



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 7 OF 2018

Lesit, J

REPUBLIC.....PROSECUTOR

VERSUS

IKI.....ACCUSED

JUDGMENT

1. The accused person IKI is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that:

“On the 23rd December, 2017, at Soweto Estate in Embakasi East Sub-County within Nairobi County, murdered Rahab Wanjiku Irungu.”

2. The prosecution called a total of six (6) witnesses. The brief facts of the case are that the deceased was the mother of the accused and mother-in-law of PW1. On the fateful day, the deceased had visited the accused at his home. They exchanged pleasantries and as they were having tea, the accused hit the deceased with a hammer on the head. The deceased was rushed to hospital but succumbed to the injuries a week later.

3. PW1 stated that on the fateful day, the accused mother (her mother in-law) paid them a visit. She explained that the accused welcomed his mother and uttered a prayer. PW1 stated that as she poured tea and buttered bread for her mother in-law, she noticed that the the accused was busy searching for something on top of the cupboard. She soon thereafter saw the accused pick a hammer with which he hit the deceased on the head.

4. PW1 stated that she ran away screaming and went to Soweto Police Station where she reported the incident. PW1 stated that policemen accompanied her back to the house where they found PW2 (her brother in-law). PW1 stated that after a period of approximately 2 hours, the accused returned to the house carrying the same hammer he had used to hit the deceased. The police were informed of his return and he was arrested soon thereafter.

5. PW2 a younger brother to the accused stated that on 23rd December 2017 he received an anonymous call from someone who informed him that he was needed at the accused place as the deceased needed his attention. On arrival PW2 found the deceased kneeling on the floor. Her head and the floor to the house were full of blood. PW2 with the help of neighbours took the deceased to Mama Lucy hospital and after

getting first aid, they were referred to Kenyatta National Hospital.

6. PW3, Bernard Owino Midea, was the pathologist, who conducted the post-mortem examination on the deceased body on 4th January, 2018. PW3 stated that on general examination, the deceased had three (3) scalp lacerations (tears) on the head, with two (2) on top of the head each measuring 1cm and another on the left side of the head, above the ear measuring 2cm. PW5 testified that there were abrasions that were healing on the sides of the eyes, lateral orbital region each 3cm in diameter. He said that there were signs of medical interventions as there was a surgical scar on the left side of the head, which had been stitched.

7. PW3 stated that internally, the deceased had tears on the left side of the brain, left temporal cerebral laceration 5cm in diameter, subaenoid hemorrhage, and bruise by parietal and severe bruises of the brain substances. PW3 came to the conclusion that the deceased died as a result of head injury due to blunt force trauma.

8. On cross examination, PW3 stated that it was not possible to tell what weapon was used. PW3 stated that given the pattern of injuries the deceased had suffered, it would be farfetched to attribute them to a fall.

9. PW4, Dr. Joseph Maundu, testified on behalf of Dr. Shako, who carried out a medical examination of the accused to determine whether or not the accused was fit to stand trial. According to the report which was dated 18th January, 2018, Dr. Shako found the accused unfit to stand trial. The doctor referred the accused to Kenyatta National Hospital to see a physician and Mathare Mental Hospital for further mental examination and assessment.

10. PW5, Dr. Kinai Mochache, a consultant psychiatrist, gave a brief history of the mental status of the accused. She stated that one Dr. Wainaina examined the accused on 6th February 2018 and one Dr. Mucheru on 27th February 2018 and they both formed the opinion that the accused was not fit to plead. PW5 stated that she assessed the accused on 7th May, 2018 and equally formed the opinion that he was not fit to plead. PW5 further recommended in patient care and treatment.

11. PW5 stated that on perusing the accused file she noted that the accused had been admitted under the recommendations of Dr. Gatere from 26th July, 2018 to 5th September, 2018. PW5 stated that after the treatment, on 5th September, 2018, Dr. Gatere formed the opinion that the accused was fit to plead. She stated that the accused had been diagnosed with schizophrenia and drug induced psychosis. PW5 added that for the schizophrenia condition, it could only be controlled and not cured. For drug induced psychosis, PW5 stated that it can be treated completely.

12. During cross-examination, PW5 stated that from the evidence she had before her, she was able to tell that the patient had been sick since 6th February, 2018 as that was the date when they first diagnosed him. She said that she could not determine for how long he had abused the drugs and that the abuse had led to psychosis. She told the court that the accused had been in remand for over a month and so they could not perform the urine test as it was too late to detect anything.

13. PW5 explained that the schizophrenia condition could be caused by many factors including genetics and use of cannabis. She however said that in this case, she could not determine what had triggered the accused condition. She further stated that schizophrenia was a psychotic utterance and could present itself with hallucinations and lack of touch with reality. She stated that the condition affects the cognition part of the brain so that one is not capable of making rational decisions. PW5 stated that medication brought down the chemical composition which caused the symptoms to the brain to reduce them.

14. PW6 was Samuel Mwadime, the investigating officer in this case. He stated that on 23rd December, 2018, at around 10.00am while on duty PW1 made a report at the Police station that her mother-in-law (the deceased herein) had been seriously assaulted by her son, the accused herein. PW6 said that he quickly visited the scene which was about 800 meters from the Police Post, in the company of his colleagues, P.C. Magut and P.C. Musyoki. He said that they found the deceased writhing in pain and

bleeding profusely from the head and hands.

15. PW6 stated that one P.C. Musyoki handed over to him the hammer he recovered from the accused. It was produced as P. Exhibit 1. PW6 added that he visited the deceased at Kenyatta National Hospital where she had been referred and found her in a state of coma. He could not record her statement.

16. The accused gave an unsworn statement in defence. He stated that he never had any problems or grudge with his mother, siblings, wife or children. The accused further went on to explain how his mother was his advisor regarding investments in land and that she had helped him pay dowry for his wife.

17. The accused said that he was shocked to hear what had happened to the deceased, that she had died and yet she was his greatest help and great friend. He said that he was also shocked to find himself in court charged with the offence yet he did not know what happened. He said that at one time, he fell ill following which he made four (4) types of prayers which he prayed throughout, even at night, without sleeping. He stated that his mother took him to Kenyatta Hospital where some medication was prescribed for him and after taking the medication, he was able to sleep at night.

18. Mr. Wakaba for the defence stated that he had filed written submissions which he wished to rely on the same entirely. The Learned Counsel for the defence submitted that the Prosecution did not prove beyond any reasonable doubt that the accused committed the offence of murder. He urged that the ingredients which constitute the offence of murder were not proved. On the issue of the defence of insanity, the defence urged that although the prosecution shoulders the burden of proving the offence of murder beyond any reasonable doubt, the accused bears the evidential burden of showing that he suffered from a mental incapacity that would negate *mens rea* or malice aforethought.

19. Counsel invoked **Section 12** of the **Penal Code** which defines the defence of insanity and 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 more of the effects above mentioned in reference to the act or omission.”

20. Mr. Wakaba submitted that the burden of proof on the accused to prove the defence of insanity was on a balance of probabilities. Counsel urged the court to be persuaded by the case of **Republic vs. SOM (2017) eKLR** which relied on the case of **Tadeo Oyee s/o Duru vs. R [1959] EA 407**. Counsel urged that the two cases support the proposition that where a defence of insanity is raised by the defence or if it emerges in the evidence the prosecution would be required to disapprove such defence beyond any reasonable doubt. Counsel submitted that in the cited case, the East Africa Court of Appeal held that the word “disease” in **section 12** of the **Penal Code** is not necessarily a disease of the mind in the narrow sense, rather, it held that a high grade mental deficiency may be a disease affecting the mind.

21. Mr. Wakaba also relied on the Court of Appeal case of **Leonard Mwangemi Munyasia vs. Republic, MLD CA Criminal Appeal No. 112 of 2014 [2015]eKLR**, for the proposition that in considering the mental status of the accused, the trial court ought to take into account all the circumstances including medical opinion.

22. Mr. Wakaba urged the court to find that the accused, due to the disease of his mind, was incapable of understanding what he was doing or of knowing that he ought not to have done the act or omission that led to the death of the deceased. He submitted that the court should consider the circumstances just before the accused was arrested, when considering whether the accused suffered from a mental disorder, given that PW2, who was the brother of the accused testified that the accused had been a street urchin when he was a young boy, during which time he was arrested and taken to Mathare Hospital.

23. Mr. Wakaba urged the court to find that the accused and the deceased had a good relationship and the accused act of causing the death of the deceased shocked everyone and was very unusual. Counsel urged that PW5 testified that the accused was found not fit to stand trial immediately after he was arraigned in court and had also been declared unfit to stand trial by two different doctors thereafter. Counsel urged that PW5 also found the accused not fit to stand trial and recommended inpatient treatment for proper management and treatment. It was after the accused's admission in Mathari Hospital that he was given a certificate of capability to make a defence.

24. As regards malice aforethought, Mr. Wakaba submitted that the accused had not formed malice aforethought within the meaning of **Section 206** of the **Penal Code**. Counsel urged that there was no evidence adduced that proved that the accused had formed an intention to cause the death or grievous harm of the deceased or any other person in the household. Counsel urged that the testimony of PW1 was clear that just before the incident, there was no confrontation between the accused and the deceased. Counsel urged that none of the prosecution witnesses adduced evidence alleging that the accused had threatened to cause death or grievous harm to the deceased or anyone else.

25. Ms. Onuga, learned prosecution counsel made oral submissions in this case. Counsel urged that the prosecution has adduced evidence to prove that the deceased died as a result of blunt force trauma caused by a blunt object.

26. Ms. Onuga urged the court to consider the evidence of PW1 which establishes that the accused was behaving in an unusual manner on the material day, as there had not been any confrontation between the accused and the deceased just before the attack. The accused in his defence, counsel urged, also said he did not know what happened and that he only regained his senses in court.

27. Ms. Onuga also referred the court to the evidence of PW2, the brother of the accused who gave a background of accused state of mind. She urged that the accused had ran away from home as a young boy and lived in the streets as a street urchin where he abused drugs. Counsel also referred to the evidence of PW5 who stated that after examining and treating the accused at Mathare Mental Hospital, she diagnosed him of suffering from schizophrenia and drug induced psychosis.

28. Ms. Onuga urged that the facts of the case pointed to a person who was suffering from mental illness. Counsel submitted that on that basis the defence of insanity applied and urged the court to invoke **section 166(1)** of the **Criminal Procedure Code** and enter a special finding in the case.

29. The accused person is facing a charge of murder contrary to **Section 204** of the **Penal Code**. In order to prove a charge of murder the prosecution must prove key ingredients of this offence:

i. That the deceased died

ii. That the deceased died as a result of an unlawful act or omission caused by the accused.

iii. That an unlawful act or omission was actuated by malice aforethought.

30. **Section 206** of the **Penal Code** sets out the circumstances which constitutes malice aforethought 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) ...”

31. After considering the evidence adduced by both the prosecution and defence and submission by the counsels, I find that there are issues that are not in dispute. It is not in dispute that the deceased died. It is not in dispute the deceased was the mother of the accused. It is not disputed that PW1 was the wife of the accused.

32. Having considered the submissions by counsel and evidence on record, I find that the following are issues for determination in this case:

i. Whether the accused person caused the death of the deceased.

ii. If it is proved that the accused caused the death of The accused, whether at the time he caused the death he was laboring under the disease of the mind.

iii. Whether the defence of insanity applies to this case.

33. Regarding whether the accused person caused the death of the deceased. The evidence before the court was an eye witness account of the wife of the accused, PW1. PW1 stated that on 23rd December, 2017, at 7.00 a.m, while they were still in bed, her husband, the accused in this case, asked that they pray and before they could pray, his phone rang and he told PW1 that it was his mother calling.

34. PW1 stated that the accused waited for the phone to ring until it hang up then he switched off his phone. Immediately after, PW1 heard her phone ring, to which the accused took it and he let it ring till it hang up, then he switched it off too. He told PW1 that it was his mother who was calling and when PW1 asked him why he had switched off her phone, he said that it was because he wanted them to pray first; PW1 added that it was their habit to pray together. On the fateful day, before they could pray, they heard a knock on the door and their children told PW1 that their grandmother had come and they opened the door for her.

35. PW1 stated that she heard the deceased tell the children to pour tea for her and that she will return to drink it and then she went away. PW1 then asked her husband how he could allow his mother to leave before she told them the reason for her visit, but the accused did not answer her. Instead he woke up and went out to tell his mother not to leave as they were awake. The accused then asked the maid why she had not given his mother (deceased) tea. The deceased told him that she was the one who had declined to be given tea, to which the accused told her that she must take tea as it had been long since she had visited them.

36. The children and the maid retired to the bedroom and the only people left in the sitting room were the accused, PW1 and the deceased. The accused called the maid and children back to the sitting room for prayers, which he led and then released them. Afterwards, the accused stood to serve PW1 tea to which PW1 declined because he had never done that before. PW1 then stood and served tea and as she applied blue band on the bread, she saw her husband searching for something on top of the cupboard. When she asked him what he was looking for, he said that he was looking for a book.

37. PW1 said that soon thereafter she noticed that the accused had taken a hammer and straightaway attacked his mother with it on the head. PW1 said that upon seeing that, she ran out screaming with the accused hot in pursuit. She said that she ran into a nearby shop and locked the door then told the shopkeeper what had happened. The shopkeeper advised her to run to the police station and report the incident and then return with police officers. That is what she did.

38. I find from the evidence adduced by PW1 and 2, and supported by the investigating officer, PW6, that the accused attacked his mother, the deceased in this case, causing her severe injuries to the head. The murder weapon was produced as P. Exh 1. I have no doubt in my mind that the prosecution has

proved beyond any reasonable doubt that the accused hit the deceased with a hammer on the head.

39. The prosecution, through the evidence of PW1, 2 and 3 proved beyond any reasonable doubt that the deceased died as a result of the injuries that the accused caused on the deceased. The injuries found on the body of the deceased were in tandem to the blows PW1 witnessed the accused inflicting on the deceased. They were also consistent with those PW2 saw on the deceased before he took her to hospital. There was therefore a nexus proved linking the accused to the injuries that led to the deceased death.

40. The other issue is that if it is proved that the accused caused the death of the deceased, whether at the time he caused the death the accused was laboring from a disease of the mind. The defence relied on the case of **Leonard Mwangemi Munyasia vs. Republic, MLD CA Criminal Appeal No. 112 of 2014 [2015]eKLR**. The court observed that:

“We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.”

41. I am well guided by this authority. The question whether the accused was suffering from mental disorder or illness is a matter of fact and can be established from both direct and circumstantial evidence. The prosecution has adduced a lot of evidence from which the court can determine whether the accused was suffering from a disease of the mind at the time of the incident.

42. PW1 stated that before the attack, there had been no quarrel or fight between them. PW1 told the court that during the time that she had lived with the accused, she had noticed that at times he would sit alone and if one spoke with him, he would not hear until you shouted at him. That he was a quite person and was not a person of war or fights. Furthermore, PW1 stated that she had never heard of him having any problems or issues with his mother. She said that the two had a normal relationship and loved each other.

43. PW2, the accused brother stated that the accused and deceased had no problems or issues, and that the whole family had a good relationship. He said that the family was surprised by the turn of events. He however gave an historical background about the accused. From that background, it is clear the accused was truant in his formative years causing him to run away from home at an early age. The family seem to have lost track of him until his incarceration in prison for an offence. The family did not find out what the accused had done. However they came to learn that while in prison the accused was admitted at Mathare Hospital. It does appear that mental illness had been detected in the accused way before the incident in question. PW5 who did mental assessment of the accused confirmed that the accused wife and brother had confirmed to her that the accused had had a history of mental illness before the incident in question.

44. I also considered the circumstances around the time of accused arrest and arraignment in court. The accused was arraigned in court on the 22nd January 2018. The investigating officer who appeared before the court then informed the court that the accused had been examined and found not fit to stand trial. Indeed, according to the report which was dated 18th January, 2018, Dr. Shako found the accused unfit to stand trial and she referred him to Kenyatta National Hospital to see a physician for physical issues, and to Mathare Mental Hospital for mental examination and assessment.

45. PW5, Dr. Kinai Mochache, a Consultant Psychiatrist, at Mathare Mental Hospital said that she saw the accused for review on 7th May, 2018. He was not fit to stand trial. PW5 testified that the accused had previously been seen by her colleagues, Dr. Wainaina on 6th February, 2018 and Dr. Mucheru on 27th February, 2018. That Dr. Wainaina found the accused not fit to plea. Dr. Mucheru also found him not fit to plead.

46. PW5 stated that she carried out a mental examination on him, took a history and went through the accused file and saw that he was admitted under Dr. Gatere from 26th July, 2018 to 5th September, 2018. That after the treatment, on 5th September, 2018, Dr. Gatere gave him a certificate of capability to make defence. The diagnosis was schizophrenia and drug induced psychosis. PW5 added that for schizophrenia, the condition could only be controlled through medication but could not be cured. For drug induced psychosis, PW5 stated that it could be treated and a complete recovery achieved so long as there was no further substance abuse.

47. Further evidence by PW1 was that the accused returned to the scene of incident two hours after the attack. He went carrying the murder weapon still stained with blood. He then remained at the scene for thirty (30) minutes before the police officers arrived to arrest him. I find that the accused conduct after the incident confirms that he was not in the right frame of mind. The natural instinct would be to flee the scene of crime, not to return carrying the evidence that would nail one to the offence. I find that the fact the accused did not attempt to dispose of the murder weapon and in addition, did not resist arrest; given the subsequent finding that he was of unsound mind soon thereafter, all establish that the accused was suffering from a disease of the mind at the time he committed this offence.

48. As to whether the defence of insanity applies to this case. The defence of insanity is provided for under **Section 12** of the **Penal Code** which stipulates 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 more of the effects above mentioned in reference to the act or omission.”

49. As was stated by the defence in their submissions, in the case of **Leonard Mwangemi Munyasia vs. Republic MLD CA, Criminal Appeal No. 112 of 2014 [2015] eKLR, supra**, that in considering the mental status of the accused, the trial court ought to take into account all the circumstances including medical opinion. I have taken into account all the facts and circumstances of this case. I find that the accused was suffering from a disease of the mind that made him incapable of knowing that what he was doing was wrong, or of knowing he ought not to do that thing. The medical record and reports produced in evidence together with the medical history of the accused establish clearly that the accused was mentally ill at the time of the commission of the offence that led to the death of the deceased. I find that the defence of insanity applies to his case.

50. Having come to the conclusions I have of this case, I find that what commends itself to the court is to proceed as provided under **section 166 (1)** of the **Criminal Procedure Code**. Accordingly, I make a special finding under **Section 166 (1)** of the **Criminal Procedure Code** to the effect that the accused is guilty of murder contrary to **Section 203** of the **Penal Code**, but was insane at the time he committed the offence. I enter a special finding of **Guilty but Insane**.

DATED AT NAIROBI THIS 11TH DAY OF JULY, 2019.

LESIIT, J.

JUDGE.