



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

**LESIT, J.**

**REPUBLIC.....PROSECUTOR**

**-VERSUS -**

**MARTIN MURIITHI MWONGERA.....ACCUSED**

**JUDGMENT**

1. The accused **MARTIN MURIITHI MWONGERA**, is charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 20<sup>th</sup> January 2010 at Kimbumbu Estate, Kiangondu location Meru South District within Eastern province murdered **KELVIN MUIRU MAINA**.
2. The prosecution called five witnesses. The facts of the prosecution case are that the accused lived with his brother, DW2 at a plot where PW1, his wife PW2, their son the deceased, PW3 and 4 among others also lived. On the 20<sup>th</sup> January 2012, at around 9.30 p.m. the accused started beating his brother inside their house and shouting “Shetani Ashindwe” (satan be defeated). PW1 and 2 went to accused house and calmed the accused down. PW1 then encouraged DW2, accused brother to walk out. PW1 and DW2 left the plot to get police assistance.
3. PW2, wife of PW1 was left behind with the deceased in the family house after leaving the accused house. PW2 testified that the accused was saying strange things and holding the Bible. PW2 testified that when PW1 and DW2 left the plot, she was left standing at the door of their house. The door was not locked. The accused was their next door neighbour. PW2 said that she saw the accused walking towards her making sounds like those of a lion and that she ran away out of fear.
4. When PW2 returned to her house, she first saw blood on the floor and then she saw her son lying on the floor. When she picked her son, she saw he had a deep cut on the head. PW4 accompanied PW2 to take her son to hospital. The child was bleeding profusely. By the time they reached the hospital, a doctor told them that the child had died.
5. PW1, DW2 and the investigating officer PW5 returned to the plot at about 11.00 p.m. They found the accused lying in a trench unconscious. He had been subjected to mob justice. The group the trio found outside reported to PW5 that the accused had cut the deceased. PW5 stated that after arresting the accused he took him for mental assessment. In the P3 Form filled by a doctor after examining the accused produced as P.Exh. 1, the accused was found to be of unsound mind due to drug dependence and the

doctor recommended that he required treatment.

6. PW5 had the deceased examined. PW5 produced the postmortem report as P.Exh.2. In the report, the deceased was found to be a child of 7 years of age and that he had died due to a severe head injury in which the skull vault was missing with a 6cm long gap with brain exposure.

7. PW5 also produced a sketch plan of the scene of incident which he drew as P.Exh.3. It shows that the accused lived in the second house from the main entrance and that PW1 and 2 were his immediate neighbours. PW5 testified that he was unable to recover the murder weapon. He was also unable to establish the motive for the murder.

8. The accused was placed on his defence. He gave a sworn statement and called his brother DW2, as his witness.

9. In his defence, the accused stated that he was a miraa dealer. That on 19<sup>th</sup> January 2010 he was sick. He asked his brother to purchase medicine for him. On 20<sup>th</sup>, the day in question he said he started vomiting and feeling dizzy. He decided to sleep. He said that from that day he did not know what happened and did not even know himself. He said that he heard the evidence of prosecution witnesses but that he could not recall those events. He said he came to his senses on 25<sup>th</sup> March, 2010, two months after the incident and found himself in prison for reasons he did not know.

10. DW2 was the accused younger brother. In his evidence he testified that on 19<sup>th</sup> January 2010 the accused complained of a headache and that he bought him a pain killer before leaving for work. DW2 testified that on 20<sup>th</sup> January the accused complained of feeling dizzy and that he decided to stay at home with him. In the evening the accused was still unwell and was unable to eat at a hotel where he had taken him. DW2 said that the accused went back home to sleep and he remained at the hotel watching world cup.

11. At 10 p.m. when DW2 returned home, the accused woke up took a Bible and started asking him if he had heard cats on the roof of their house. The accused then started asking strange questions and saying "Shetani Ashindwe". The accused walked outside their house and became rowdy. He then returned to the house and started jumping on top of the bed saying that the devil was in the house. Eventually PW1 went to their house and tried to calm the accused down before telling DW2 that they go to the Police Station to report.

12. Mr. Kaimenyi for the accused submitted that the prosecution had not adduced any eye witness account of how the deceased met his death and that the accused should be acquitted. The defence counsel urged that the accused in his defence had said that he had no recollection of the events of that day. Mr. Kaimenyi urged that DW2 did not know how injuries on deceased were inflicted. He urged that the evidence by the prosecution did not show motive.

13. Mr. Mungai for the state urged that the prosecution had proved its case. Counsel urged that the accused was placed at the scene and that the only issue was whether it was the as accused who perpetrated the offence and secondly whether the accused was in his right state of mind at the time. Mr. Mungai urged that the accused was found "fit to plead" at the time of plea and that it was upon him to prove was insane at the time.

14. I have carefully considered the evidence adduced in this case by both the prosecution and the defence. I have also considered the able submissions by both counsels in the case.

15. The accused faces a serious offence. It is upon the prosecution to prove the charge against the accused beyond any reasonable doubt. The prosecution must adduce evidence to establish that it was the accused that by an act or omission inflicted an injury on the deceased out of which the deceased died. The prosecution must prove that at the time the act or omission causing death was inflicted, the accused was motivated by malice aforethought. Section 206 of the Penal Code lists some of the ingredients that

constitute malice aforethought as follows:

**“206. 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) ...**

**(d) ...”**

16. The evidence adduced by the prosecution clearly shows that the accused became berserk on the evening of the day in question and turned violent against his own brother, DW2, who shared a house with him. It was late at night and what PW1 and 2 did was to assist DW2 escape the attacks of his brother. It is clear that when PW1 and DW2 left for the Police Station, PW2 was left at the door of her house. By that time the accused was busy claiming there were devils in his house and accusing the landlord of being behind the strange happenings in the plot. The next thing that PW2 saw and heard was the accused running towards her making noises like those of a lion. She ran for her life leaving the door to her house open. On returning shortly later, the accused was gone and her son was lying in a pool of blood on the floor of their house.

17. The prosecution is relying on circumstantial evidence. In the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those 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.”**

18. In **Bakari vs Republic (2012) 2 EA 34** the Court of Appeal of Tanzania held:

**“In a case depending conclusively on circumstantial evidence, the court must before deciding on conviction, find that the inculpatory facts are incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilty.”**

19. The prosecution has adduced evidence that has established that when PW2 ran from the accused, she left her door open. There was no one else at her house except the accused. The prosecution has firmly and cogently proved the circumstances upon which the inference of guilt is based. These circumstances point unerringly towards the accused guilt. Considering the totality of the prosecution case, the accused is the only one who could have inflicted the injury on the deceased and committed the offence. I find that there are no co-existing circumstances which may destroy the inference of guilt and that the inculpatory facts are incompatible with the accused innocence.

20. The defence has argued that the motive for the offence was not proved. At the same time there is the accused defence of temporary insanity due to illness. Under S.11 of the Penal Code a person is presumed

to be of sound mind unless proved otherwise. That section provides as follows:

**“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.”**

21. On the other hand S.12 of the Penal Code regarding criminal responsibility in case of insanity states 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 reference to that act or omission.”**

22. In the Court of Appeal case of MARII V REP [1985] KLR 710, NYARANGI JA, PLATT AND GACHUHI Ag. JJA held:

**“1. Where an accused person raises the defence of insanity, the burden of proving insanity rests with the accused, because a man is presumed to be sane and accountable for his actions until the contrary is shown.**

**2. The burden on the accused to prove insanity is not as heavy as the one of the prosecution. The burden is discharged by proving on a balance of probabilities that it seemed more likely that due to mental disease, the accused did not know what he was doing at the material time, or that what he was doing was wrong, and so he could not have formed the intent to kill the deceased.**

**3. Whether the defence has proved the case of insanity is a matter of fact for the judge and assessors. Where it is found that the accused was insane, a special finding may be entered; if he is found to have been sane, the finding may be murder or manslaughter; and in the case of manslaughter, that would be due to the fact that although sane, by reason of illness, the accused did not appreciate the full consequence of his act.”**

23. The accused has the burden to prove that at the time he caused the deceased death he was insane. The standard of proof is on a balance of probabilities and the question the defence is proved is a matter of fact.

24. The accused in his defence stated that he did not know himself and had lost his senses until two months after the incident. PW2 and 3 and DW2 all say that the accused started behaving strangely and to say weird things and make strange noises. That prompted PW1 and DW2 leave for the Police Station to report the matter. At the same time, the strange noises the accused made prompted PW2 to run for her dear life.

25. DW2, the brother to the accused in his testimony said that the accused started ailing two days before the night of the incident. He complained of head ache and had malaise so that DW2 bought him medicine the first day. The next day the accused complained of dizziness and because of his condition DW2 said that he did not go to work so as to observe him. By evening of the second day is when he went berserk and started jumping up and down on the bed, claiming weird things and even turned violent. When DW2 and PW1 went to get Police assistance is when the accused became unmanageable, made sounds of wild animals as he chased PW2 from the door of her house. It is at that point that the accused entered PW1 and 2's house where the deceased was sleeping and hit him on the head.

26. After his arrest, the accused was taken to hospital for treatment of injuries he suffered due to mob justice. PW5, the arresting and investigating officer testified that after arresting the accused on the 21<sup>st</sup> January, and having him treated for assault, he took him back to hospital the next day. PW5 stated that he was of the view the accused required treatment as he looked mentally disturbed. PW5 produced the P3

form the doctor filled on the same day as P. Exh. 1. The report shows that on 29<sup>th</sup> January, 2010 when Dr. Kaburi saw the accused he found him to have hallucination, paranoid, flight of ideas, perceptual disorder and he concluded that the accused was of unsound mind and therefore unfit to plead.

27. Having examined and analyzed the facts and evidence before me I find that the accused had no prior history of insanity. I find that on the day in question his mind was affected by illness, and that since then he has recovered. I find that on a balance of probabilities, the accused was sane on the material day, but due to illness he did not appreciate the full consequences of his actions. Due to the circumstances of this case, it was not necessary to prove the motive for this attack.

28. Having considered the entire evidence before me I find that the prosecution did not prove malice aforethought. Consequently the offence of murder was not proved. I find that the offence proved is manslaughter. In the result I substitute the offence of murder contrary to section 203 of the Penal Code with that of manslaughter contrary to section 202 of the Penal Code. I find the accused guilty of the substituted charge of manslaughter and convict him accordingly.

**DATED AT MERU THIS 4<sup>th</sup> DAY OF DECEMBER, 2014**

**LESIT, J.**

**JUDGE.**