REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 43 OF 2019

GEOFFREY ANZINO OSUNDWA ALIAS

***'KUKA' ALIAS 'KUKS' ALIAS 'GOOGS'*...APPLICANT**

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....................................RESPONDENT

RULING

1. Geoffrey Anzino Osundwa alias '*Kuka'* alias *'Kuks'* alias '*Googs'* (herein "the Accused") was arraigned in court on 11th July 2019, charged with the offence of; murder contrary to section 203 and 204 of the Penal Code (cap 63) Laws of Kenya.

2. The particulars of the offence state that; on the 19th day of June 2019, at around 1400 hours at Darfur Area, within Kariobangi North, Nairobi County, he murdered; Boniface Humphrey Opir alias "Epe".

3. On the date of appearance, the court was informed that, the accused had been taken for mental assessment and found not fit to stand trial. The doctor recommended EEG (Electric Shock Treatment) as the accused was epileptic. As a result, thereof, the court directed that the accused be taken to Mathare Mental and Referral Hospital for the EEG treatment and subsequently, mental assessment.

4. On the 1st October 2019, the court was informed that, the Applicant had been taken for mental assessment and found to be fit to plead to the information. The information was read to him and he pleaded not guilty.

5. On the same date, the Learned Counsel Mr Kariu, representing the accused, requested for bail pending hearing and indicated that, he will engage the prosecution on a plea bargaining agreement and sought for bail pending trial.

6. Ms Kimani for the prosecution Responded to the effect that, the prosecution would not be objecting to the accused being released on bail, however, he needed to file a formal application for the same. By a ruling dated 2nd day of October, 2019, the court granted the accused cash bail of; Kshs 100,000.00 with an alternative bond of Kshs 200,000 with one surety of like sum.

7. The parties continued to engage in negotiations on plea bargaining; and on 16th December 2020, the court was informed that, the agreement was ready and had been executed by all the parties. On the 22nd day of December 2019, the court was informed that, following the agreement of the plea bargaining, the prosecution had substituted the information with the charge of manslaughter.

8. The new charge of manslaughter was read to the accused who pleaded guilty thereto. The facts thereof were read and the accused accepted that all the facts were correct in total. He was then convicted on his own plea of guilty and an order made that, a Probation Officer's report be prepared before the Accused could give his mitigation and the matter set for further orders.

9. On the 30th March 2021, the defence Learned Counsel Mr Kariu offered mitigation on behalf of the Accused. It is during this mitigation that, the counsel raised the issue of the accused suffering from "insanity". He invited the court to note that, when the Accused was first arraigned in court, he was found to be mentally unfit to plead to the information. That, he suffers from epilepsy and Tuberculosis, which is a disease that affects the mind. The court was invited to consider the provisions of; section 9 and 12 of the Penal Code (cap 63) Laws of Kenya, in sentencing the accused and the decisions in; **Republic vs CGG (2020) eKLR, Republic vs ENW (2019) eKLR, Republic vs ANN (2017) eKLR**, and **Republic vs SOM(eKLR).**

10. However, the court sought to know whether, the defence was raising the issue of insanity as a defence or a mitigating factor. The defence counsel maintained that, it was raising the same as a mitigating factor.

11. It is at this point that, the court needs to interrogate whether the issue of insanity can be raised as a mitigating factor or a defence.

The provisions of; Section 12 of the Penal Code states 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".***

12. It follows from these provisions that, there are two main elements of; the Mc'Naghten insanity defence; that, the accused was suffering from a mental disease at the time of the crime and did not know the nature of the criminal act committed or that, he or she, was wrong because of the mental disease.

13. Thus, it is important, that, it has to be established and/or proved. Therefore, at a minimum, an Accused person claiming insanity must produce evidence to prove it.

14. It suffices to note that, generally, there is presumption that an accused person is sane; as stated in; Republic vs Retef (1941) & EACA.71, just as there is a presumption that they are innocent. The case then has to be heard and that presumption rebutted or otherwise.

15. In that regard, s**ection 167(1), (a), (b), and (c) of the Criminal Procedure Code** states as follows: -

> ***(1) If the accused, though not insane, cannot be made to understand the proceedings—***
>
> > ***(a) In cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President's pleasure; but every such order shall be subject to confirmation by the High Court;***
> >
> > ***(b) In cases tried by the High Court, the Court shall try the case and at the close thereof shall either acquit the accused person or, if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President's pleasure.***

16. Indeed, all the legal authorities cited by the defence, relates to the offence(s) of; murder contrary to; section 203 as read together with section 204 of Criminal Procedure Code, which were fully heard and determined. In fact, in the case of; **Republic vs CGG**, the Accused therein was found to be mentally "unfit" to plead to the charges on the first appearance. The plea was thus deferred until he got well. However, the trial proceeded and the accused therein was found to be guilty, convicted but found to be insane. That was the position in the other cases cited herein.

17. In that regard, all the legal authorities cited are distinguishable from the case herein; in the sense that, whereas there was a full trial in the cited cases, the matter herein has not gone through a trial as the accused entered a plea of guilty on the substituted charge of manslaughter contrary to Section 202 as read together with section 205 of the Penal Code.

18. Further, evidence was adduced in those cases to prove each respective accused was insane; giving rise to the verdict of guilty but insane. No evidence has been adduced herein in that regard. Additionally, the issue raised in those cases, was whether, the fact that a person has been found guilty and insane, and detained at the President's pleasure, ousts the court's judicial function to sentence a person found guilty but insane.

19. It therefore follows that, a defence of insanity cannot be raised as a "mitigating factor". As aforesaid, at the mitigation stage, the court cannot have the benefit of the medical report relied on to support that defence. In the given circumstances, I find that, the defence of insanity, raised by the accused amounts to a plea of not guilty to the offence he was arrested and charged with. As such, the court cannot sustain a conviction on plea of guilty.

20. The Accused is basically seeking to be heard on the defence of insanity to the charge. Consequently, I set aside the order entered herein of; plea of guilty to the charge of manslaughter. The proceedings taken on the charge of manslaughter are thus marked as "spent" and/or overtaken by events and/or vacated. The case will now proceed to a full trial, on the original charge of; murder contrary to section 203 as read with section 204 of the Penal Code, so that, the matter is fully heard and determined.

21. However, if the prosecution wishes to reduce the charge of murder to manslaughter then, it has the right to do so within the precincts of the law, and the matter be fully heard, and if the accused intends to offer the defence of insanity, then he should do so during the hearing.

22. In the conclusion, I direct that the matter be prepared for hearing on the original charge of murder.

It is so ordered.

Dated, signed and delivered virtually on the 14th day of April 2021.

GRACE L. NZIOKA

JUDGE

In the presence of

Mr Naulikha for the State

Mr Kariu for the Accused

Accused present in person.