



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL APPEAL NO. 28 OF 2013**

**SKM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

SKM the Appellant/Applicant in this case, was charged with the offence of infanticide, contrary to *Section 210* of the *Penal Code*. On 15<sup>th</sup> February, 2013 she pleaded guilty to the offence and on 20<sup>th</sup> February 2013 she was sentenced to serve life imprisonment.

By way of Notice of Motion dated 14<sup>th</sup> February 2018, under *Article 50(6)(b)* of the *Constitution of Kenya, 2010* and under *Section 358* of the *Criminal Procedure Code*, she urges this court to grant her leave to adduce additional new medical evidence during the hearing of the appeal as the said evidence was not available when she took plea before the subordinate court. She craves to call one *Dr. Kinyanjui* of the Psychiatric Division of Moi Teaching and Referral Hospital, Eldoret to give evidence on her mental condition. She avers that she suffers from a mental condition called Schizophrenia, of which only a psychiatric can expound to court. In support of the claim she annexed an in-patient invoice and a Discharge Summary Form from Moi Teaching and Referral Hospital of the year 2011, showing she suffered Schizophrenia.

*Madam Mooka*, appearing for the state opposed the application on the ground that it does not meet the threshold for adducing new evidence. She argued that new evidence must not have been available during the trial and due diligence must have been exercised by the applicant to obtain it, but in vain. It must also be evidence admissible at the trial and of probative value of which if availed would lead to a different verdict. She alleged the evidence the applicant wishes to adduce was available in the year 2011 and in 2013 should have been adduced. Before she took plea in the year 2013 she was examined by *Dr. Kemboi* who found that she was mentally sound and fit to stand trial. Nothing shows she was unwell during plea and a report of 2011 cannot be of any assistance. It cannot lead to a different verdict.

In deciding on the issue before this court, I have considered that to every offence, save for the offences of limited liability, there are two elements of which are “mens rea” and “actus reus”.

“Mens rea” refers to guilty knowledge and willfulness. It is a fundamental principle of Criminal law that a crime consists of both mental and a physical element. Mens rea, a person’s awareness of the fact his or her conduct is criminal, is the mental element, and actus reus, the act itself, is the physical element. The mental element is the one which makes insanity a recognized defence in criminal matters. Any mental ailment which would negate mens rea is therefore relevant evidence to any offence and is of probative value. *Article 50(6) (b)* reads that:-

“A person who is convicted of a criminal offence may petition the High Court for a new trial if:-

(b) new and compelling evidence has become available.

*Section 358 (1)* reads:-

“In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court”.

The applicant did not petition the High Court for a new trial but applied to adduce additional evidence during the appeal. The most applicable Section is therefore *358(1)* of the *Criminal Procedure Code*, rather than *Article 50(6) (b)* of the *Constitution*. The sought evidence is relevant and of probative value in determining on whether the applicant was of sound mind when she committed the alleged offence, so as to rest the question of mens rea. As to her mental state at the time of plea does not matter most given that the right procedure under *Section 162* of the *Criminal Procedure Code* was followed. The attached Discharge Summary Form shows she had been taken to hospital after she strangled a nephew claiming that she wanted to kill him to prevent him from being tormented by some demons she claimed were tormenting her, and wanted to commit suicide. It is therefore important for the court during the hearing of the appeal to understand what schizophrenia

is all about and whether giving birth would have any effect to such a patient. It would therefore be at interest of justice to hear the intended additional evidence. The application is merited and is granted. *Dr. Kinyanjui* of Moi Teaching and Referral Hospital in Eldoret will be summoned during the hearing of the appeal to adduce evidence before the High Court.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 31<sup>st</sup> day of May, 2018**

In the presence of:-

Mr. Miyienda Advocate for the appellant

Ms.Kegehi for state

Mr. Mwelem – court assistant