REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 38 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

S E.....ACCUSED

J U D G M E N T

1. The Accused, **S E** is charged with Murder contrary to Section 203 and read with Section 204 of the Penal Code. In that on the 20th day of May, 2015 in Gilgil Sub-County within Nakuru County he murdered **N W E**. He denied the charges and was represented by Mr. Mburu.

2. On his first arraignment in court, the Accused could not take plea as a report from the psychiatrist at Gilgil Sub-County Hospital indicated that he was not mentally fit to plead and required treatment. He was subsequently admitted to Mathari Mental Hospital. On 22nd December 2015 the hospital reported that he had recovered and was capable of standing trial. Whereupon the DPP elected under Section 163 (2) of the Criminal Procedure Code that the proceedings would continue.

3. Through seven witnesses the prosecution presented the following case against the Accused. The Accused had been married to **N W E** for 10 years in 2015. It was a rocky marriage as the Accused constantly battered his wife. They resided in a rental premises in Njoro. Between them they had four children, the eldest of them being **WE (PW1)** aged 8 years in 2015. The deceased was an orphan and had been raised by a maternal grandmother **A M (PW4)** who resided at Kikopey.

4. **PW4** and her sister **A N M (PW2)** related closely with the deceased treating her as a daughter. About March 2015 the deceased sought the help of **PW2** and **PW4** to leave Njoro because the Accused had attempted to kill her. It would seem that following that incident on the previous night, the deceased had managed to escape and sought shelter in a neighbour's home. However before **PW4**, who had been joined by **PW2** could travel to Njoro, the Accused arrived at Kikopey seeking to know the whereabouts of his family.

5. Although the three of them agreed to travel to Njoro, the Accused somehow avoided the trip. Nevertheless **PW2** and **PW4** travelled to the Accused's home in Njoro. They found the house doors wide open and a cloth noose hanging from the rafters of the house. When they traced the deceased to the neighbour's home, she narrated to them the events that led to her escape, stating that the Accused had tried to hang her on the aforesaid noose. She was adamant that she could no longer cohabit with the Accused. Thus **PW2** and **PW4** travelled with the deceased and her four children to Kikopey.

6. The Accused visited the home a day later, and several days after that. Despite discussions held between him, the deceased and **PW4**, the deceased was not persuaded with the Accused's pleas to return to Njoro with him. She complained of constants beating from the Accused. At some point the Accused appeared to relent and stopped pressuring the deceased to return. The deceased meanwhile secured a casual job as a househelp at the Gilgil Barracks but continued to live with her children at **PW2's** house at Kikopey.

7. In May 2015 the older children were enrolled in a local school. On one occasion the Accused asked the deceased to go back to him as he was planning to commit suicide, but the deceased refused to go. It appears from the Accused's increased visits subsequently, that the Accused had moved to Gilgil. He was an itinerate hawker of small items such as caps and wallets.

8. On several occasions prior to 20th May 2015, the Accused would come early to **PW4's** house and walk the deceased to her place of work, and accompany her on the way home in the evening. The deceased told **PW4** that on these occasions, the Accused was trying to persuade her to return to him but she had refused giving the enrollment of the children in school as her reason.

9. On 20thMay, 2015 the Accused had gone to **PW4's** home in the afternoon but left before she could get back to the house from the garden. She saw him leave the home and heading towards Gilgil. At 6.30pm of that day, **J N.(PW3)** and **I. M. (PW5)** both students of [particulars withheld] Secondary School were on their way home. They met with the deceased who carried a small *kiondo,* but a short while later they heard screams in the valley below the road on which they walked.

10. On rushing there, they spotted the deceased involved in a tussle with the Accused. When they ran down the hill to intervene, the Accused drew a knife. The boys fled and went home. Later at 11.45pm on the same day, Accused was to present himself at Gilgil Police Station where he found **PC Joseph Thuo Gitau (PW6)** on crime stand by. He reported that he had been involved in a fight with his wife and feared she had sustained injuries. He however did not give her full particulars or the scene of alleged fight. **CIP Simon Kirui (PW7)** when notified of the report came down to the station and interviewed the Accused. Unable to get more details from the Accused, **PW7** had the Accused placed in custody overnight.

11. On the next morning however, the body of the deceased was found at the scene where the students **PW3** and **PW5** had witnessed the aforesaid struggle. Also at the scene were assorted merchandise including caps and wallets and a bag identified by **PW2** as the sort of goods the Accused ordinarily hawked [Exhibit 2, 3, 4 and 6]. Also found at scene and identified by **PW2** and the students **PW3** and **PW5** was the *kiondo* the deceased carried on previous day, along with provisions such as rice and potatoes [Exhibit 1].

12. The body of the deceased was removed to the local mortuary. It had several cut wounds including a deep cut wound severing the neck through the trachea, aesophagus and neck vessels. The cause of death was severing of the neck resulting in cardiopulmonary arrest.

13. When placed on his defence, the Accused made an unsworn statement to the following effect. He was born in 1980 in Laikipia and was husband to the deceased with whom he had four children between 2007 and 2013. That the couple had cohabited for ten years, mostly at Njoro. He stated the he killed the deceased but could not tell what provoked the action as he loved his wife. He said he only learned of his actions while receiving treatment at Mathari Mental Hospital and could not explain how it all happened. He stated that he has been under medical treatment since discharge from the hospital. He produced treatment records as exhibits. [D. Exhibit 1].

14. The court has considered the evidence on record. There is no dispute as to the relationship between the Accused and the deceased. It is not disputed that the Accused killed the deceased on the material date. The Accused has raised a defence of insanity, a statutory defence under the Penal Code. Section 11 of the Penal Code provides that every person is presumed to be of sound mind, and to have been of sound mind at any time which comes into question, until the contrary is proved.

15. Section 12 of the Penal Code 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 reference to that act or omission."

16. The basic ingredients of the offence of murder as defined in Section 203 of Penal Code are malice aforethought, also defined in Section 206 of the Penal Code, and the *actus reas* being the unlawful act or omission leading to death. As to intention and motive accompanying an act or omission, the general rule on criminal responsibility is found in Section 9 of the Penal Code which provides as follows:

"(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) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, 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."

17. Fortuitously for this court, the above provisions were considered at some length by the Court of Appeal in the case of **Leonard Mwangemi Munyasia -Vs- Republic [2015] eKLR**, being an appeal from the High Court at Mombasa. And though the facts of the case differ somewhat from the instant one, the court discussed the defence of insanity and the duty of the trial court where such defence raised, or where there is evidence suggestive of insanity on the part of an Accused.

18. After setting out the historical background to the formulation of the principles commonly known as the **McNaugthen Rules** in the United Kingdom, the Court of Appeal stated that:

"Under the rule insanity is a defence if at the time of the commission of the act, the accused person 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 he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under section 167 (1) (b) of the Criminal Procedure Code he would be convicted and ordered to be detained during the President's pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.

Both Section 12 aforesaid and the McNaughten Rules recognize that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to law. The test is strictly on the time when the offence was committed and no other. Yet it would be virtually impossible to lead direct evidence of the exact mental condition of the accused person at the time of the commission of the crime. Borrowing from a medieval English Judge, Brian CJ in a 1468 case of Greene vs Queen, and who in turn reiterated Cicero who famously remarked that:-

"The thought of man is not triable, for the devil himself knoweth not the intendment of man",

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.

What must be avoided and what this court has warned against in the two decisions relied on by the appellant's advocate in this appeal, is the likelihood of sentencing to death a person with a mental disorder. Therefore, it is the duty of trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person's history or antecedent, to inquire specifically into the question. Indeed, it would serve as a good practice, like it is in England, to call evidence based on the opinion of an expert in such cases in terms of Section 48 of Evidence Act to explain the state of mind. It is the duty of both the investigating officer and the defence, to have the accused person subjected to a medical examination to establish whether he suffered from the disease of the mind that affected his mind and made him incapable of understanding his action. In addition, and in order to ascertain the accused person's state of mind at the time of the offence, the expert opinion of a forensic psychologist, may also be sought. The field of forensic psychology has become a popular field of psychology in Kenya, yet their expertise is hardly sought in criminal trials." (emphasis added)

19. In the present case, the Accused was found to be unfit to take plea on the first arraignment. The psychiatrist's report dated 29th

May, 2015, the presumed date of examination states that:

"S was accompanied to hospital by a police officer for mental assessment. He is wearing torn and dirty civilian clothes. He is able to respond to most question asked, though some responses are inappropriate. His mood is low. He has been having auditory hallucinations. He lacks insight. He is not fit to stand trial. He will benefit from treatment (antipsychotics) as he is mentally unstable."

20. Unfortunately, the subsequent report filed into court by Mathari Mental Hospital and dated 22nd December 2015 merely stated that the Accused had become capable of making a defence. That notwithstanding, evidence by the couple's eldest son (**PW1**) and the two grandmothers of the deceased (**PW2** and **PW4**) reveals that the Accused was in the habit of assaulting the deceased and was violent towards her. The issue of insanity was raised early by the defence counsel during cross-examination of prosecution witnesses.

21. Both **PW1**, **PW2** and **PW4** denied that the Accused suffered from a mental illness in the material period. **PW1** admitted that the Accused used to threaten that he would commit suicide, but maintained that he also often threatened to kill the deceased. Regarding the suicide threats **PW1** stated:

"Yes father also said he would commit suicide – take poison. Yes I and my small brother threw some poison into a toilet once. Father had come home and stayed there. The package was marked "Sumu, danger. Hatari"…..we threw it into pit latrine."

In cross-examination **PW1** stated

"Yes father threatened often to commit suicide. When we saw packet with poison we threw it away. The poison was on a table."

22. **PW4** also confirmed in her evidence that **PW1** had narrated the above incident to her. She however said she only heard about the Accused's alleged mental illness after the death of the deceased. She and **PW4** described the presence of a noose in the house of the Accused in March 2015 when they went there in answer to a plea for help by the deceased. The latter explained that the Accused had tried to kill her by hanging her on the said noose.

23. Regarding this background and the Accused's own defence, no evidence was tendered regarding his previous treatment as a mental patient despite the order made on 12th May 2016 at the defence request. It was then said that the Accused had misplaced his previous medical documents which presumably contained his medical history. This history however was not given orally at the defence hearing.

24. Thus concerning the said history as gleaned from both sides, the court has to ask itself whether the fact that a person is repeatedly violent against a spouse and threatens suicide is conclusive evidence of mental illness. This is not an easy question to answer because it is not uncommon in our society for spouses, particularly males, to resort to physical violence, intimidation or even manipulation by threatening a spouse with suicide, as a means of dealing with relational difficulties between spouses. The fact that the accused went as far as bringing poison and displaying it in the house, may not mean that he was suicidal due to mental illness necessarily. Evidence of past mental illness would have brought clarity on this issue.

25. But moving closer to the material period, evidence by **PW4** was that after the deceased left the matrimonial home and commenced her stay at Kikopey, the Accused tried on several occasions to convince her to go back to the matrimonial home. In one instance, he came accompanied by his alleged brother and held discussions with the deceased and **PW4**. It would seem that in that period the Accused did not attack the deceased or in any way act violently towards her or **PW4**.

26. Indeed, it appears that he had moved to Gilgil and visited the deceased often at **PW4's** home. He continued to hawk his merchandise as evidenced by the goods found at the scene of murder. In May, he had called the deceased to go back and threatened suicide, but the deceased did not yield. It was after this event that he started coming early to **PW4's** house and leaving with the deceased as she left for work, and escorting her back home in the evening.

27. According to **PW4**, the Accused continued to press the deceaesed to return to his home, which the deceased flatly refused, as

she had already enrolled the children in school. Pausing here, the Accused's conduct thus far is consistent with that of a sane, reasonable man whose wife has left the matrimonial home making efforts to persuade her to return to him by all means. His persistence, without more cannot be evidence of mental illness. Rather, it is the conduct of a sane estranged spouse who desires to mend the marital breach.

28. On the actual date of the murder, the Accused was observed by two students **PW3** and **PW5** while engaged in a scuffle with the deceased. The Accused in his charge and cautionary statement recorded by **PW7** on 26th May, 2015 and produced an Exhibit 9 gave an account of the events of 20th May, 2015:-

"The suspect having understood the charge and caution wishes to state as follows:-

I do recall very well that on 20th day of May, 2015 I came to Gilgil from Nakuru. I was communicating with my wife N W E by borrowing phones and we had agreed that I come wait for her and escort her home after work as she does manual work at Army Camp. I came and waited for her at about 6.00pm and while she headed home, she found me on the road.

As I escorted her, I do not remember what happened but I do remember we disagreed and fought somewhere on the way.

I left her while I had critically injured her and I found my way to police station where I reported that I fought with my wife and the police arrested me, telling me to wait until morning so that I take them to where I had fought with my wife.

I then slept at station until the following day when I was picked by police and I took them to where I had fought with my wife, Mama W (W I) who is my first born son's name.

I took police to the scene but I did not find Mama W, I took them to cucu's place where I found my children but their mother was not there.

That is the much I can remember, since I have had problem of forgetting things. That is all I state."

29. According to **PW3** and **PW5**, when they attempted to intervene, the Accused chased them off with a knife. This evidence is believable even if the police statements of the two witnesses only recalled events of 21st May, when the body was retrieved. For two reasons: the police only recorded these witnesses' statements in June 2015 and not on the 21st May, and secondly the witnesses said the recording officer only asked them about events of the 21st May. That is not unusual, and indeed it is while on their way to court to testify that the two young boys sought direction from the investigating officer concerning the brief details in their police statements.

30. I observed them testify. I do believe **PW3** and **PW5** were credible witnesses. They maintained a good demeanour and answered with apparent candour the questions put to them during cross-examination. They have no axe to grind with the accused and their involvement in this family tragedy was purely coincidental because of their use of the path close to the scene of murder, to and from school. What they described is consistent with the Accused's narration in the charge and cautionary statement.

31. That the Accused had the presence of mind to chase away these two boys when they interrupted him, and later presenting himself to the police at 11.45pm, to my mind negates the suggestion that at the material moment, he did not know what he was doing or that it was wrong. The Accused's cautionary statement is detailed enough concerning his meeting the deceased on 20th May 2015 and surrounding circumstances, and it narrates how a disagreement arose as he escorted the deceased home.

32. He states that he recalled a disagreement and a "fight" between them along the way as he escorted her. He also recalled that she was critically injured after the fight and thus his report to the police station. This part of his statement gives credibility to the evidence of the two police officers **PW6** and **PW7** who interviewed the Accused when he arrived at the station at 11.45pm. **PW6** stated that:

"I met a male who was barefoot and wore a jacket minus a shirt. He appeared confused. I spoke to him. He said he had fought with his wife on that day and feared she had sustained injury."

33. A few hours after the attack, the accused reported to police, precisely because he knew that what he had done only a short while before was wrong, indeed criminal. He however did not give evidence of the scene of fight or wife's name, beyond the name **"Mama W"** (local moniker equivalent for mother of **W (PW1**).

34. Under cross-examination, PW6 admitted that it was difficult to get full details from the Accused on the material date and that though looking confused, the Accused was not violent and his mode of dress (barefoot and jacket without shirt) appeared odd. When **PW7** was called to the station on the 20th May at about midnight he too attempted to question the Accused. He was unable to gather any further information from the Accused who appeared "confused". **PW7** stated during cross-examination that the Accused *"appeared confused.……was in shock and unable to tell us where incident occurred"*. The witness said he believed the Accused was fully dressed at the time.

35. Reviewing the evidence by **PW6** and **PW7** in light of the Accused's defence, it cannot be said that the Accused did not know what he had done or that it was wrong. It would seem that in his statement to **PW7** the Accused claimed to have amnesia about the critical moments of the material events and did not mention that he was mentally ill at any point. Indeed this statement, recorded on 26th May, 2015 paints the picture of a lucid person. Confusion and shock described by **PW6** and **PW7** should be the expected natural reactions of a normal man who has just committed an act of utter cruelty by slitting his wife's throat. Thus evidence by **PW6** and **PW7** regarding the Accused's initial state while reporting must be seen in that light.

36. In his evidence before this court, the Accused said he could not tell what provoked this gory attack on his wife. The real explanation in my view is however is found in the evidence of **PW1, PW2**, and **PW4**. The Accused had desperately tried to persuade the deceased to make up with him and to go back to his home. Having failed, he had decided to execute his ultimate threat: killing the deceased. Thus he armed himself with a sharp knife, way laid her and butchered her before presenting himself to the police some 5 hours later and withholding vital information as to her identity and scene of attack.

37. It may well be that the Accused presented as a mentally unstable person when **Doctor Gitau** examined him on 29th May, 2015, but there was no evidence that this documented condition affected his mind on the material evening in such a manner as to bring this case within the provisions of Section 12 of the Penal Code, as it relates to the actual time of offence. In order to qualify as a complete defence, the mental disease pleaded by an Accused should be one that affects his mind so as to be incapable of understanding what he is doing or knowing that he ought not to do the act. The psychiatrist's report of 29th May, 2015 does not contain a clear diagnosis and symptoms of the mental illness of the Accused. Besides, subjective complaints recorded therein such as auditory hallucinations ought to have been stated by the Accused to **PW6** and **PW7,** if true.

38. It is in my view that based on unimpeachable evidence by **PW1, PW3**, **PW4** and **PW5** on one hand, and **PW6** and **PW7** on the other, concerning historical and immediate events to the offence, it cannot be said that the alleged illness which on the face of it was first raised to the doctor on 29th May, 2015 and not even during the charge and cautionary statement, deprived the Accused at the time of offence, of the mental capacity to know what he was doing or that it was wrong. Mere mental illness not shown to affect a person so as to be incapable of understanding what he is doing or that he ought not to do the act is not a defence under Section 12 of the Penal Code.

39. On the facts of this case, it cannot be that the Accused was swinging successively between sanity and insanity in the entire material period. Regarding the specific events of 20th May, 2015these are consistent with evidence of the surrounding circumstances before the date, with regard to the Accused's mental state. In my view, it would amount to stretching the statutory defence provided in Section 12 of the Penal Code to unreasonable limits to conclude, as the defence seemed to require of the court, that all spouse batterers and those who threaten suicide or murder their spouses do so because they labour under mental illness and ought to be treated as such.

40. For purposes of the present case, I have given reasons why the defence of insanity does not hold. The same is rejected. On the evidence placed before me, I am satisfied that the Accused person, exasperated by the adamant refusal by the deceased to return to the matrimonial home, decided to deal with her violently. He armed himself with a sharp knife and waylaid her on the path she used from work to **PW4's** house. At that scene he attacked her and slit her throat. The injuries documented in the post mortem form are severe. The deceased stood no chance of surviving a severed neck. The injuries manifest a clear intention to cause her death.

41. The murder was a self-fulfilling karma: having previously threatened to kill the deceased, the Accused eventually carried out his wishes. He cannot now be allowed to hide behind the convenient smokescreen of a vague mental illness. He is guilty of murder contrary to Section 203 of the Penal Code as charged. I so find and will convict him accordingly.

Delivered and signed in Naivasha this 20th day of December, 2017.

In the presence of:-

Mr. Mutinda for the DPP

Mr. Mburu for the Accused

Accused – present

Court Assistant – Barasa

C. MEOLI

JUDGE