



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL CASE NO. 6 OF 2010

REPUBLICPROSECUTOR

VERSUS

STEPHEN MWANGI MAINA.....ACCUSED

J U D G M E N T

1. **STEPHEN MWANGI MAINA** stands charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the night of 18th/19th March 2010 at unknown time at Sagana Township in Kirinyaga District within Central Province murdered SHADRACK MAINA MUCHIRI.
2. The case of the Prosecution was premised on the evidence of nine (9) witnesses. There is no evidence of an eye witness. The prosecution entirely relied on circumstantial evidence.
3. PW1 - Dr. Stephen Wangombe Nderitu who carried out the post-mortem on the deceased's body found the cause of death to be severed head, neck, chest and limbs. He confirmed that the deceased's head had been severed from the torso and his limbs had also been severed from the main body. He produced his filled and signed Post-Mortem form (EXB1).
4. PW6 - CPL Reuben Manyara a Scenes of Crimes Officer gazetted under Gazette Notice No.4562 of 7/7/2003 took photographs of the deceased's body and the severed parts. The parts fitted well into the torso. These photographs (EXB 2(i) – (iv)) confirmed the findings by the Doctor PW1.
5. The deceased used to stay in a rented premises belonging to PW2 – Raphael Irungu Njukia. On this premises were other tenants PW3 – Njaimo Mwangi included. It was the evidence of PW3 that on 18th March 2010 at 7.30pm the deceased arrived on the plot with the accused whom he had not seen on the plot before. They had entered the plot through the front gate. The deceased's house was next to the urinal. After a while PW3 went to the urinal and also greeted the deceased and the accused. He closed his shop at 8pm and went to his house and started cooking. At 10pm he could hear the accused and deceased talking loudly in a jovial mood. At the same time there was a very strong smell of bhang coming from the room of the deceased.
6. At 1.30am, PW3 was up washing utensils for his milk business. At about 4am he heard a knock on his rear door and on peeping through the keyhole he saw it was the accused so he did not open. While washing the utensils near the deceased's door, the accused opened the deceased's door while holding a big polythene bag fully stuffed in his hand. They exchanged greetings and the accused told him the deceased had gone on a journey. He then left through the front gate.
7. Later PW3 and another neighbour Mrs Waweru who had smelt the bhang smoke reported the matter to their landlord PW2 – Raphael Irungu Njukia who promised to take action. At about 7-7.30pm, the accused returned to the deceased's house. PW3 went and alerted PW2 who came to

- the plot. PW2 and PW3 confirmed that when the accused was confronted by the former he had a luggage (stuffed polythene sack). He told them the deceased had gone to Nairobi. He was asked to open the deceased's house but he said he did not have the keys. They knew he was lying as he had just come from the deceased's house.
8. The Assistant Chief was called and he called the police who came. Meanwhile a crowd had formed and the accused was beaten by them. The accused's luggage was opened in the presence of the police. Inside the luggage they found a head, two severed legs, a panga and jembe. The Police Officers present arrested the accused before forcing the door to the deceased's house open. Inside the house they found the rest of the deceased's body without the head and legs on the bed.
 9. PW5 – Esther Wangeci who is the mother to the accused testified that on 19/3/2010 at 7.30am she was at home when she saw the accused headed to the latrine while carrying a paper bag. She saw him enter the latrine. She assumed he went back to his house but saw him leave. She had a strange feeling within her and so took a torch and went to the latrine with the paper bag. She flashed and saw some white wrapped papers inside the latrine. When Police Officers came she showed them what she had seen and the papers with money were recovered inside the latrine.
 10. PW7 – CPL Lawrence Mwitii and PW8 - P.C. James Kemboi were part of the police team that rushed to the scene and recovered the body parts of the deceased and the papers and money that the accused had thrown in a latrine at his home.
 11. PW9 – Dr. Joseph Thuo is a Psychiatrist and he examined the accused for a mental assessment. He did this assessment on 30th March 2010 and produced the report (EXB8). His finding was that the accused had a mental illness called **“Psychotic disorder”**. He further explained that the accused in his thoughts believed that the deceased had taken his property. He was hearing voices telling him this. The doctor (PW9) alluded this to his undetected illness for six (6) months prior to the incident. And this illness could have influenced his actions. He stated that the illness makes one see and hear things that others don't. He said he could however stand trial.
 12. In his unsworn defence the accused denied the charge. He testified that he used to work as a goods carrier and one day a customer gave him a luggage to carry. Later the luggage was found to contain the body parts of a human being. Mr. Mogusu for the accused made oral submissions. He submitted that from the report on accused's mental status the accused was not in a position to conceive the offence of murder hence *mens rea* was lacking. This is the case before the Court.
 13. The accused faces a charge of murder under section 203 as read with section 204 of the Penal Code. The main ingredients for this offence are;
 - i. Malice aforethought – **“Mens rea”**
 - ii. The act of killing – **“Actus reus”**

As mentioned above there was no eye witness to the actual killing of the deceased person. What is before this Court is pure circumstantial evidence. In the case of **REPUBLIC –V- TAYLOR WEAVER & DONOVA [1928]21 CRIMINAL REVISION 20**, it was said;

“Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial”.

14. A Court relying on circumstantial evidence must be satisfied that:
 - i. The incriminating acts are incompatible with the innocence of the accused OR guilt of any other person.
 - ii. The incriminating facts are incapable of explanation upon any other reasonable hypothesis than that of his guilt.
 - iii. Before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

See **MWANGI & ANOTHER –V- REPUBLIC [2004]2 KLR 32; MOHAMED & 3 OTHERS – V- REPUBLIC [2005]1 KLR 722; NZIVO –V- REPUBLIC [2005]1 KLR 700.**

In the NZIVO case the Court of Appeal held thus;

“In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference”.

15. The evidence of PW3 is to the effect that on 18th March 2010 at 7.30pm he saw the accused and deceased enter into the deceased’s house. They were there the whole night making merry loudly and more so there was a strong smell of bhang emanating from the deceased’s house. That was the last time the deceased was seen alive.

- Secondly the accused was on the early morning of 19th March 2010 seen by PW3 leaving the deceased’s house. He even told PW3 that the deceased had gone on a journey.
- PW5 who is the deceased’s mother confirmed that the accused had on 19th March 2010 been seen with a paper bag with which he entered the latrine. Later the paper was retrieved by Police Officers and it was found to contain paper bags plus shs.8,838/= in coins wrapped therein. He was said to be a seller of paper bags.
- PW2 (Landlord) confirmed receiving a report from his two tenants (PW3 and another) about the conduct of the accused and deceased the previous night.
- The accused who had left in the morning returned in the evening and sneaked into the deceased’s house and came out with a fully stuffed paper bag and locked the door. That’s when he was confronted by PW2 and PW3 to explain the whereabouts of the deceased.
- Upon his arrest the paper bag/sack he had was found to contain the head, severed legs of the deceased plus a panga and jembe.
- The deceased’s house was broken into and the rest of the body was found on his body.

16. This chain of events is not broken at all by any other evidence; it shows that the deceased was last seen alive with the accused. The accused was also found in possession of the deceased’s body parts. The house which he had left locked in the morning and opened by him in the evening was found to have the deceased’s torso and other parts of the body.

17. The accused in his defence admits having been found with a luggage containing human body parts. He is quick to add that the luggage had been left with him by a customer.

Following the traces of the evidence by PW2, PW3 and PW5 it comes out clearly that these body parts were not left to the accused by anyone. He was the owner of the luggage. He even had in the luggage the murder weapons i.e. the panga and jembe (EXB. 4 and 5). My finding is that it is the accused person who killed the deceased.

18. The issue for determination is whether he had malice aforethought. The manner in which this heinous crime was committed is so telling. The doctor (PW9) who carried out the metal assessment said the accused was suffering from a mental illness called PSYCHOTIC DISORDER which had remained undetected. And the accused had been suffering from the said illness for six (6) months prior to the incident on the night of 18th/19th March 2010. The Doctor explained that when one is suffering from this illness he/she loses touch with realities. He/she hears and sees things that other people do not see.

19. After considering the evidence of the Doctor – PW9 and the bizarre manner in which the accused killed the deceased, I am satisfied that the accused was suffering from a mental illness at the time he committed this offence. I therefore make a special finding of GUILTY BUT INSANE under section 166 Criminal Procedure Code. The accused will be detained at the President’s pleasure.

DATED, SIGNED AND DELIVERED AT EMBU IN OPEN COURT THIS 9TH DAY OF SEPTEMBER 2014.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Mr Momanyi for Mogusu for for Accused

Accused

Mutero/Kirong – C/c