IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MADAN, POTTER AND HANCOX JJA)

CRIMINAL APPEAL NO 88 OF 1982

MARANDU M'ARIMI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court of Kenya at Meru, O'Kubasu J 31 March, 1982)

JUDGEMENT

The appellant was convicted of the murder of his step-mother Sabela Neiomba w/o M'Arimi.

At the appellant's trial it was proved beyond reasonable doubt, as well as unequivocally accepted and admitted on behalf of the appellant, that the appellant on February 24, 1979 hit the deceased with an axe as a result of which she died, the cause of death being fatal fracture dislocation of the cervical spines. The appellant's defence was under Section 12 of the Penal Code that when he struck the deceased with the axe he was a person of unsound mind. After striking the deceased the appellant ran into a forest where he was found by a posse led by a sub-chief. He told the sub-chief that he had killed the deceased, and asked to be taken where he made a charge and caution statement. He said: "This is true that I hit her. I did not know she could die. That is all." Before his trial the appellant had been examined by Dr Mwanza, the consultant psychiatrist at Mathare Mental hospital, Nairobi. Dr Mwanza testified that the appellant was quite clear in his mind that he had killed his step-mother following a quarrel over a shamba. Although the appellant showed absent-mindedness and question had to be repeated, he claimed that he was often disturbed by dreams of people who wanted to kill him and he got frightened, but he was quite lucid when he committed the offence; he showed a full insight into his crime expected punishment accordingly, though giving a picture of normally he was a case of inadequate personality.

The learned judge said that the only issue before him was whether the appellant was insane when he committed the offence. He appreciated that the burden of proving insanity was on the appellant on the balance of probabilities. Before us the appellant claims that he was, wrongly convicted; in addition the issue of insanity is also before us whether the judge was right in not bringing in a special finding of guilty but insane. If the appellant struck the deceased with the axe truly because of a dispute over a shamba he was capable of feeling and understanding the deceased's arguments in the dispute and also experiencing the emotions of anger and frustration, or either of them, which were the impellent and not an already existing mental disease, which led him to hit the deceased with the axe. His flight to seek refuge from the people first in the forest, and his request to be taken to a police station for reasons of personal safety, were both conscious acts of a balanced mind. His admission is his statement later that he hit the deceased proved that his memory was working normally. His denial that he did not know the deceased would die was a conscious attempt at self exoneration.

Some entirely sane persons are absent-minded, and some also have an inadequate personality. Dr Mwanza said that persons of inadequate personality are likely to commit crimes for no reason but he did not say that the mind of such a person is affected by disease which necessarily makes him incapable of understanding what he is doing, or knowing that he ought not to do the act. There was no evidence which established that the appellant's mind making him incapable of understanding what he was doing, or of knowing that he ought not to do the act. In the opinion of Dr Mwanza the appellant was quite lucid when he committed the offence and expected to be punished for it. He knew what he was doing and he was quite clear in his mind that according to him he had killed his step-mother following a quarrel over a shamba. We think the reference to a quarrel as an afterthought put forward for the reason we have stated, otherwise it would have formed a part of the appellant's statement which he made to the police on the day of the killing.

To establish the defence of insanity it was therefore necessary for the appellant to prove, the onus being upon him but no higher than what we have mentioned, that at the time when he killed the deceased he was -

(a) suffering from disease affecting his mind;

(b) through such disease incapable -

(i) of understanding what he was doing, or

(ii) of knowing that he ought not to kill the deceased. Philip Muswi s/o Musela v R [1956] 23 EACA 622 at p 624.

Mr GBM Kariuki who appeared for the appellant at the trial as well as before us referred to Bratty v Attorney General for Northern Ireland [1963] AC 386 at p 412, Tadeo Oyee v Reg [1959] EA 407 and Reg v Kemp [1957] 1 QB 399 which we have considered.

The evidence in this case fell short of establishing even the probability that the appellant through disease affecting his mind, was incapable of knowing that at the time of doing the act he was incapable of understanding what he was doing or of knowing that he ought not to do the act. His flight into the forest after the killing indicated that he knew what he had done was wrong. The three assessors were also unanimously of the opinion that the appellant killed intentionally and he knew what he was doing.

No provocation came to light in relation to the dispute over a shamba or otherwise.

The appeal is ordered to be dismissed.

Dated and delivered at Nairobi this 18th day April 1983

C.B Madan

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JUDGE OF APPEAL

K.D Potter

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JUDGE OF APPEAL

A.R.W Hancox

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JUDGE OF APPEAL