



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 29 OF 2017

B R O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against findings, decision judgment of Hon. J.Mitey (RM) in Criminal Case Number 253 OF 2016 in the Chief Magistrate's Court at Kisumu on 28th April, 2017)

JUDGMENT

1. On 7th April 2017; the applicant was convicted for the first count of malicious damage to property contrary to section 339(1) of the Penal Code in which he was fined Kshs. 5,000/- in default 3 months imprisonment and for the second count of offensive conduct contrary to section 94(1) of the Penal Code in which he was sentenced to serve 4 years imprisonment.

The appeal

2. Being dissatisfied with the conviction and sentence, the appellant lodged the instant appeal. In his amended grounds of appeal filed on 9th May 2017, the appellant raised 10 grounds. The main ground of appeal is THAT:

The Learned trial magistrate erred in both law and fact in failing to appreciate that accused was mentally unwell and hence ought to have been referred for specialized treatment prior to being tried.

3. When the appeal came up for hearing on 16th January, 2018, Mr. Onsongo for the appellant submitted that appellant had a psychiatric but was tried as if he was sane. Ms. Wafula, learned counsel for the state conceded to the appeal on the ground that the appellant was insane and ought to have been convicted but detained at the President's pleasure. The state urged the court to detain the appellant at Mathari Mental Hospital where he would receive treatment.

Analysis

4. This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of OKENOVVS.REPUBLIC[1972]E.A.32, where it held that:-

“It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”

5. I have carefully considered the oral submissions made on behalf of the appellant and on behalf of the state. This is yet another appeal in which the judgment of the magistrate's court is impugned for failure to comply with the provisions of the **Criminal Procedure Code** prescribing the procedure for dealing with an accused that has unsoundness of mind. Both the appellant and the respondent contend that the judgment is a nullity by reason of failure to adhere to the prescribed procedure.

6. When appellant was aligned before the court on 30.3.16, the state informed the court that the appellant was a psychiatric patient and presented a case summary dated 29.2.16 which shows that appellant had been treated at Kisumu County Hospital for drug induced psychosis. On the basis of that report, the court referred the appellant for psychiatric examination and on 11.4.16 received a report dated 7.4.16 from Jaramogi Oginga Odinga Teaching and Referral Hospital to the effect that appellant was relatively stable mentally and fit to plead.

7. Appellant opted to give no defence. The trial court was satisfied that the prosecution case against the appellant had been proved beyond reasonable doubt on counts 1 and 2 and it fined him Kshs. 5,000/- in default 3 months imprisonment in the 1st count and 4 years imprisonment in the 2nd count.

8. The main issue in this appeal is whether the appellant's case was handled in accordance with the relevant provisions of the Criminal Procedure Code. There is no scintilla of evidence that the appellant could have been suffering from a disease of the mind at the time when the offence was committed. The real question is his state of mind during his trial.

9. Again, it is common ground that appellant was represented during the trial but there is no evidence that he was not alright and was not able to participate without hindrance during the presentation of the prosecution case.

10. In his mitigation, appellant told the court that he had a mental problem and sometimes hallucinates. In its judgment, the trial court considered appellant's mitigation and ruled that there was no evidence regarding his mental status at the time the offence was committed and convicted him accordingly.

11. The appellant's history contained in a medical report by Dr. Owiti dated 29.8.08 and Dr. Gatere's reports dated 1.4.16 and 3.5.17 are prove that appellant's condition did not develop post-conviction, but is one which would have required the trial court to handle the appellant's case strictly as provided in section 166 of the Criminal Procedure Code. In *Leonard Mwangemi Munyasia v Republic, Cr. App. No. 112 of 2014*, a psychiatrist expressed the view that the appellant, who had a history of mental instability, was "fit to plead" as a result of which the appellant was tried and convicted of murder. On appeal the Court of Appeal took into account the previous and supervening mental condition of the appellant and found that there was doubt whether he was truly sane. The Court also emphasized that the purpose of the provisions of the Criminal Procedure Code detailing the procedure for dealing with an accused person who is insane is to avoid the likelihood of sentencing a person with mental disorder. In that case, like the present one, the appellant was found to suffer from psychosis and paranoid schizophrenia. The Court of Appeal stated:

"Technical terms such as bipolar disorder, schizophrenia and mild psychosis have been used in evidence to describe the appellant's state of mind. How do these conditions affect a person's state of mind" Again, these are questions, which ought to have been answered at the trial by the experts. But according to World Health Organization Publication, the ICD-10, Classification of Mental and Behavioural 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. Schizophrenia is a condition of mental disorder which makes a patient have false beliefs, unclear or confused thinking and auditory hallucinations. While bipolar disorder, on the other hand is a brain disorder that causes unusual shifts in mood and energy activity levels. Clearly the condition the appellant suffered have severe effect in a patient's mind and perception. The condition according to the above literature may be long term, transient and intermittent in nature...The law recognizes, as we have seen, that the society has people like the appellant who may fall in this category of the population, and therefore provides for the procedures to be followed by the court in two instances where the question of insanity arises at the trial.

12. I am satisfied that the trial court did not apply the procedure set out in section 166 of the Criminal Procedure Code as it was duty bound to do. Under the provisions of Section 166, the court should have made 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. The court should then have reported the case for the order of the President, and ordered that the accused be kept in custody in such place and in such manner as the court directs. In this case, it must be borne in mind that under section 162(5), apart from making an order for the detention of the accused person in a mental hospital or any other suitable place, the President is empowered to make any further order in the matter. Such an order could be an order that is potentially for the benefit of the accused person, including possibly regarding his further trial or non-trial. By short-circuiting the prescribed procedure, the trial court could therefore unwittingly be denying an accused person an order that could be to his benefit (See *D M M v Republic [2016] eKLR*).

13. Accordingly, the conviction and sentence of the appellant on the basis of a trial that did not comply with section 166 of the Criminal Procedure Code was flawed.

ORDERS

14. In view of the foregoing analysis, this court makes the following orders:

1. The appeal is allowed and the conviction quashed and substituted with an order 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

2. The sentence is set aside and in lieu thereof substituted with an order for the detention of the appellant at Mathari Mental Hospital where he shall in the meantime continue treatment

3. The Deputy Registrar shall forthwith transmit to the Cabinet Secretary responsible for the Kenya Prison Service a copy of the proceedings of the High Court as well as a copy of this judgment, to the intent that the appellant shall be dealt with in the manner set out in section 166 of the Criminal Procedure Code. It is so ordered.

DATED AND DELIVERED THIS 8TH DAY OF FEBRUARY 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix and Caroline

Appellant - Present

For the Appellant - Mr Ariho/Mr Onsongo

For the State - Ms Wafula