



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(Coram: Kneller, J A Chesoni and Nyarangi, Ag. J A)
CRIMINAL APPEAL NO 77 OF 1983

BETWEEN

OSMAN ABDI MOHAMEDAPPELLANT

AND

REPUBLICRESPONDENT

**(Appeal from a sentence of the High Court of Kenya
at Nairobi (Brar, J) dated June 14th 1983**

IN

Criminal Case 86 of 1980)

JUDGMENT OF THE COURT

Osman Abdi Mohamed, the appellant, asks this court to reduce the sentence of 8 years imprisonment imposed on him on June 14th 1983 by the High Court (Brar, J) in Nairobi, when he was convicted of manslaughter.

He first appeared before the High Court, on July 31 1981, when he was charged with murdering Muktar Sheikh Adan on January 7th 1980, at Tarbay trading center in Wajir district, in the North Eastern Province.

Before he pleaded to it, his advocate, Mr Raballa, asked the court to remand him for examination by a psychiatrist, and the appropriate order was made. He was arraigned on February 19 1982, and pleaded not guilty and remanded for trial, on October 4 the same year, but on that day, the same advocate asked for an adjournment and further remand for the psychiatrist to observe the appellant, until he could prepare a report which included his opinion of the probable state of the appellant's mind on January 7 1980, the date of the alleged murder, which the trial judge ordered.

During 1983, the appellant appeared before the High Court in Nairobi on April 15 and May 6 for the report to be considered but it was not ready, but on the second date his advocate asked for the trial date to be fixed, and June 14 and 15, were allotted for this.

On June 15 1983, the appellant offered to plead to manslaughter and the State Counsel said the Republic submitted that, that was appropriate, in view of the medical evidence. He had read the psychiatrists report. The State Counsel narrated the facts and the appellant agreed they were correct. Muktar Sheikh Adan, was about 7 years old, on January 7 1980, and a nephew of the appellant. He was playing with another

child in the Trading Centre. The appellant struck them with a club and one blow landed on Muktar Sheikh Adan's head and he died of brain damage. The other child survived.

The appellant was about 32, at the beginning of 1980 and 35 when he was convicted and sentenced. He had been in remand for 3 ½ years and had no relevant previous conviction. He pleaded guilty and his advocate conveyed to the court, the appellant's profound remorse. He was unmarried and supported one or more of his parents.

The learned judge, in his note on sentence, considered all this and the fact that, the appellant had killed an innocent child for apparently no reason.

The appellant has not added anything to all that in his memorandum of appeal, or his submissions today, except to submit that the sentence was manifestly excessive in the circumstance, of the case, and to explain that, he pleaded guilty because his advocate advised him to do so and because, although he did not know what happened at the time, people with whom he had been brought up and whom he knew were not liars, told him that he had just killed the child and he believed them.

The consultant psychiatrist was Dr Fazal, who, in his report of October 28 1981, found that, on that date, when he interviewed him, the appellant had no symptoms of any mental illness but he wanted him admitted to Mathare Hospital for observation. He presumed, the appellant suffered occasional bursts of mental illness brought on by chewing and imbibing excessive quantities of miraa, (1 to 2 kilos at a time) which the appellant had confessed to doing. The appellant also claimed, he had had attacks of malaria, which made him lose his reason. He had been treated for one bout with traditional medicines, in 1973.

The father of the small boy was Ibrahim Mohamed Yusuf, who knew the appellant 'behaved like a madman sometimes'. Another relative, Hillow Nur Hussein, who had known the appellant a long time, described him as 'a mentally disturbed person (or) in other words, a madman'.

When he was charged with this alleged murder, by I P Marangu at Wajir, on October 1980, who also cautioned him, the appellant elected to make a reply and said, among other things, "..... Madness overcame me"

The appellant told Dr Wamaya, the Wajir Medical Officer of Health, who examined him there on October 10 1980, that he had a history of mental illness for the previous 7 years but the doctor could not detect any sign of any mental disorder. The appellant had been in remand for 9 months then.

The appellant added to this, in his testimony to the committing magistrate and the Wajir prosecutor did not cross-examine him on it. He explained that, in 1973, he was brought back from Nairobi to Wajir because he was mentally disturbed. Since then, he had been isolated by his relatives at Wajir for the same reason. At times, his mind went blank and he connected it with his attacks of fever.

We do not know whether the psychiatrist wrote a second report, and if he did, what was in it or whether the learned judge, State Counsel and defence advocate, read it, but on the material on record, this was not a case in which a plea of guilty to manslaughter should have been accepted, but a plea of not guilty entered or maintained, and the issue of the appellant's state of mind at the time he is alleged to have killed this child, been resolved.

The learned judge, in our respectful view, exercised his discretion improperly and the consequence is that, the appeal must be allowed, the conviction quashed, the sentence set aside, a re-trial held and the appellant remanded in custody until it begins, and we so order.

Delivered at Nairobi, this 2nd day of February, 1984.

A A KNELLER

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JUDGE OF APPEAL

Z R CHESONI

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AG JUDGE OF APPEAL

J O NYARANGI

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AG JUDGE OF APPEAL

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

DEPUTY REGISTRAR