REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 10 OF 2015

JKK………………………..……………………………………APPELLANT

VERSUS

REPUBLIC………………………………………………………….RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case Number 166 of 2014 in the Senior Principal Magistrate's court at Kapsabet – Hon. G. Adhiambo (SRM)

JUDGMENT

1. The appellant herein, JKK, was charged with the offence of of grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on the 14th day of January 2014 at Kapsoo village within Nandi County unlawfully assaulted Ruth Chepngeno Koech.

2. The appellant denied the charge and a trial was conducted in which the prosecution tendered the evidence of 5 witnesses and at the close of the prosecution's case, the trial court found that a prima facie case had been established against the appellant who was then placed on his defence. The appellant tendered an unsworn statement in his defence and at the close of the case, the trial court found that prosecution had proved its case against the appellant beyond reasonable doubt and as a consequence thereof, he was convicted and sentenced to life imprisonment. Aggrieved by both the conviction and sentence, the appellant filed the instant appeal in which he faulted the trial court for convicting him against the weight of the evidence, failing to take into account his mental health assessment report and for passing a sentence that was manifestly harsh in the circumstances of the case.

3. In his written submissions, the petitioner cited the case of **Grace Nyoroka vs. Republic Criminal Appeal No. 246 of 2006** and **Justus Wariomba Githua vs. Republic Criminal Appeal No. 261 of 2006** in support of the claim that his mental status needed to be considered during conviction and sentence. He submitted that under Section 167(1) (b) of the Criminal Procedure Code (CPC), a mentally ill suspect can be convicted and ordered to be detained at the Presidents pleasure as an insane convict requires treatment as opposed to punishment.

4. At the hearing of the petition, Mr. Tanui, learned counsel for the appellant, submitted that the appellant had history of persecutory delusions and grandiosity which history was supported by the medical report and the testimony of PW1, the appellant's wife, who testified that the appellant was delusional.

5. Counsel further relied on the Mac Naughten's Rule which states that insanity is a defence if at the time of the commission of the offence an accused was laboring under a defect by reason of mental illness.

6. Miss Mumu, learned counsel for the state, opposed the appeal and submitted that the appellant's mental status was considered during the trial when he was found to be fit to stand trial. Counsel further submitted that the complainant confirmed that the appellant attacked her without any provocation.

DETERMINATION

7. I have considered the Record of Appeal and the submissions made by counsel for the appellant and the State. This is the first appeal therefore the duty of this court is to consider the evidence presented before the trial court afresh with a view to re- evaluating the same so as to arrive at its own independent conclusion while at the same time bearing in mind the fact that it neither heard nor saw the witnesses testify. See **Okeno –vs R [1972] EA 32.**

8. A summary of the prosecutions case was that the appellant and the complainant were husband and wife respectively. PW1 testified that on the material day, 14th January 2014, the accused took some alcohol after which he became incoherent and started uttering words that she could not understand while claiming that some people were coming to attack and kill him. The appellant continued to talk to himself till late into the night but no sooner had the complainant fallen asleep than the appellant attacked her with a panga which he used to cut her twice on the right cheek. The accused also cut her on the left shoulder, right shoulder and at the back of the neck.

9. At the time of the attack, the complainant was breast feeding a young baby. The appellant escaped after the attack thereby leaving the complainant for the dead. The complainant was rescued by neighbours and relatives who rushed her to hospital for treatment. The treatment notes, the P3 form and the panga used by the appellant during the attack were produced as exhibits.

10. PW2 and PW3 were the complainant's neighbours. They confirmed that the complaint was injured in the attack. PW4 was the doctor who received and treated the complainant while PW5 was the investigating officer.

11. In an unsworn testimony in his defence, the appellant narrated the events of 15th January 2014 when he was arrested by the police while he was allegedly on his way to Nandi Hills to collect money. He denied any knowledge of the charges levelled against him.

12. From the summary of the evidence tendered before the trial court, I find that it was not in dispute that the complainant was viciously attacked on the fateful night and that the attacker was none other than the appellant herein who was her husband of 14 years and with whom they had shared supper before she retired to bed. The appellant was therefore not a stranger to the complainant and I find that he was positively identified by the complainant as the assailant on the fateful night. The prosecution produced cogent oral and documentary evidence in support of their case and I find that the trial court made the correct finding on the involvement of the appellant in the assault of the complainant.

13. My understanding of the gist of the appeal, which was evident in the submissions of his advocate's submissions at the hearing of the appeal, is that the appellant does not challenge the conviction but rather the sentence on account of the appellant's mental status. The appellant's case was that he was mentally ill at the time he committed the offence in question and that for that reason, under section 167 (1) (b) of the CPC, the trial court should have, upon convicting him, ordered for his detention at the President's pleasure as an insane convict instead of being sentenced to life imprisonment. The appellant challenges the trial court's decision on the ground that there was evidence pointing to his mental state; to the effect that he may have been suffering from a mental disorder at the time of the incident. The appellant's counsel suggested that the trial court ought to have found that the appellant was guilty but insane. Miss Mumu, learned counsel for the state, on the other hand, contended that the issue of the appellant's mental status was duly considered at the trial and that it was confirmed that he was fit to stand trial.

14. In considering this ground of appeal, I will consider the evidence presented before the trial court so as to satisfy myself as to the correctness of the outcome of the said trial. It is a rule of universal application and of criminal responsibility that a man cannot be condemned if it can be proved that at the time of the perpetration of the criminal act he was not master of his mind. In other words, the law presumes that every person is sane and responsible for his actions at all times including when he is alleged to have committed an offence because sanity is the normal and usual condition of mankind. In this regard, **Section 11** of the Penal Code provides thus;

> ***"11. 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."***

15. From the above provision, it is clear that the presumption of sanity is rebuttable, hence the recognition in criminal law, of the defence of insanity. **Section 12** of the Penal Code provides for the application of the defence of insanity as follows:

> ***"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 other of the effects above mentioned in reference to that act or omission."***

The applicable law is found at **Section 9** of the Penal Code which stipulates that:-

> ***"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."***

16. From the wording of **section 12** aforesaid, which is founded on the McNaughten Rules, it is clear 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 the law. The test, therefore, is strictly on the time when the offence was committed and no other. It is however not always possible to lead direct evidence on the actual mental condition of an accused person at the time he committed the offence. In the instant case, it is worthy to note that the appellant did not present the defence of insanity during the trial where he raised the defence of alibi which the trial magistrate found that he had not proved.

17. The lingering question in this appeal, however, is whether the appellant was laboring under the burden of mental illness at the time he committed the offence. A perusal of the lower court record shows that the only time that the appellant's mental status was dealt with was at the tail end of the case when the appellant, in his mitigation before sentence, indicated that he has been unwell thereby prompting the court to order for his mental assessment and in a letter dated 30th December 2014, addressed to the principle magistrate Kapsabet Law Courts, the Medical Superintendent, Kapsabet Referral Hospital informed the trial court of the appellant's mental status as follows:-

> ***Re: JKK***
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> ***Following your order dated 30/12/2014, on the mental state assessment of the aforementioned. The report is as follows; He is male well kempt with Hand cuff. Has normal psychomotor behavior. His mood and effect are congruent. He has normal speech.***

He has history of persecutory delusions and grandiosity but currently has insight.

Conclusion

Advice on follow-up at our mental health clinic.

He can take plea

18. As the first appellate court, it is permissible for this court to reanalyze the evidence tendered before the trial court from which it can form an opinion regarding the mental status of the appellant 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. Needless to say, irrespective of the timing of the mental assessment report, this court cannot ignore the fact that there is medical evidence to the effect that the appellant had history persecutory delusions. Having regard to the said report, I find that the trial court needed to warn itself of the possibility of sentencing to life imprisonment, a person with mental disorder.

19. In the similar and oft cited case of **Richard Kaitany Chemagong v. R.** Criminal Appeal No. 150 of 1983 the appellant made no mention of his mental illness during the trial, but upon application by the defence he was examined by a psychiatrist who found that although he was, at the time of examination normal, he had a history of mental illness for which he had been admitted in a mental hospital. For this and other reasons, the court found that the appellant was legally insane. It is to be noted that in the instant case, the appellant did not have legal representation during the trial and this may have impaired his capacity to pursue the defence on mental illness.

20. In the case of **Julius Wariomba Githua vs. Republic [2008] eKLR** the court observed that in addition to the provisions of **Sections 162 and 166** of the Criminal Procedure Code, it is the duty of the trial court to ensure that the accused person's mental status at the time he is alleged to have committed the offence is established, if that question becomes relevant. In the present case, the appellant's mental status at the time of the commission of the offence was not known, however from the evidence tendered by none other than the complainant who was the appellant's wife, one gets the irresistible feeling that there was more than meets the eye in as far as the mental status of the appellant was concerned. The complainant stated as follows on the conduct of the appellant on the fateful night that she was assaulted:-

> ***"When the accused finished the third bottle of shakers, he appeared drunk and he started saying words that I could not understand. He was saying that there were people who were coming to attack him…When the accused came to the bedroom, he was still talking a lot but I did not answer him. He was saying that his brothers have betrayed him. He said that his brothers had withdrawn 3.8 million from his phone….the was still talking as I slept."***

21. From the above extract of the complainant's testimony, one can conclude that the appellant was not in his right frame of mind at the time he committed the offence, more so considering that the attack was totally unprovoked as it is not stated that the appellant had argued or disagreed with his wife before he assaulted her. My finding is that, having noted, from the complainant's testimony, that the appellant's behavior was unusual on the night in question, the trial court ought to have requested for his mental assessment first before proceeding with the trial. This was not done and I find that it presented a fundamental flaw and misdirection on the part of the trial court. My take is that this was not an ordinary case of assault but one that needed further interrogation by the trial court. It was in evidence that the appellant and the complainant had dinner before the complainant retired to bed where she was breastfeeding her baby. There was no form of misunderstanding between them prior to the incident.

22. According to **World Health Organization Publication, the ICD-10, Classification of Mental and Behavioral Disorders,** 1992, a patient suffering from *psychosis* experiences hallucinations and/or delusions that they believe are real, and may behave and communicate in an inappropriate and incoherent fashion. In the present case, as I have already stated in this judgment, the complainant testified that the appellant was ***"saying words that she could not understand……that there were people who were coming to attack and kill him"***. My take is that the appellant's behavior, on the night in question, fits the description of a patient suffering from psychosis as defined hereinabove.

23. I therefore find that the correct procedure that the trial court ought to have adopted in the circumstances of this case is provided for under **Section 166** of the Penal Code which states:-

> **166. (1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.**

24. From the above provision, where the trial court finds that the accused person was legally insane when he committed the crime, as was the case in the instant appeal, it has to report the case for the direction of the President, who may then order that the accused person be detained in a mental hospital, prison or other suitable place of safe custody. It is to be noted that it is the duty of the trial court to be satisfied through evidence that the accused person did the act charged but was insane at the time he did it.

25. My finding is that the trial court failed to take note of the appellant's unusual behavior, at the time the offence was committed, and having found that the mental assessment report indicated that the appellant had history of delusions I find that the trial court ought not to have imposed a term of life imprisonment but should instead have made a special finding of guilty but insane and ordered for his detention in custody pending the President's further orders.

26. It is therefore my further finding that the sentence was unlawful and while I confirm the conviction, which was not contested in this appeal, I hereby set aside the life imprisonment sentence imposed on the appellant and substitute it with a special finding of guilty but insane and direct that the appellant shall be detained at the pleasure of the President pursuant to section 166 of the Criminal Procedure Code.

Orders accordingly.

Dated and signed at NAIROBI this 18th day of January 2019.

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 30th day of January 2019.

H. A. OMONDI

JUDGE

In the presence of:

Ms Mumu for the state

Appellant present in person

Court Assistant – Towett