REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 16 OF 2013

REPUBLIC

VERSUS

CNG.......ACCUSED

JUDGMENT ON SENTENCE

The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. It was alleged that on the 2nd day of May 2013 in Nyeri County, he murdered MNG. The latter happens to have been his mother.

When he was presented before court for plea on 26 July 2013 to answer to the charge, the state informed the court that the accused was not fit to take plea; Ms Kitoto, the learned counsel for the state made reference to a psychiatrist's report dated 21 May 2013 according to which the accused was established to be mentally handicapped. This Honourable Court (Wakiaga, J) then ordered that the accused be committed to a mental hospital for treatment.

By a letter dated 4 October 2013, Josephta Mukobe, the Principal Secretary, Ministry of Interior and Co-ordination of the National Government directed that the accused be removed from prison and put into the custody of the Chief Consultant Psychiatrist in charge of Mathari National Teaching and Referral Hospital for treatment. Since then, except for the routine mentions to confirm the status of the accused's health and, in particular, his mental health, the proceedings against him were virtually suspended.

By a letter dated 5 August 2014, Dr. Wamukhoma, a consultant psychiatrist at the Mathari Hospital reported to court that she had attended to and examined the accused on the material date and established that he was not yet ready to stand trial. Her opinion was based on the findings that the accused was partially deaf and spoke with a lot of difficulty; that he only partially understood his charge and that he was not oriented in time. His attention and concentration were found to be poor. His memory was also found to be poor. The psychiatrist confirmed to court that the accused was still on medication and on what I think was a positive note, she reported that the accused no longer displayed psychotic symptoms.

With this report the accused's trial could not take any further step except for the regular mentions to track his progress, if any, towards normalcy.

On 5 February 2015, Dr. Wamukhoma again briefed the court of the mental status of the accused. Just as was the case in her pervious brief, the accused's condition had not improved as at this date.

Similarly, by 29 September 2016, the accused's condition was largely still the same although there was some slight improvement. On this particular date, Dr Jumba of the same Mathari hospital examined the accused and reported as follows:

> **The above named was assessed recently on 29/9/2016; the assessment revealed an elderly man who appeared to have hearing difficulty and slow understanding. He is not fully aware of the death that occurred but claims he hit his mother and the brother with a jembe as they interfered with their cow that was giving birth.**
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> **The patient was oriented in time and place and appeared well nourished. His speech was slow. He had slowed (sic) though processes and comprehension of facts was poor. The patient lacked insight. In comparison with the previous assessment he has shown some progress since he is able to talk and bath on his own.**

Inevitably, the Psychiatrist concluded that the accused was not fit to stand trial and advised that he continues with the treatment. The treatment apparently continued until 13 January 2018 when Dr Catherine Syengo Mutisya, opined that he was now fit to stand trial. Based on Dr Syengo's report, both the state and the counsel for the accused were in agreement that the accused could take his plea. This was on 25 June, 2018.

When the charge and information were read to the accused, his answer interpreted in Swahili language, which is the language he adopted, was “it is true”. I explained and warned him that the charge to which he had pleaded carried with it a potential death sentence if he was convicted and for this reason the charge and the information were read to the accused again. Once again, he responded “ni kweli” which in English translates to “it is true”. He also did not dispute the statement of facts when it was read to him.

Going by the history of the accused’s mental status, I was reluctant to immediately convict him on his own plea of guilty. Rather before reaching my verdict, I sought for more evidence from the family members and also the psychiatrists who had previously attended to him if not for anything else, to be certain of the appropriate sentence that I could possibly mete out.

The accused’s sisters GW and PMG testified on oath that their brother had a history of mental illnesses since 1979 when he left school. Similarly, his brother KG gave evidence to the same effect. They all urged the court to set the accused free.

On her part, Dr. Victoria Wamukhoma confirmed, also on oath, that she had attended to the accused and briefed the court on the accused’s mental status at least on two occasions. She not only reiterated the findings and opinion in the two reports but she also produced them, together with Dr Jumba’s report, in support of her testimony. She testified further that the accused had all along been suffering from schizophrenia and had had this problem since 1979. According to Dr Wamukhoma, a patient of such disease is prone to violent disposition and has no touch with reality.

Considering this evidence in its entirety, there is no doubt that the accused suffered from some disease of the mind that may have compromised his judgment of what is right or wrong and, in particular, whether he understood the nature of his actions and the natural consequences that flowed from them.

Section 12 of the **Penal Code** absolves from criminal responsibility any person suffering from a disease affecting his mind and who, for that reason, is incapable of understanding what he is doing, or that he does not know that he ought not to do the act or make the omission which, in ordinary circumstances, would attract criminal liability.

It is necessary in a case of murder such as the one against the accused, the court must be satisfied that the death was as a result of a voluntary act of the accused and this is not just a requirement necessary in murder cases only; it is, as a matter of law, essential in any other criminal offence.

A disease of the mind compromises one’s capacity to make a rational judgment and this avails him of the defence of insanity. Where such defence prevails, the accused is said to be guilty but insane. This concept was developed in the wake of the decision in **R versus M’Naghten (1843) 8 E.R 718,** where the accused, Daniel M’Naghten was charged with the murder of one Edward Drummond by shooting him with a pistol. He pleaded not guilty. During his trial, evidence was led on his behalf, that he was not, at the time of committing the act, in a sound state of mind. His defence prevailed and was found not guilty and, accordingly acquitted.

Following this decision, the House of Lords asked a panel of judges a series of hypothetical questions about the defence of insanity. Lord Chief Justice Tindal who presided over the panel stated the primary question to be this:

> **Whether at the time the act in question was committed, the prisoner had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of the opinion that the prisoner was not sensible, at the time he committed it, that he was avoiding violating the laws both of God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of the opinion that when he committed the act he was in a sound state of mind, then there verdict must be against him.**

The learned judge stated that the jurors (where the trial is by jury) ought to be reminded in all cases that;

> **“…every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused as labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.”**

This pronouncement later became to be popularly referred to as “the M’Naghten Rule” (or rules); it is codified and, more or less, encapsulated in **sections 11** and **12** of the **Penal Code**. Reference has already been made to **section 12** earlier in this judgment; **Section 11,** on the other hand, presupposes the sanity of every person, and a person to have been of sound mind at the time he is accused of having committed the offence in issue until the contrary is proved.

The upshot is that an act is not punishable if it is done involuntarily, without any control by the mind or rather an act done by a person who is not conscious of what he is doing because he is suffering from some mental deficiency or, to put it straight, a disease of the mind.

In **Bratty versus Attorney-General for N. Ireland (1961) 3ALL ER 523 at page 532,** the House of Lords defined what constitutes a “disease of the mind” within the M’naghten rules and cited instances of diseases that would fall into this category of sickness. It stated:

> **The major mental deceases, which the doctors call psychoses, such as schizophrenia, are clearly diseases of the mind.** (Per Lord Denning).

The learned judge went further to substantiate that:

> **It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind.**

The accused was diagnosed with schizophrenia which, as noted, has been acknowledged by the learned judges of the House of Lords to be one of those diseases that fit the description of a 'disease of the mind' within the context of the M'Naghten Rule. There is no doubt therefore that the accused was suffering from a disease of the mind at the time he murdered his mother.

When insanity is raised as a defence, the burden is on the defence to prove it. It was so stated in **R versus Saidi Kabila Kiunga (1963) E.A 1 where** Spry J., at page 2 reiterated that:

> **when insanity is advanced by the defence, as it was in this case, the burden of proof is on the defence, although it is not a heavy burden. As Windham, J.A. (as he then was) said in Nyinge s/o Suwatu (1959) E.A. 974(C.A)**
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> **"he must show, on all the evidence, that insanity is more likely than sanity, though it may be ever so little more likely. Merely to raise a reasonable doubt might still leave the balance tilted on the side of sanity."**

The accused, as noted pleaded guilty and therefore the question of whether he raised a defence of insanity does not arise; however, it would be irresponsible on the part of this Honourable Court if it was to close its eyes and convict the accused purportedly on his own plea of guilty without any reference to his mental health history particularly taking into consideration the evidence by the psychiatrist on his mental handicap. I am persuaded that as much as he admitted having committed the offence, he must have been under delusion as not to be capable to appreciate what he was doing or the nature and quality of his acts because of the underlying disease that affected his judgment.

In the ultimate I am bound to invoke **section 166** of the **Criminal Procedure Code** and make a special finding that the accused is guilty but insane.

The deceased's family members who also are the accused's family members have urged this court to release the accused owing to his medical condition. I sympathise with their and the accused's situation but going by the psychiatrist's evidence, there is no guarantee that due to the nature of the disease he is suffering from, the accused will not in future harm himself or harm members of his family or generally not endanger the society at large. It would be imprudent, in these circumstances, to set him loose on his family or on the unsuspecting members of the public. Accordingly, I would invoke section 166 (2)(3) of the Criminal Procedure Code and I direct that the accused remains in the custody of Nyeri main prison at the pleasure of the President. It is so ordered.

Dated, signed and delivered in open court this 3rd day of June, 2019

Ngaah Jairus

JUDGE