



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
CRIMINAL DIVISION

CRIMINAL CASE NO. 36 OF 2010

REPUBLIC .....PROSECUTOR

VERSUS

PHILLIP ONDARA ONYANCHA .....1<sup>ST</sup> ACCUSED

TOBIAS NYABUHANGA ARAD.....2<sup>ND</sup> ACCUSED

DOUGLAS OBIERO MAKORI .....3<sup>RD</sup> ACCUSED

RULING

1. The accused persons:- **PHILLIP ONDARA ONYANCHA, TOBIAS NYABUHANGA ARAD** and **DOUGLAS OBIERO MAKORI** are all charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on 14<sup>th</sup> April, 2010 at Ngando village in Dagoretti within Nairobi province murdered **ANTHONY NJIRUA MAIRURI**.

2. They appeared in court on 15<sup>th</sup> June, 2010 for the first time and on 26<sup>th</sup> June, 2010 the late Simani then appearing for the 1<sup>st</sup> accused brought to the court's attention that the 1<sup>st</sup> accused might have been suffering from mental illness and urged the court to make an inquiry under the provisions of **Section 162** Criminal Procedure Code which application was then opposed by the prosecution and to that application the court ordered that the 1<sup>st</sup> accused be reexamined by the chief psychiatrist of the Republic of Kenya with a panel of two other psychiatrist and a report thereon presented to court.

3. On 19<sup>th</sup> July, 2010 **DR. DONALD APOLO KOKONYA** the provincial psychiatrist Southern Region, in the then Eastern Province presented the report in which they concluded that the 1<sup>st</sup> accused could take plea, follow proceedings and effectively instruct counsel and based upon the said report the accused persons took their plea wherein a plea of not guilty was entered for all the accused persons.

4. On 6/4/2011, Mr. Omirera, the learned prosecutor, informed the court that the 1<sup>st</sup> accused needed to undergo a further psychiatrist assessment for mental fitness and Mr. Muite Senior Counsel then on record for the 1<sup>st</sup> accused sought court's assistance for the payment for an independent medical examination and on 1/7/2011 urged the court to allow the 1<sup>st</sup> accused to be reexamined by Dr. Owiti since the government doctors had indicated that he had suffered a traumatic past without giving details thereof which was subsequently done.

5. On 19/7/2011 Mr. Mwangi who appeared for the 1<sup>st</sup> accused informed the court that the State had concluded that based on the medical report by Dr. Owiti the case against the 1<sup>st</sup> accused to proceed under **Section 166** of the Criminal Procedure Code to which the court made an order that the court will deal with proceedings under **Section 166** of the Criminal Procedure Code and thereafter consider the case for 2<sup>nd</sup> and 3<sup>rd</sup> accused. On 6/12/2012 the court Ombija J (as he then was) made a further order in the following terms:-

***"I order that the case will proceed with prosecution adducing available evidence. The defence is at liberty to inject on the report of medical examination in evidence of insanity. At the close of the prosecution's case, the defence will be at liberty to adduce evidence of insanity and any other information evidence they may wish to have on record."*** (Emphasis supplied)

6. In the meantime before the trial commenced, the 1<sup>st</sup> accused on 31/7/2013 filed a Chamber Summons under certificate of urgency in which he urged the court to acquit the 2<sup>nd</sup> and 3<sup>rd</sup> accused on the ground that at the time when he made his statement to the police implicating the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons he was under duress. He supported his application with a sworn affidavit wherein he deponed that he mentioned

the names of his co-accused when Special Crime Prevention Unit of police tortured him and demanded that he give them the names of his accomplices and therefore mentioned any name that came to his mind in the hope that the torture would end. From the record it seems that the application was not determined but the 1<sup>st</sup> accused confession was admitted on record.

7. At this stage I must point out that the 1<sup>st</sup> accused was also charged alone with two other charges of murder in **High Court Criminal Case No. 37/2010** and **High Court Criminal Case No. 38/2010** which cases were on 13/2/2014 placed in abeyance until this cause is finalized though those cases have no relevance to this ruling.

8. To prove its case the prosecution called a total of thirteen (13) witnesses including two doctors **PW1 DR. DAVID MUSAU KIRIMA** and **PW5 DR. FREDRICK RICHARD OWITI** and at the close of the prosecution case the parties herein filed and made oral submissions on whether the prosecution had established a prima facie case.

### **SUBMISSIONS**

9. On behalf of the prosecution it was submitted that the prosecution had proved its case beyond any reasonable doubt against the 1<sup>st</sup> accused and that against that evidence the court was invited to invoke the provision of **Section 166** of the Criminal Procedure Code and to return a verdict of guilty but insane without putting the accused on his defence. It was submitted that there was no evidence linking the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons save for the confession of the 1<sup>st</sup> accused person.

10. On behalf of the 1<sup>st</sup> accused it was submitted that **Section 166** only comes to play where there is a prima facie evidence that the accused committed the murder which was not the case with the present matter since the accused confession only talks about a lady and not a child. On behalf of the 2<sup>nd</sup> accused it was submitted that the same had nothing to do with the case and therefore the prosecution should have dropped the case against him. Similar submissions were made on behalf of the 3<sup>rd</sup> accused who submitted that the only part the 3<sup>rd</sup> accused played was that the motor vehicle which ferried the victim to the scene of crime was provided by him but there was no proof of the existence of the said motor vehicle or ownership thereof.

### **ANALYSIS AND DETERMINATION**

11. At this stage of the trial the court is called upon to make a determination whether or not the prosecution has established a prima facie case against the accused persons to enable the court place them on their defences or not under provisions of Section 306 and 307 of Criminal Procedure Code that is to say whether the accused persons may be granted an opportunity to state their own case regarding the offence. Justice J.B Ojwang (as he then was) in the case of **REPUBLIC v SAMWEL KARANJA KURIA CRIMINAL CASE NO. 130 OF 2004 Nairobi (2009) eKLR** set out what to be considered in the following terms:-

*“The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled”.....*

*In the Court of Appeal No. 77 of 2006 the Court of Appeal expressed that too detailed analysis of the evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence as too much details in the trial court's ruling could then compromise the evidentiary quality of the defence to be mounted.”*

12. In this matter there is the issue as to whether a determination has been made by court as regards the mental status of the 1<sup>st</sup> accused person so as not to put him on his defence as the prosecution has invited the court to do? It must be noted that the medical evidence tendered by the prosecution are inconclusive as regards whether the 1<sup>st</sup> accused was suffering from a disease of mind at the time of the commission of the offence so as to bring him under the operation of **Section 12** as read together with **Section 11** of the Penal Code. Justice Ombija (as he then was) did not make any conclusive finding as to which of the two medical reports produced herein he had believed and at the end of this matter this court shall be called upon to make a conclusive finding thereon.

13. It is clear that where the defence of insanity is raised by the prosecution as it seems to had been strangely done in this case, the defence still retains the right to raise the same defence at the close of the prosecution case as stated herein in paragraph 5. In this holding I find support in **REPUBLIC v JEREMANO MNGAI NYERI HIGH COURT CR. CASE NO. 434/1972** where the Judge had this to say:-

*“..... defence of insanity is contained in Section 12 of the Penal Code and in order to establish this it is necessary for the appellant to prove that at the time he killed..... He was suffering from a disease affecting his mind and through such disease he was incapable (i) of understanding what he was doing or (ii) knowing that he ought not to kill the deceased person. See MUSWI s/o MUSELE v REPUBLIC [1956] EACA 622.....*

*The onus on an accused person to establish insanity is no heavier than on a party in civil case.....*

*As a general rule evidence as to an accused state of mind should be called by the defence and not by the prosecution. This was stated by the Court of Appeal in MUSWI s/o MUSELE v REPUBLIC (supra) where it was also directed that the following procedure followed in England and set out in Archibold's (33<sup>rd</sup> Edn) page 20 should be followed in Kenya.*

***Insanity being a matter of defence, the onus of establishing it lies upon the prisoner REPUBLIC v OLIVER SMITH [1910] 6 CR App REP 19. The procedure that the defence should call any witness whose evidence is directed to that issue should be strictly followed, the duty of the prosecution being limited to supply the defence with a copy of any report of statement of any prison medical officer who can give evidence on that issue and to make such person available as witness for the defence REPUBLIC v CASEY [1947] 32 CR Appl. Rep 91. Where evidence to establish insanity has been called for by the defence, the prosecution may call rebutting evidence REPUBLIC v SMITH [1912] 8 CR App Rep 72. And where it is clear from cross examination of witnesses for the prosecution that the defence of insanity will be raised, and it is ascertained that no evidence will be called to establish this defence, the crown may before closing its own case call evidence to negative insanity REPUBLIC v AMBRAMOVITCH [1912] 7cr App. RP 145..... If insanity as a complete defence is available to the accused at the close of the prosecution case why should it not be available to him at the close of the defence case where provision of Section 12 of the Penal Code are no less applicable.*** (Emphasis added)

14. I am in total agreement with the above holding and unable to buy the prosecution's submissions that the court ought not to put the 1<sup>st</sup> accused on his defence if prima facie case is established. I am further guided by the provision of **Article 50(2) (K)** of the **Constitution** which accords every accused person the right to adduce and challenge evidence and **Section 111(1)** of the **Evidence Act** which provides that when a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any exception or exemption from or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him noting that the court had not made a conclusive finding on the mental capacity of the 1<sup>st</sup> accused the fact the initial trial court made an order in error that the matter proceed under **Section 166** of Criminal Procedure Code notwithstanding.

15. Based on evidence on record and without saying much thereon I am satisfied and find that a prima facie case has been made against the 1<sup>st</sup> accused to enable the court place him on his defence which I hereby do.

16. As regards the 2<sup>nd</sup> and 3<sup>rd</sup> accused in addition to the confession by the 1<sup>st</sup> accused person which has been admitted in evidence unchallenged there are enough corroborating circumstantial evidence tendered to enable the court put them on their defence which I hereby do.

17. The accused persons are therefore advised of their rights under **Section 306(2)** and **307** of the Criminal Procedure Code.

DATED, DELIVERED and SIGNED at Nairobi this 23<sup>rd</sup> day of October, 2017.

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mrs. Kinoti for the State*

*Mr. Ambani for the 1<sup>st</sup> Accused*

*Mr. Gichuru for 2<sup>nd</sup> accused*

*Mr. Ambani for Mochere for 3<sup>rd</sup> accused*

*Accused persons present*

*Court clerk Tabitha*