IN THE COURT OF APPEAL

AT MOMBASA

CORAM: CHESONI, CJ, TUNOI & LAKHA, JJ.A.

CRIMINAL APPEAL NO. 42 OF 1998

BETWEEN

HESHIMA BEBEWA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Waki J) dated 10th July, 1998

in

H.C.CR.C. NO. 16 OF 1995)

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JUDGMENT OF THE COURT

HESHIMA BEBEWA was charged with the murder of ***MUDATA MWAMUMBO*** which occurred in the morning of the 7th day of February, 1989, at Nunguni Village, Mwereni Location in Kwale District of Coast Province. The superior court (Waki J.) made a special finding that Heshima unlawfully killed Mudata but was insane when he did so. The learned Judge then directed that the case shall be reported for the order of the President.

The appellant has through his counsel, Mr. Ole Kena appealed against the superior court's special finding and subsequent orders on eight grounds which we need not reproduce here. The prosecution set out to establish beyond reasonable doubt that the appellant was suffering from mental disturbance. Evidence was adduced from six witnesses to prove the prosecution's case. The post-mortem report as to the cause of death was not produced in evidence because the learned Judge would not receive it unless it was produced by the maker who had since left the jurisdiction of the Court. S.77 of the Evidence Act (Cap. 80, Laws of Kenya) was thus overlooked. Nevertheless, the learned Judge held that the cause of death was patently obvious and that is that the deceased died from the injury inflicted by the appellant who cut through his (deceased's) neck.

The medical evidence offered by Dr. Edwin Githire Mwinga (P.W.8) was that he found the appellant suffering from paranoid psychiatric disorder which made the appellant feel out of his senses. It made the appellant feel the world was against him and so he would go out to fight assumed events or enemies. At one stage the learned Judge allowed the assessors to put questions to the doctor for him to clarify the appellant's unsoundness of the mind.

When Mrs. Mwangi closed the prosecution's case Mr. Ole Kena made a lengthy submission and urged the court to find that there was no case to answer and acquit the appellant under S.306 of the Criminal Procedure Code. Mrs. Mwangi did not agree and she beseeched the learned Judge to put the appellant on his defence for the charge of murder. The record of the superior court does not show that the learned Judge complied with S.306. He neither made a finding of not guilty nor informed the appellant of his right to address the court, either personally or by his advocate, to give evidence on his own behalf, or make an unsworn statement, and to call witnesses in his defence. The appellant was legally represented, consequently his advocate ought to have been required to state whether it was intended to call any witnesses as to fact other than the appellant himself. The learned Judge was under obligation to record all the information to the aforegoing requirements. That was not done. The appellant was shut out as the learned Judge proceeded to make his ruling on 10th July, 1998. This was a serious omission, which made the whole trial an illegality.

Mr. Gacivih urged us to order a retrial of the case. The Court should take into account, when deciding whether a retrial is appropriate, the length of time which elapsed since the alleged commission of the offence and the interests of justice. In general a retrial will be ordered only when the original trial was illegal or defective, and each case must depend on its own facts and circumstances - see ***M'KANAKE V REPUBLIC [1973] E.A. 67, FATEHAL I MANJI V THE REPUBLIC [1966] E.A. 343 and WILSON WASHINGTON OTIENO V REPUBLIC (1989) 2 KAR 251*** **.** The offence was committed in 1989 and although the appellant was medically certified fit to plead in 1991 his trial did not take place till 1998. This was partly because of the appellant's mental state. Mr. Gacivih did not ask for a retrial so as to fill gaps in the evidence nor to rectify faults of the prosecution. The trial being illegal, we are of the opinion that in the circumstances of this case and in the interest of justice the appellant should stand a new trial.

We note that although the assessors were part of the trial, they were not asked to give their opinions.

The upshot of what we have said is that we allow this appeal, set aside the superior court's special finding and order that the appellant be re-tried on the same charge before another judge.

Dated and delivered at Mombasa this 20th day of July, 1999.

Z. R. CHESONI

CHIEF JUSTICE

P. K. TUNOI

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR