



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.....1ST ACCUSED

TOBIAS NYABUHANGA ARAD.....2ND ACCUSED

DOUGLAS OBIERO MAKORI.....3RD ACCUSED

RULING

1. The accused persons:- **PHILLIP ONDARA ONYANCHA, TOBIAS NYABUHANGA ARAD** and **DOUGLAS OBIERO MAKORI** were 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 14th day of April, 2010 in Dagoretti within Nairobi province murdered **A N M**.

2. On 15/6/2010, they appeared for the first time before Lesiit J. who remanded them in custody upon the request by the prosecution until 29/6/2010 with an order that the Deputy Registrar of this court appoint for each of them Advocates to represent them in the case.

3. On the 29/6/2010, Mr. Omirera appeared with Mrs. Obuo and Mr. Imbali for the State, while Mr. Simani appeared for the 1st accused, Mr. Nyasani held brief for Mr. Kanyangi for the 2nd accused and Mr. Nderitu appeared for the 3rd accused. At the second appearance, Mr. Simani for the 1st accused informed the court (Lesiit J.) that he was of the opinion that the 1st accused was suffering from a mental illness under **Section 162** of the **Criminal Procedure Code** and asked the court to conduct an inquiry into the fact of the unsoundness of the mind of the 1st accused. This was opposed by Mr. Omirera for the State on the basis of the medical report by **Dr. Njau**, the Provincial Psychiatrist – Nakuru. Mr. Simani in response submitted that the committal bundle he had been supplied with portrayed the character of the 1st accused person as a man who kills women and sucks their blood and that more charges were likely to be preferred against him.

4. The Judge (Lesiit J.) made a Ruling thereon that the court was interested in ensuring that a judicial trial takes place whereby no doubt exists as to the ability of any of the accused persons before court to stand trial and follow proceedings. The Judge therefore ordered for another psychiatric examination by the Chief Psychiatrist of the Republic of Kenya with a panel of at least two (2) other Psychiatrists from outside Nakuru Provincial General Hospital and Mathari Mental Hospital.

5. On 19/7/2010, **DR. DONALD APOLO KOKONYA**, then a Provincial Psychiatrist Southern Region, Eastern Province, appeared before the Judge with the report of the panel of three (3) Psychiatrists in which he stated that they had reached a unanimous conclusion that the 1st accused could take plea, follow proceedings and effectively instruct counsel. As a result of the said medical report, the accused persons took their plea and a plea of not guilty was entered for each of them and the trial fixed for 17th, 18th, 19th and 20th January 2011.

6. On 18/1/2011, Mr. Simani, Advocate for the 1st accused informed Ochieng J. that he had been appointed the Chair of Political Parties Dispute Tribunal and was therefore not in a position to represent the accused person and on 31/1/2011, the matter was fixed before Ombija J. where he was notified that a Mr. Mbugua Muriiti had been assigned to represent the 1st accused person. On 29/3/2011, Mr. Ngunjiri for the 3rd accused informed the court (Ombija J.) that the 1st accused wanted to engage the services of a private doctor for a further medical report which application was objected to by Mr. Omirera, the learned prosecutor but stated that the medical report that had been given by the three (3) government doctors upon which the 1st accused was found fit to stand trial was vague.

7. On 14/6/2011, the court was informed that Mr. Muita, Senior Counsel who then came on record for the 1st accused person was to organize a team of doctors to examine the 1st accused and had identified a Dr. Owiti - Consultant Psychiatrist, to examine the 1st accused and the court on 1/8/2011 made an order for the 1st accused to be examined by Dr. Owiti and a report made to court. On 17/11/2011, Mr. Kanyangi, then on record for the 2nd accused was allowed to withdraw from representing the same.

8. After several mentions, on 30/5/2012 Mr. Omirera informed the court that they wanted to consolidate **Criminal Cases No. 36, 37 and 38 of 2010** which I will refer to shortly in this Ruling, while Mr. Mwangi informed the court that a team of defence lawyers (sic.) had written to the DPP on the basis of third medical report of the 1st accused from Dr. Owiti, whose opinion tended to show that the accused was mentally disturbed at the time of the alleged offence, that is to say, the accused was not mentally sound at the time. Mr. Omirera for the prosecution informed the court that he had done a letter to the DPP so that the matter proceeds under **Section 166** of the **Criminal Procedure Code** and in the event the DPP agreed, they intended to proceed with the evidence of the three (3) doctors and the doctor that did the post mortem examination and the witnesses who last saw the deceased persons when they were alive.

9. On 17/7/2012, Mr. Mwangi informed the court that as regards the 1st accused case, the State had concluded that the matter proceeds under **Section 166** of the **Criminal Procedure Code** to which the court made the following orders:-

“1. The court will deal with proceedings under Section 166 of the Criminal Procedure Code. Thereafter the court will consider the case for the 2nd and 3rd accused.

2. Hearing of the proceedings under Section 166 of the Criminal Procedure Code to be on 5th and 6th October 2012.”

10. On 5/12/2012, Mr. Omirera informed the court that they intended to proceed with the case against the three (3) accused persons since the evidence against them was intertwined. Mr. Mwangi informed the court that they intended to call the consultant doctors on the side of the prosecution and consultant doctor on the side of the 1st accused person to which Mr. Gichuru for the 3rd accused stated that they should have the medical doctors to tender their evidence and thereafter the court will be able to decide whether the accused is capable of standing trial. Mr. Omirera then replied that they had comprehensively complied with **Section 162** of the **Criminal Procedure Code**.

11. On 6/12/2012, the trial Judge (Ombija J.) made the following orders:-

“By way of directions I order that the case will proceed with the prosecution adducing available evidence. The defence is at liberty to inject in the course of cross-examination evidence of insanity. At the close of the prosecution case, the defence will be at liberty to adduce evidence of insanity and any other information or further evidence they may have on record.”

12. The issue at the back of the court's mind is whether by this Ruling the court set aside or reviewed its other Ruling that the matter proceed under Section 166 of the Criminal Procedure Code?

13. Based on the said Ruling, the trial commenced with Mr. Omirera making his opening address to court on this matter and informed the court as follows:-

“The theory of the prosecution case is that the deceased, a child of nine (9) years was on 6/4/2010 playing with his cousins, another child aged about eight (8) years by the name R W W and another child by the name A N K aged about two (2) years. The three children were playing at [particulars withheld] Academy Play Ground. As normal with children, they picked the gumboots of a Maasai header who chased them, all the children scattered in different directions. That was the last time the deceased was seen alive.

It is the prosecution case that a day or two later, a ransom note was dropped at Kamukunji Police Station. The sum of Kshs.30,000/= was placed on the head of A N M. The parents of A by name S M paid the ransom. He sent the sum of Kshs.4,000/= to a mobile number 0717919100 via M-pesa. The recipient was HENRY MUNGAI KANGARA.

The prosecution will table evidence to show that HENRY KANGARA was arrested and gave a plausible explanation that he did not receive the money. We shall table M-pesa account transaction to show that when the money was wired to 0717919100, the sum was transferred to 0712183747 registered in the name of PHILIP ONDARA ONYANCHA who was then arrested and led to the arrest of DOUGLAS OBIERO MAKORI and TOBIAS NYABUHANGA ARAD. The State will give evidence to show that upon interrogation, Onyancha led the police in the recovery of the remains of A M. We shall also demonstrate that ransom letter was examined by the document examiner and linked to the hand of Philip Ondara Onyancha.

We shall further demonstrate that the deceased was brutally murdered (post mortem report) hence there was malice aforethought. We shall also be bringing medical examination report of all the three (3) accused on the suitability to plead and participate in the proceedings. We shall also bring up the first Psychiatric report from Nakuru General Hospital which clearly indicates that he did not have any mental problems hence fit to plead. Immensely we shall place before the court a second medical opinion done by a panel of three (3) Consultant Psychiatrist evidence that Onyancha was traumatized in his childhood and was still suffering from this trauma. Medical report by Dr. Owiti Consultant Psychiatrist will be produced by the defence...”

14. This is the basis upon which the matter proceeded before Ombija J. who heard the evidence of all the prosecution witnesses and partly the evidence of PW13, the investigating officer, before retiring from the Judiciary. On 13/6/2016, the parties appeared before Lesiit J. where directions were issued under **Sections 201 (1) and 200** of the **Criminal Procedure Code** that the matter proceed from where it had reached

before me with a rider that the investigating officer, **PW13**, be heard afresh. On 2/11/2016, the said witness proceeded with his evidence-in-chief before me and at the close of the prosecution case, Mr. Omirera for the State once again submitted before the court that a case had been proved beyond any reasonable doubt against the 1st accused. It was submitted that the evidence against the 2nd and 3rd accused was the uncorroborated confession statement of the 1st accused and they should therefore be discharged. It was submitted as regards the 1st accused once again that the court should invoke **Section 166** of the **Criminal Procedure Code** and return a verdict of guilty but insane.

15. Mr. Ambani for the 1st accused submitted that **Section 166** of the **Criminal Procedure Code** is only applicable where there is a *prima facie* evidence that the accused committed the murder. It was submitted that as per Dr. Owiti's evidence, the accused had indicated that he had killed eighteen (18) persons and not three (3) and that all were women. It was submitted that in his confession, the accused did not talk of any boy but a lady and that there was no evidence that the victim in this case existed. On behalf of the 2nd and 3rd accused, it was submitted that the State had concluded that there was no evidence against them and should therefore be discharged.

16. I, however, in a Ruling dated 23/10/2017 found that all the accused persons had a case to answer and duly put them on their defence and all the accused persons gave their sworn statements of defence and denied taking part in the commission of the offence herein.

17. At the close of the defence case, Mr. Omirera for the State once again submitted that the prosecution did not submit any evidence against the 2nd and 3rd accused save for the confessional statement of the 1st accused and being a co-accused, that evidence without corroboration was very weak. On the 1st accused, he submitted that he had made an application before the court to invoke **Section 166** of the **Criminal Procedure Code** and that if there was any evidence that the accused was insane, then he should not be punished. He supported his submission by use of the case of **LEONARD MWANGEMI MUNYASIA v REPUBLIC, CR. APPEAL NO. 112 OF 2014 reported in [2015] eKLR, GRACE NYOROKA v REPUBLIC, CR. CASE NO. 246 OF 2006 KISII reported in [2007] eKLR** and **REPUBLIC v HMM CR. CASE NO. 98 OF 2011 reported in [2016] eKLR** and noted that in **MUNYASIA CASE** the Court of Appeal ordered a retrial where the trial court did not follow the correct procedure where insanity was an issue.

18. Mr. Ambani for the 1st accused submitted that **Section 162** and **164** of the **Criminal Procedure Code** is only applicable where the insanity comes out during the proceedings and once a report is made, the court proceeds to refer the matter to the President. He submitted that **Section 166** is only applicable where an act or omission is charged as an offence and is given in evidence that the accused was insane at the time of the commission of the act. He submitted that in this case it is the prosecution which proceeded under **Section 166** and that the accused did not raise insanity as a defence.

19. This is the situation that confronted the court at the time of making the Ruling herein and which has led to the regrettable decision the court has to come to.

20. The background of this matter is that the accused had been charged with three (3) cases of murder; **CR. CASE NO. 36/2010** involving a child, **CR. CASE NO. 37/2010** and **CR. CASE NO. 38/2010** involving women. It is these two other cases which the accused is known for and which has been extensively covered in the press. For record purposes, those two cases were not before this court and have never been heard since the trial court (Ombija J.) had stayed them, which order was set aside by this court.

21. The issue that has confronted the court in this matter is the proper procedure to be followed where there is a defence of insanity and where the issue of insanity is in question and whether the correct procedure was followed in this matter. As I have stated herein, in this matter, Ombija J. (as he then was) made an order which is still on record that the matter was proceeding under **Section 166** of the **Criminal Procedure Code** and having made that order which was not challenged by the defence, the trial proceeded erroneously on the basis that it was under **Section 166** upto the time when I placed the accused persons on their defence.

22. It would therefore be in order to restate the law and procedure on insanity. There is the procedure provided for under **Sections 162 – 164** of the **Criminal Procedure Code** which is applicable where the court has reason to believe that the accused is of unsound mind and is incapable of making his defence, which the Court of Appeal has declared in several cases must be strictly followed and which Lesiit J. complied with thereby finding that the 1st accused was capable of making his defence and following the proceedings.

23. The second procedure is under **Section 166** of the **Criminal Procedure Code** which is applicable where the defence of insanity as at the time of the commission of the offence is raised and proved at the end of the trial where the court then makes a special finding as to the effect that the accused was guilty of the act or omission charged but was insane when he did the act.

24. In this matter, the court records shows that the trial Judge (Ombija J.) made a determination under **Section 166** of the **Criminal Procedure Code** at the commencement of the trial before evidence was tendered before the court and this said determination which was not set aside and or reviewed upto the time when the accused persons were put on their defence, is a procedural error on the part of the court which is likely to cause or has caused a gross-miscarriage of justice to the accused persons and the victims herein.

25. The Court of Appeal in **REPUBLIC v EDWARD KIRUI [2014] eKLR** quoted with approval the Supreme Court of India decision in **MURUGAN & ANOTHER v STATE BY PUBLIC PROSECUTOR, TAMIL NADU & ANOTHER [2008] INSC 1668**, in which quoting the case of **BHAGWAN SINGH v STATE OF M. P. [2002]4 SCC. 85** about miscarriage of justice the court said:-

“The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent.”

26. The court further stated in paragraph 21:- **“A miscarriage of justice is the result of inter-alia an unfair trial and the trial under consideration was such as unfair trial with regard to the prosecution and the victims of the murder which the trial court found was committed. Both the victims and the families were deprived of fairness . . . A fair trial will attempt to ascertain the truth. Miscarriage of justice was discussed in the Indian case of ZAHIRA HABIBULLAH SHEIKH & ANOTHER v STATE OF**

GUJARAT & OTHERS, AIR 2006 SC 1367 wherein the Indian Supreme Court of India stated:- “It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted . . .”

27. Having pointed out the procedural error on record and the fact that the prosecution is the one that offered the defence of insanity to the accused person without complying with the provisions of **Section 12** of the **Penal Code**, I have come to the conclusion that there is a miscarriage of justice herein thereby rendering the trial a nullity which can only be cured by declaring a mistrial herein which I hereby do.

28. I therefore order that this file be placed immediately before the Presiding Judge of the Division for further directions on fresh trial of the accused persons herein before another Judge in the Division and it is so ordered.

DATED, DELIVERED and SIGNED at Nairobi this 5th day of April 2018.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Mr. Ambani for the 1st Accused

Mr. Gichuru for the 2nd accused

Mr. Gichuru for Mochere for the 3rd accused

Accused persons present

Court clerk – present