Republic of Kenya

Court of Appeal, at Nairobi

Criminal Appeal No 116 of 1985

Marii

versus

Republic

(Appeal from the High Court at Nairobi, Torgbor J)

December 11, 1985, Nyarangi JA, Platt & Gachuhi Ag JJA delivered the following

Judgment.

The appellant clement Nyanganatha Marii was convicted of the lesser offence of manslaughters, having been charged with murder, and sentences to 12 years' imprisonment. He appeals to this court against the sentence but in fact several matters of legal principle arise which affect his conviction.

Mr Ombete who undertook the defence of the appellant, hard tried had to put before the court the defence of insanity. In his final address he ended with the remarks that the only rational explanation of the accused's conduct was insanity, and therefore a proper verdict should be not guilty of murder, but rather guilty although insane. The basis for such a submission must be section 166(1) of the Criminal Procedure Code which unfortunately was not specifically referred to, as far as we may judge from the record. That section provides:

"166(1) where an act or omission is charged against a person as an offence and it is given in evidence on the trial of that person for that offence that he was insane so as not be responsible for the acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission. It was Mr Ombete's case that in all the circumstances as ordinary people do not kill their brothers, it must be that at the material time the accused suffered from acute psychosis.

As section 166(1) provides, this state of mind is to be gathered from the evidence in the case. There are a number of authorities dealing with the defence of insanity and its relation to murder or manslaughter, off which perhaps Ellis v Republic [1965] EA 744 is the most striking, in comparison with circumstances of this case. The views of Sir Samuel Quashie-Idun, P set out at page 750 are of great interest:

"It is our view that on the directions given by the learned trial judge in his summing up the to jury, with which we respectfully agree in substance, the jury were entitled to come to the conclusion that although the appellant was epileptic he was not insane at the time he did the act; and that while he knew what he was doing and that it was wrong, he did not by reason of his illness appreciate the full consequence of his

act, viz; that the blow would most probably cause the death of or such grievous harm to the deceased as was likely to cause his death.

It was not disputed in that case, that where an accused raises the defence of insanity, the burden of proving insanity rests with the accused, because a man is presumed to be sane and accountable for his actions until the contrary is shown. But while this burden rests with him, it is not such a heavy one as rests on the prosecution, and indeed after considering the evidence it is to be decided on the balance of probability, whether it seems more likely that due to mental disease the accused did not know what he was doing at the material time, or that what he was doing was wrong, and so could no have formed the intent to kill the deceased. Whether the defence has proved the case of insanity is matter of fact, for the jury in England, and then the judge and assessors in Kenya. It follows from the decision in Ellis' case that if the jury found that the accused was insane then a special verdict maybe entered; if they found that he was sane the verdict may be murder or manslaughter; and in the case of the latter verdict, that would be due to the fact that although sane, by reason of illness, the accused did not appreciate the full consequence of his act. With these principles in mind, we attempted to find out how the learned judge addressed assessors, but unfortunately the learned judge only noted that he had summed up to the assessors. In Upar v Uganda [1971] EA 98 Duffus, P (as he then was) made the following comments:

"The failure to make notes of his summing up was no doubt due to an oversight perhaps because the facts of the case appeared so simple, but we would emphasise the desirability for this, especially when, as in this case, the trial judge omitted to deal with some essential point for decision in his judgment. A reference to this point in the notes of his summing up, would assist the appeal court, if there had been a failure of justice."

Considering the judgment of the High Court in the present case, it not clear wether the three possibilities of insanity, sanity or though sane the appellant could not appreciate the full consequence of his act were present in the mind of the learned judge or that he summed up in this fashion. The learned judge's conclusion was:

"In view of Mumbi Mwaura's evidence, there is some doubt as to the true condition or state of the accused at the time of the alleged offence.

The assessors find the accused not guilty of murder but of manslaughter and for the reasons, I have stated, and in the light of Mumbi Mwaura's evidence I accept the verdict and find the accused guilty of manslaughter."

The first assessor had advised the judge that the accused was not guilty of murder, a matter concerning which he (the assessor) was not convinced beyond reasonable doubt.

The accused hit the deceased only once. The accused said that he did not intend to kill, and the assessor believed him. The accused's life history showed that he was not all that normal and there was lack of evidence of his condition. The second assessor had said the accused was not guilty of murder. The accused had no intention to kill. The accused used to have an acute psychosis. His behaviour of cutting a dog and damaging a water tank showed that something was wrong in the brain.

The third assessor repeated the reasons given by his fellow assessors.

Then each assessor was called upon to vie what the judge calls "a verdict," and each one returned a finding of manslaughter.

The evidence of Dr Mohammed Fazal, the specialist Psychiatrist at Mathari Mental Hospital, was that he had known the appellant as a patient from the September 21, 1976.

He was suffering form severe mental illness known as acute psychosis. By stages the appellant improved and by November 1, 1977 he had completely recovered. The appellant claimed that he needed to smoke cannabis and take alcohol; but these drugs were connected with acute psychosis, and he was warned

against taking them. It was thought that by July 1978 he had stopped taking cannabis, but that he was still taking alcohol by the October 16, 1979. He did not come back after that, and he was next seen in April 1984 when he was in custody. The death of the appellant's brother Dominic had occurred on May 23, 1983. When the appellant was seen in 1984 he appeared to be of sound mind. But as the learned judge noted, Mumbi Mwaura had informed the court that the accused had been behaving in a strange way. He went about destroying things like damaging a water tank with the nail. On the May 21, 1983 he had cut a dog which belonged to the child of Mumbi Mwaura. On the May 22, he had come to attack Mumbi herself. Indeed during the whole of May his behaviour had continued to be same, that of threatening Mumbi, without provocation.

The appellant's defence was to the effect that his brothers and sisters including Dominic the deceased and the witness Mumbi had excluded him from sharing the family land. He had called on Dominic the deceased to intervene on his behalf. But the appellant had been reviled. Another story concerned a dispute over tools. The appellant had become seized by a rage and he had struck the deceased, the blow being fatal. There is no dispute that the appellant committed this act of violence on Dominic.

Mumbi denied that there was a dispute over land in the way the appellant described it. He had been jealous of land allotted to her. It was not true that the appellant had been reviled by the deceased Dominic or herself.

Either way this evidence needed careful consideration. If the appellant had been hallucinated into dreaming up disputes that could fit with Dr Fazal's evidence as to how he had first found the appellant suffering acute psychosis with some hallucinations. If this defence was true, how could that affect a person with his propensities? The curious feature about Dr Fazal's evidence is that the behaviour of the appellant during the month of May 1983 was not put to Dr Fazal for him to comment upon. His evidence was not relevant to the crucial period. Whether or not there was evidence that the appellant had taken a drug or alcohol, why was his behaviour so strange during the month of May 1983 in particular? It seemed to two of the assessors that the appellant had something wrong with his brain. The third assessor agreed. (We would like to note here that the assessors give opinions orally rather than verdicts – vide section 322(1) of the Criminal Procedure Code.) Their opinions were of special importance. Since the state of the appellant's mind was in some doubt. From that finding and the opinions of the assessors, it seems clear, that although the prosecution had argued that the evidence generally had showed that the appellant was sane, the appellants' insanity at the time of the offence, was a more reasonable conclusion than that he was sane. Had the learned judge set out three possibilities as illustrated by Ellis case, we have little doubt but that the assessors would probably have found on the balance of probability that the appellant was insane at the time he committed the offence. It seems to us that there was a distinct possibility, that the case was decided solely upon the basis, that while the appellant's mind may well have been disturbed, that would result merely in manslaughter, since section 166(1) of the Criminal Procedure Code was never referred to. In view of the apparent misdirection's or nondirections, we set aside the appellant's conviction for manslaughter contrary to section/s 205 of the Penal Code and the sentence of 12 years' imprisonment, and substitute therefore a special verdict that while the appellant is guilty of the act charged he was insane when he did it, in accordance to section 166(1) of Criminal Procedure Code. We understood that the learned state counsel agreed with this conclusion.

Consequently, by virtue of section 166(2) of the Code, the court will report the case for the orders of H E the President and meanwhile order the appellant to be detained in Kamiti Prison, at which prison such further specialist treatment in custody as is necessary may be arranged. The appeal will be allowed to this extent.

December 11, 1985

Nyarangi JA, Platt & Gachuhi Ag JJA