



REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL CASE NO 434 OF 1972

REPUBLIC.....APPELLANT

VERUS

JEREMANO M'NGAI.....ACCUSED

JUDGMENT

The accused is charged on three counts of murder contrary to section 204 of the Penal Code, all the alleged offences having been committed on 8th June 1972 at Akirang'ondu sub-location in the Meru district of the Eastern province.

Briefly, the prosecution case is that the first-named deceased, Inokobia, was the wife of the accused. In May 1972, she went to the home of her father Geoffrey M'Erimba and told him that the accused had been threatening to kill her with a *panga*. Geoffrey M'Erimba built her a house in his own compound. On 8th June 1972, Geoffrey learnt that his daughter was dead and he saw her body in Meru hospital with a cut wound on her neck. The accused made a cautionary statement to the police, the admissibility of which was not objected to, and in which he admitted having killed his wife.

The second deceased was a young girl, about seven or three years old (her exact age is not clear but it does not matter), named Ncurubi daughter of M'Inyingi, who was not in any way related to the accused. She was at her home with two of her sisters, one named Ncororo, daughter of M'Inyingi, who was then aged eight years, but is now thirteen years old, and the other named Kainda, daughter of Mborio (an adult), when for no apparent reason the accused slashed her on the neck with a *panga* (and killed her as a result), in the presence of her two sisters. The accused also cut Ncororo on her back with the *panga*, but she managed to run and get away from him.

The third deceased was an old man named M'Riburu, son of Riburu. He was also not related to the accused and had happened to be walking together with another old man named Mungania Kaleele when, again for no apparent reason, the accused slashed him on his neck with a *panga* on the same afternoon and caused him grievous injury as a result of which M'Riburu died.

A Dr Patel, who was then the district surgeon at Meru, performed the post mortem examination of the three bodies, and found (in effect) that in each case the death had resulted from the serious injury which he had found on the neck of each of the deceased persons. Dr Patel was no available to give evidence as he had left the country and his reports were admitted in evidence under section 33 of the Evidence Act.

Except for the evidence of Geoffrey, the father-in-law of the accused, the testimony of none of the other prosecution witnesses was challenged. They impressed me as honest and straight-forward persons, and I accept their evidence as true. Geoffrey's evidence was challenged to the effect that his testimony in the preliminary inquiry before the lower court was different. However, I am satisfied that there was clearly

some confusion in what he had told the lower court, and I accept his evidence before me. I am satisfied that his deceased daughter had told him about one month before she met her death in a violent manner that the accused had threatened to kill her with a *panga* and, being frightened of him, she had left his home. This expressed fear of the deceased taken in conjunction with the accused's own cautionary statement, which was not objected to, leaves me in no doubt that the accused caused the injuries to his wife with a *panga*, which resulted in her death, and that those injuries were serious.

As regards the killing of the child Ncurubi, the evidence of Ncororo, a child of tender years, has been corroborated by her elder sister, Kainda. There is also clear evidence of the killing of the third deceased from Mungania Kaleele who had known the accused for a long time. Upon consideration of all the evidence available to me I am satisfied beyond reasonable doubt that the accused slashed all the three deceased individuals with a *panga* and caused them grievous injuries as a result of which they died.

In the normal course of things a person is expected to foresee the natural consequences of his actions, and section 2 of the Penal Code provides that "Every person is presumed to be of sound mind ... at any time which comes in question, until the contrary is proved". But it is the accused's defence that when he committed these acts he was legally insane and, consequently, not responsible for his actions. I now propose to consider whether this defence is tenable in the circumstances of this case.

There is evidence from all the witnesses who had known the accused before the killings on 8th June 1972 that they had never detected anything abnormal in the accused's behaviour. It is true that, in his cautionary statement in which he admits having killed his wife, the accused states that his wife left him because he was mentally sick; but he then goes on to state that he later recovered and then went to see his wife about his property. In his cautionary statement about the killing of Ncurubi he states that he did not know why he had killed her, his head being sick because of *bhang*. In his final cautionary statement, he states that he did not know if he had killed M'Riburu; but that, even if he had killed anybody, he could not know as he had smoked *bhang*. After the killings, the appellant himself went to the chief of his area and informed him that he had killed three persons and injured many others, and that he wished to be locked up. That would indicate that the accused at least knew what he had done.

However, all this evidence has to be considered in conjunction with the evidence of Dr Mustafa, the senior psychiatrist specialist in charge of Mathari hospital. The accused was admitted to that hospital on 2nd April 1973 and remained there until 8th July 1975: a period of more than two years. Dr Mustafa found that the accused was suffering from schizophrenic illness, which is a major mental illness. He was deluded and hallucinated and emotionally he was very flattened, and he had no insight in his own mental state. The three killings had taken place on 8th June 1972; and it was not until 2nd April 1973 (about ten months later) that Dr Mustafa first saw the accused. However, Dr Mustafa was of the opinion that it was probable that the accused was suffering from the same illness in June 1972, and that the accused would know exactly what he was doing but that his judgment to distinguish between right and wrong would be impaired.

The defence of insanity is contained in section 12 of the Penal Code, and, in order to establish this, it is necessary for the appellant to prove that (at the time he killed the three persons) he was (a) suffering from a disease affecting his mind; and (b) through such disease he was incapable (i) of understanding what he was doing, or (ii) of knowing that he ought not to kill the deceased persons (see *Muswi s/o Musele v R* (1956) EACA 622. Accepting Dr Mustafa's evidence, as I do, I find that there exists a probability that at the time of the killings, the accused, because of the disease of his mind, did not know that he ought not kill, although he understood what he was doing.

The onus on an accused person to establish insanity is no heavier than on a party in a civil case on whom is laid the burden of proving a particular issue (see *R v Noormahomed Kanji* (1937) 4 EACA 34, *R v Retief* (1941) 8 EACA 71, *R v Kabande w/o Kihigwe* (1948) 15 EACA 135 and *R v Mwose w/o Mwiba* (1948) 15 EACA 161). Again, it has been stated that the burden of proof resting upon an accused to prove insanity is not as heavy as the burden of proof resting upon the prosecution to prove its case beyond reasonable doubt. It is, generally speaking, sufficient if he produces such a preponderance of evidence as to show that the conclusion that he was insane at the time of the offence is substantially the most probable

of the possible views of the facts (see *R v Kachinga* (1946) 13 EACA 135).

All, the assessors are of the unanimous opinion that the accused is guilty of the acts charged but that at the time of the commission of these acts he was insane. In view of the probability which exists that he did not at the time know that he ought not to have done what he did, in my view also the accused has established that he was legally insane, and I concur with the opinion of the assessors. I also take this opportunity of thanking them for their assistance to me in this matter.

In view of such a finding, normally, I would have proceeded to make a special finding as required by section 166(1)(a) of the Criminal Procedure Code. However, before I proceed to do so, I must deal with two very interesting points which Mr Kariuki, for the accused, has raised. The first point is (if I understand Mr Kariuki correctly) that, since the prosecution had called Dr Mustafa as its witness, upon his evidence as it stood, the accused had no case to answer and should have been acquitted at the close of the prosecution case since the defence of insanity as provided for in section 12 of the Penal Code had become available to the accused. The second point was that, in any event, there was a conflict between sections 12 of the Penal Code and 166(1)(a) of the Criminal Procedure Code and that in the interpretation of statutes, it was the accepted practice that the one dealing with substantive law (as opposed to procedural matters), in this case the Penal Code, should prevail.

I will first deal with the first point. As a general rule, evidence as to an accused's state of mind should be called by the defence and not by the prosecution. This was stated by the Court of Appeal in *Muswi s/o Musele v R* (1956) 23 EACA 622, where it was also directed that the following procedure followed in England and set out in *Archbold's* (33rd Edn) page 20 should normally be followed in Kenya:

Insanity being a matter of defence, the onus of establishing it lies upon the prisoner *R v Oliver Smith* (1910) 6 Cr App Rep 19. The procedure that the defence should call any witness whose evidence is directed to that issue should be strictly followed, the duty of the prosecution being limited to supplying the defence with a copy of any report of statement of any prison medical officer who can give evidence on that issue and to making such person available as witness for the defence; *R v Casey* (1947) 32 Cr App Rep 91. Where evidence to establish insanity has been called for the defence, the prosecution may call rebutting evidence; *R v Smith* (1912) 8 Cr App Rep 72. And where it is clear from the cross-examination of witnesses for the prosecution that the defence of insanity will be raised, and it is ascertained that no evidence will be called to establish this defence, the Crown may, before closing its own case, call evidence to negative insanity; *R v Abramovitch* (1912) 7 Cr App Rep 145.

In the present case, Dr Mustafa was called by the prosecution to give evidence under unusual circumstances. He had in fact been made available as a witness at the request of the defence. However, he had travelled from Nairobi especially to give evidence in this case and was in a hurry to get back to a lot of outstanding work he had in Nairobi. In fairness to him and to the defence, the state counsel decided to call him as his first witness and in doing so, in my view, he acted quite properly in the peculiar circumstances of this case.

While the fact remains that Dr Mustafa was a prosecution witness, in my view the issue posed by Mr Kariuki should be considered in its wider perspective. If insanity as a complete defence is available to the accused at the close of the prosecution case, why should it not be available to him at the close of the defence case where the provisions of section 12 of the Penal Code are no less applicable? Mr Kariuki has referred me to *Uganda v Matte* [1974] EA 575 in which it was held that, by accepting the defence of insanity, the prosecution must be taken to have abandoned its case and accordingly the accused's guilt had not been proved. With respect to the judge who decided that case, it would appear (and as is stated in the editorial note in the law report of that case) that the Court was misled by the special procedure in Uganda whereby a legally-represented accused can agree with facts and documents. In any event, as pointed out by Mr Etyang, under the Ugandan decree if an accused is found to be insane when he committed the acts complained of, a special finding to the effect that the accused is not guilty of the act or omission charged by reason of insanity has to be made, while in Kenya the special finding is to the effect that the accused is guilty of the act or omission charged but was insane when he did the act or made the

omission.

As to the second issue raised by Mr Kariuki, which is clearly connected with the first issue, section 12 of the Penal Code does not give an accused person a complete defence to the charge against him. All it provides is that if the accused is insane at the relevant time, he is not criminally responsible for the act committed. The section does not lay down that the accused should be held to be not guilty or is entitled to an acquittal. The same word “responsible” is used in section 166 of the Criminal Procedure Code and in my view there is no conflict between the two sections. All that section 166 does is to lay down the procedure which is to be followed when an accused person is held not to be responsible for his acts due to insanity. It matters not if he is held not be responsible for his acts at the close of the prosecution case or at the close of the defence. It was clearly the Legislature’s intention that such legally-insane persons should not be sentenced in the normal manner but should be dealt with appropriately taking into account their mental disabilities. It is common sense that the Legislature did not intend to provide them with insanity as a complete defence and then let them loose on the public without any safeguard. In the instant case, while Dr Mustafa is of the opinion that the accused has made tremendous progress since 1973, he has not ruled out the possibility of the disease recurring if the accused is subjected to further stresses and strains (as undoubtedly he would be when he returns to the society in which he committed these terrible acts). There can be no doubt that the appropriate authorities would and should ensure that the accused is capable of living the life of a normal law-abiding citizen before considering his release.

In view of my findings as aforesaid, I consider that it is a fit and proper case in which I should make the special finding under section 166(1)(a) of the Criminal Procedure Code that the accused was guilty of all the three acts charged against him in the three counts of the charge but was insane when he did the acts, (see also *Jama Warsama v R* (1950) 17 EACA 122). Under section 166(1) (b) of the Criminal Procedure Code this case shall be reported for the order of His Excellency the President and in the meanwhile the accused shall be kept in custody.

Order accordingly.

Dated and delivered at Nyeri this 26th January 1977.

S.K Sachdeva

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JUDGE