



WC v Republic (Criminal Appeal 78 of 2018) [2023] KECA 597 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 597 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 78 OF 2018
F SICHALE, FA OCHIENG & LA ACHODE, JJA
MAY 26, 2023

BETWEEN

WC APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Eldoret
(G. W. Ngenye, J.) dated 7th July, 2015 in HC.CR.C. No. 28 of 2007)*

JUDGMENT

1. WC, “the appellant” was charged in the High Court at Eldoret, with the two counts of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars in the information were that on February 20, 2007 at Kapkoiwo Location in Baringo North District, within Baringo County, the appellant murdered DJD “1st deceased” and JD “2nd deceased” respectively.
3. It is worth noting that from the onset of the trial, the appellant’s mental status could not be ascertained. When the matter first came up for plea taking on July 26, 2007 the appellant was found unfit to plead. Several medical reports were submitted to the court and the appellant was still unfit to stand trial. This was the case until July 10, 2013 when plea was taken.
4. The appellant denied the charges and his trial soon thereafter ensued. In a bid to prove its case against the appellant, the prosecution lined up a total of 7 witnesses. Their testimonies were as follows:
5. According to PW1, on February 20, 2007 he heard screams and rushed to where they were coming from. He found a crowd had formed around the place where three people were lying on the ground and the appellant stood over them holding a panga. The appellant tried to attack him as well but with the aid of one Ambrose, they were able to disarm him and tied him down with ropes. He stated that he had known the appellant as a normal person.



6. PW2 stated that on the material day he heard screams from the home of David Cheptumo. He rushed there. He found the appellant with a panga. The woman of the home and two children were lying down on the floor. The children were already dead. The appellant put the panga down and PW2 arrested him by tying him down with ropes.
7. PW3 witnessed the post mortem exercise.
8. PW4 heard a woman screaming, on the day of the incident and rushed there. He found the appellant holding a panga and two children lying down on the ground. The mother of the children was also lying down on the ground. She had a cut wound on the back and was bleeding. She could not talk. He stated that he had known the appellant since childhood. He testified that the appellant occasionally became mentally ill.
9. PW5 was the appellant's mother. She stated that the appellant went to the home of the deceased to ask for food. When he was denied food, he attacked the children with a panga, resulting in fatal injuries. She testified that the appellant had a mental illness and was so sick at the time of the murder.
10. According to PW6, the appellant went to her home and started cutting iron sheets into pieces using a jembe. He then removed a panga and hit the 2nd deceased on the face. In her efforts to rescue the 2nd deceased, she was cut on the head. She fell down and the appellant cut her on the shoulder. She was also carrying the 1st deceased who was cut in the midst of the chaos. Both children suffered fatal injuries. The appellant was her brother in-law whom she had known for a long time. She was not aware he suffered from a mental illness.
11. PW7 conducted the post-mortem. The results of the post-mortem reveals that both the deceased died of massive intracranial haemorrhage secondary to cut wounds. PW7 also examined the appellant on March 19, 2007. The appellant was unkempt and looked mentally disturbed and he was disoriented with pressure speech. His judgment and concentration was also poor. He directed that the appellant be seen by a psychiatrist. The psychiatrist, Dr Omar Ali observed that the appellant had a history of schizophrenia and he was at the time declared unfit to plead.
12. When the appellant was found to have a case to answer, he gave an unsworn testimony. He denied committing the offences he was charged with. He stated that on the material date he was nowhere near the home where the murders had occurred. He only came to learn of the same when he was informed by some people that he had killed somebody.
13. The court noted that at the time of his testimony the appellant appeared unresponsive to the issues at hand and could not comprehend what went on.
14. The trial court in evaluating the evidence observed that the death of the deceased was not in doubt as the children had been cut to death in the presence of PW6. PW1, PW2 and PW4 all confirmed that the deceased were cut with a panga which the appellant was still holding when they arrived at the scene. The evidence of PW1 was corroborated by that of PW2 and PW4. There was no doubt that it was the appellant who inflicted fatal injuries on the deceased. The deaths of the deceased were confirmed by PW7 to have been as a result of the cut wounds.
15. As regards malice aforethought, PW7 corroborated the evidence of PW2, PW4 and PW5 that the appellant had a history of mental illness. This was also verifiable from the various medical reports which indicated that the appellant was unfit to plead or to stand trial. The trial court noted that under the provisions of Section 206 of the Penal code, it was doubtful whether the appellant had malice aforethought when he assaulted the deceased. The court further noted that it could not be ruled out



- that the appellant was insane. The court held that the appellant was not possessed of the mens rea to commit the act.
16. Guided by the provisions of section 12 of the [Penal Code](#) and Section 166(1) of the [Criminal Procedure Code](#), the learned Judge found that the appellant was guilty of murder in respect of the two counts and he was accordingly convicted. The learned Judge also held that the appellant was insane at the time of commission of the offence. The appellant was to be held at the pleasure of the president pursuant to Section 166(2) of the [Criminal Procedure Code](#). In the meantime, the appellant was to be held in custody at GK Prison Eldoret.
 17. Aggrieved by the decision of the trial court, the appellant lodged the present appeal in which he raised five grounds to wit; that the learned Judge erred in law by convicting the appellant on the grounds that he; possessed the intention to commit the alleged offence without considering that the element of malice aforethought was not proved beyond reasonable doubt; be held at the President's pleasure without considering that he was driven by the heat of passion and anger when he was denied food by the deceased; be held at the President's pleasure without observing that the doctor had declared him unfit to plead and stand trial; the prosecution case was not proved beyond reasonable doubt; and rejecting his defence without giving reasons as provided for by section 169(1) of the [CPC](#).
 18. At the hearing of the appeal, the appellant was represented by Mr Kosgei whereas the respondent was represented Ms Okok. Counsel relied on their written submissions.
 19. The appellant submitted that the ingredients necessary to prove murder were cited in the case of [Anthony Ndegwa Ngari v Republic](#) [2014] eKLR. However, the only issue in dispute was whether the appellant had malice aforethought.
 20. Counsel pointed out that the court noted that the appellant appeared not to be able to comprehend what went on. He submitted that at the time of the act, the appellant was insane and he did not know what he was doing and he was therefore, not criminally liable for the act committed as provided for under sections 12 and 9(1) of the [Penal Code](#).
 21. Counsel concluded by stating that the offence of murder cannot be committed where it is proved that there is no malice aforethought during the commission of the offence. Conviction and sentence in such cases is unlawful. The learned judge ought to have found the appellant not guilty and set him at liberty.
 22. Opposing the appeal, counsel submitted that it was not in dispute that the appellant committed the offence. What was in dispute was the appellant's mental state at the time the offences were committed. She relied on the [M'Naghten rule in Queen v M'Naghten](#), 8 Eng. Rep. 718 [1843] in submitting that the appellant could not have been said to have been insane at the time the offence was committed. She contended that the evidence of PW6 pointed out that the appellant was not always sick but was sick occasionally especially when he failed to take his medication. The same witness stated that she had never seen the appellant exhibit any mental illness for the time she had known him. She also confirmed that the appellant might have suffered interludes of mental sickness.
 23. Counsel stated that the evidence of PW5 was clear that the appellant had the intention to commit the offence when he got angry after he was denied food by PW6. She concluded by stating that the appellant was at the time of committing the offence in-charge of his full faculties and should not be allowed to hide behind the veil of insanity. She urged this Court to substitute the finding for guilty but insane to that of guilty as charged and proceed to mete the appropriate sentence. (See: [BGKM v R](#) [2015] eKLR).
 24. We have carefully considered the record, submissions by counsel, the authorities cited and the law. The issues for determination are; whether malice aforethought was proved as is closely intertwined with



whether the appellant could be convicted of murder within the meaning of Section 203 of the [Penal Code](#) and whether the special finding under Section 166 amounts to sentence?

25. Section 203 of the [Penal Code](#) under which the appellant was charged provides that:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

26. To sustain a charge under the said provision, the prosecution had to prove beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and that such an unlawful act or omission was committed with malice aforethought.

27. Having set out the elements of murder as set out in Section 203 of the [Penal Code](#), the learned Judge was satisfied that the first element, the actus reus, was proved against the appellant beyond any reasonable doubt.

28. As regards malice aforethought, the mens rea, the learned Judge relied on the overwhelming evidence on record by the prosecution witnesses as was corroborated by the medical evidence adduced by PW7; and the state which the appellant was in at the time of giving his statement of defence, to conclude that the appellant was not possessed of the mens rea to commit the act and was therefore, incapable of understanding what he was doing when he killed the deceased.

29. The evidence adduced was that, upon his examination of the appellant, it was apparent to PW7 that the appellant, from his conduct was not normal. He directed that the appellant be taken for further evaluation by a psychiatrist. The psychiatrist confirmed that the appellant was indeed mentally unstable and unfit to plead. There were several other medical reports made to court with the same conclusion; that the appellant was mentally unfit. This was the main reason for the delay in the taking plea in this case until 2013 when the appellant was certified by another psychiatrist to be fit to plead.

30. Guided by Section 166(1), the learned Judge found that the appellant had indeed committed the act charged but that at the time of so doing he was insane so as not to be responsible for his actions. The learned Judge proceeded to make a special finding to the effect that the appellant was guilty of murder but was insane at the time. (See: [BGKM](#) (*supra*)).

31. From the record, we have no doubt in our minds that the appellant suffered from a mental illness, particularly schizophrenia, at the time he committed the offence.

32. Section 11 of the [Penal Code](#) presumes every person to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved. In the present appeal, there is overwhelming evidence on record that the appellant was mentally unfit.

33. The [M’Naghten](#) Rule (*supra*) was codified into Section 12 of the [Penal Code](#).

The rule states:

“ A criminal defendant is not guilty by reason of insanity if, at the time of the alleged criminal act, the defendant was so deranged that she did not know the nature or quality of her actions or, if she knew the nature and quality of her actions, she was so deranged that she did not know that what she was doing was wrong.”



34. Section 12 provides thus:

“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

35. Similarly, Sections 13(2)(a)(b), 14 and 16 also provide for instances where certain criminal acts or omissions are excusable on account of lack of criminal intention.

36. In the present case, it is common ground that the appellant killed the deceased. It is also common ground that he was not criminally responsible for his acts or omissions as a result of the disease (schizophrenia) that had impaired his mental faculties of reason, judgment, memory and understanding. The trial court held that malice aforethought was not proved and that the action of the appellant striking the deceased with the intention to kill could not arise since the appellant did not possess the mens rea. The learned Judge nonetheless found the appellant guilty but insane. The learned Judge proceeded to make a special finding under section 166 of the CPC that the appellant be held at the President’s pleasure.

37. Section 9(1) of the Penal Code provides that:

“a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident”.

38. Section 166 (1) which provides that:

“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 to be responsible for his 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.”

39. This Court in the case of PIM v Republic, Criminal Appeal No 91 of 1981, observed that there can be no conviction when clearly the accused person was suffering from a disease of mind within the M’Naughten Rules, hence the special finding of “guilty” but insane. The court stated that:

“In our view the Presidential order for the detention of a person in respect of whom a special finding is made is not punitive but is preventive. And that is because it is detention for safe custody for an indefinite period, and not imprisonment for a fixed term...”

...We are of the opinion, however, that in the law of Kenya, as in the law of England, the verdict upon a criminal charge must be a conviction or an acquittal, and there is nothing in



between. If the accused is found guilty of the offence charged, he is convicted. If the accused is found “guilty” only of the act charged, as on a special finding, or not guilty of the offence charged, the effect is the same, for the accused has not been convicted of the offence charged.

We would not object to the special finding or verdict being referred to as “technically an acquittal”, See Smith and Hogan, Criminal Law, 4th Edition, page 176, but it is an acquittal.

Accordingly, in our judgment, no appeal to the Court of Appeal from the High Court lies under section 379 of the Criminal Procedure Code in respect of a special finding under section 166 of the Code, and a special finding is not a conviction, but is an acquittal.”

40. Similarly, this court in the case of *KCK v Republic* [2016] eKLR when faced with comparable facts had this to say:

“The question we ask in order to understand the import of a special finding is whether it amounts to a “conviction” for the act charged as suggested by Mr. Monda. In the case of *Felstead v Rex* (1914) AC 534, the House of Lords unanimously held that the special finding was one and indivisible and was in fact a verdict of acquittal and not a conviction notwithstanding the use of word “guilty” in the relevant section. Lord Reading explained that;

“It is unfortunate that this word (“guilty”) is there used, as it suggests the responsibility for criminal act. If the requirement under the Act had been merely to find that the accused did the act, instead of that he was guilty of the act, there could have been no room for doubt that such a verdict was not a conviction, but was an acquittal”

41. It is trite that an act constituting an offence of murder does not make a person guilty unless the mind is also guilty. For an act or omission to constitute the crime, there must be actus reus and mens rea. The prosecution is required to prove both the presence of the unlawful cause of death and malice aforethought in order to sustain a conviction for murder under Section 203.
42. The finding of “guilty” under Section 166(1) on the other hand is used only as a confirmation that the appellant was indeed the person who caused the death; that he was the person to blame for the death, but this confirmation does not include the mental state with which he did the act. The special finding is then treated as an acquittal because one essential element for the commission of the offence of murder contrary to section 203 is absent.
43. We therefore find that the special finding under Section 166 is neither a conviction nor a sentence. It cannot amount to a conviction because insanity is recognized in law as an illness requiring treatment and not punishment. When detained at the President’s pleasure the accused is considered a patient and not a prisoner. The learned Judge, therefore properly found that there was no malice aforethought because indeed that was the fact.
44. In the end, we find no substance in the appeal and the said appeal is accordingly dismissed.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF MAY, 2023.

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F. SICHALE
JUDGE OF APPEAL

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F. OCHIENG
JUDGE OF APPEAL

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L. ACHODE
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

