the shoulder was no more than a swing of the panga wielded by the accused where the panga fell was conclusively determined by the medical evidence of PW5, it was on the head right to the brain matter. The different perceptions did not affect the material fact that the deceased was cut on the head by the accused, and that the deceased died as a result of that injury and not any injury on the shoulder.

23. In connection with the time of the dying declaration, there is no doubt that both PW1 and PW2 heard the deceased cry *"woi woi", I am dying or I am dead."*

24. Under Section 33 of the Evidence Act, a statement written or oral, of admissible facts made by a person who is dead is admissible -

> ***(a) when the statement is made by a person as to cause of death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes in question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever the nature of proceedings in which the cause of death comes into question."***

25. In the instant case, PW1 heard PW2 heard shouts from the deceased, *"woi I am dying"* and came out immediately and I saw the accused cutting my mother about 10 metres away. ***"I saw the accused cut the deceased on the right face and right hand shoulder."***

26. PW1 was so scared that she run to Sarah's home a neighbour and never returned until she heard the sound of a Police vehicle. It was his testimony that she did not observe the injuries suffered by the deceased – not that the deceased had not suffered any injury. This is no contradiction at all.

OF WHETHER THE ACCUSED COMMITTED THE OFFENCE WHILE UNDER THE RIGHT FRAME OF MIND

27. Although learned counsel for the accused raised this question under one single heading, the issue comprises two separate legs -

> ***(a) whether there was provocation, and***
>
> ***(b) whether the accused suffered from a disease of the mind***
>
> which I will discuss separately in the subsequent passages of this judgment.

OF PROVOCATION

28. Provocation is one of the statutory defences not only to killing but to other offence such assaults under the Penal Code. Section 207 provides as follows -

"203.When a person who unlawfully kills another under circumstance which, but for the provisions of this Section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."

and Section 208 of the Penal Code defines provocation as follows -

"208(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self- control and to induce him to commit the assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

(2) when such an act or insult is done or offered by one person to another, or in the presence of another person who is under the immediate care of that other or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault."

29. For the defence of provocation to stand, the court must consider the evidence adduced on behalf of

the accused, that he did the act which caused the death of the deceased in the heat of passion, caused by sudden provocation, that is to say, any wrongful act or insult done by an ordinary person to another ordinary person who stands in a conjugal *(spouse)*, parental, *(filial) (child)* in relation to the person insulted.

30. It is not every provocation that will reduce murder to manslaughter. To have that effect, the provocation must be such as temporarily to deprive the person provoked of the power of self-control, as the result of which he commits the act which causes death. An unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did – **REPUBLIC VS. GACHANJA *(supra)* and REPUBLIC VS. CHIVATSI & ANOTHER [1989] 333.** The same conclusion was reached in **INTHITHIO VS. REPUBLIC [1988] KLR 796.**

31. In this case, the deceased and accused stood in the position of parent *(mother)* and son *(filial).* They qualify within the definition of provocation under Section 208 aforesaid. The question however is, whether the deceased actually provoked the accused. We only have the word of the accused that the deceased *"approached him screaming"*. He does not say what words or epithets the deceased uttered that so provoked him that he *"pushed her with the panga"*. There was also no evidence that the deceased was drunk and may have uttered unspeakable epithets that so provoked her son *(the accused)* into a fit of uncontrollable passion *(anger)* causing him to react with violence and cut his mother on the head with the panga.

32. The evidence of PW2 was that the accused had some disputes with the deceased *(not on the material day)*, and in particular over two matters, the deceased's habit of *"roaming"* into the accused's house which the accused did not like.Although the record of proceedings does not contain the word *"not"* in the phrase *"did not hear"*, the sense to be drawn from the entire sequence of evidence is that PW2 did not hear any quarrel or exchange of words between the accused and the deceased, before *"gogo"* shouted *"woi woi, I am dying, or I am dead."*

33. PW4, the Investigating Officer testified that it was an "ambush" by the accused of the deceased. He found no evidence of either drunkenness on the part of the deceased or any quarrel between the accused and the deceased. Any suggestion to the contrary is in my view of the evidence is far fetched, and I reject it.

OF THE DISEASE OF THE MIND

34. The defence of insanity was first formulated in the 19th Century Scottish case of **McNAGHTEN CASE (1843)** 10 ct. & Fin, 200, 8 ER 718 in these words -

"... 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."

35. That formulation has been adopted in Penal Codes or statutes of most countries of the common law tradition and is found in Section 12 of our Penal Code which says -

"S.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 more of the effects above mentioned in reference to the act or omission."

36. The above Section 12 should I think be read together with the preceding sections, and in particular, Section 9 which says -

"9(1) Subject to the express provisions of this Code, relating to negligent acts and omissions, 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.

2. ***… the result intended to be caused by an act or omission is immaterial.***

3. ***… the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."***

37. In his admirably well argued judgment in the case of **REPUBLIC VS. GACHANJA [2001] KLR 428,** Etyang J. stated quite clearly the cardinal principle of law that the burden proof of guilt of accused person lies on the prosecution, and that an accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities.

38. Whereas indeed an accused person assumes no responsibility to prove his innocence, where however an accused person assumes one of the statutory defences of provocation, insanity or other similar defence such as intoxication, the burden does not shift upon the accused, but the court must consider whether there is cogent evidence, the existence or otherwise of any of those defences. To establish the defence of insanity, the court must clearly be satisfied that *when the accused committed the act of which he is indicted, he was (i) suffering from a disease which affected his mind, and by reason thereof (ii) he was incapable of understanding what he is doing or knowing that he ought not to do the act or make the omission of the intention to do so S. 9. To prove these two ingredients it is necessary to examine the accused's defence.*

39. It was the accused's unsworn statement both before and after psychiatric examination that he had been suffering from mental illness since the 1990s, and that on the date of the incident, he did not know what he was doing, or that he committed the act of which he is indicted. It was in particular part of his second unsworn statement that as a result of that illness he can neither ride a bicycle nor drive a motor vehicle nor climb heights, all he recalls of the incident, is that he wanted to go and cut grass for his cows, but found that one of his children had taken his panga, so he asked his sister to give him her panga, and that the deceased "*approached him screaming*" -

"I pushed her with a panga and almost all of a sudden I found myself facing a different direction. Then I gave the panga back to the child to go and cut grass for cows and I then went running to collect my cell-phone from the kiosk and returned to my house where I heard the Police had come in a vehicle to remove the body of the deceased. I was sick and I do not remember cutting the deceased."

40. In the Ugandan case of **TADEO OYEE S/O DURU VS. R [1959] E.A. 407,** the Court of Appeal was considering Section 12 of the Penal Code of Uganda which is in *pari materia* with Section 12 of our Penal Code, and held that high grade *mental deficiency may be a disease affecting the mind* within Section 12 of the Penal Code and that the trial court took too restricted a view of the word *"disease"* in Section 12 and was not correct that the defence of insanity was not available to the appellant when there was such evidence.

41. Though the burden never shifts, I do not believe the accused's story, that he was sick, and does not remember cutting his mother. If this story is to be believed, it does not answer the contradictions in his own statement. He cannot be suffering from selective amnesia. He remembers his own panga having been taken by one of his own children. He remembers being given a panga by one of his sisters, he does not remember what he did with that panga, but remembers giving the panga to one of his children to go and cut grass, he remembers running to the kiosk to collect his cell-phone where he had taken it for charging. He remembers hearing the sound of a motor vehicle, the Police coming to remove the body of his mother his arrest at about 8.30 p.m.

42. The evidence of PW1, and PW2 shows that the deceased cried *"woi, woi, I am dead, I am dying."* Neither PW1 nor PW2 heard the deceased screaming at the accused. There was no evidence that the

deceased was drunk, she had come to collect some vegetable ingredients namely onions from PW2, and was on her way to her house, when PW1 and PW2 heard the cries by the deceased that she was *"dying"*, and for PW1 and PW2 to dash out and witness the accused wielding the panga over his mother.

43. The evidence of PW4 the Investigating Officer was that the accused "ambushed" the deceased and inflicted fatal injury on her head as PW5, testified. The evidence of PW4 pointed to a grudge, not a disease of the mind, because the mother supported the visit by the wife of the accused to see her relatives in Eldoret, and which the accused did not like or approve.

44. If indeed the accused was suffering from some form of hallucinations, and it was said, he does not take alcohol, or that he does not climb heights, he cannot ride a bicycle, or drive a motor vehicle how come that these issues only arose after he was put to his defence. None of those issues arose during cross-examination of any of the prosecution witnesses particularly PW1 and PW2 *(persons well known to him)* and PW4, the Investigating Officer.

45. Besides, the accused was subjected to further psychiatric examination, and it was established that he was "mentally stable, he was calm, attentive and answered questions appropriately, his thoughts and perception, internal and external were normal, his judgment was good and understood the charges facing him and was capable of defending himself. These findings are consistent with the findings in the Medical Examination Report *(P. Exh. C2(i) p.2)* done and made by Dr. Maragi on 2nd August 2009, three or so days after the incident which found the accused to have a *"normal memory, with normal intelligence, and normal mental status, and consequently fit to stand trial."*

46. Thus the clear impression to me from the evidence is that the case of the accused does not fall within the pattern of cases of mental instability which learned counsel for the accused cited to the court.

47. In **REPUBLIC VS. LINUS MAINA WANYAMBURA** *(Nyeri HCCR. NO. 109 of 2003)*, the Doctor who examined the accused two weeks after the commission of the offence, found the accused suffering from a mental illness.

48. In this case, two reports made by two different doctors at different times, one before the accused was charged and one after show that the accused was mentally stable and not suffering from any mental illness. There is therefore no basis of even making a special finding under Section 166(1) of the Criminal Procedure Code that the accused was insane and not responsible from his acts or omission (S.12), at the time of commission of the act, and therefore to make a report to the President of such finding.

49. In the premises, I reject the defence of insanity as advanced by the accused. On the contrary, I find the accused guilty of the murder of Magdaline Kabon Chamas, contrary to Section 203 of the Penal Code, and I convict him accordingly.

50. I call upon counsel to address me in terms of Section 329 of the Criminal Procedure code, on the question of sentence.

51. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 16th day of May, 2014

M. J. ANYARA EMUKULE

JUDGE