**Wechuli v Republic (Criminal Appeal 16 of 2021)**
**[2023] KECA 1125 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1125 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CRIMINAL APPEAL 16 OF 2021**

**AK MURGOR, MSA MAKHANDIA & GWN MACHARIA, JJA**

**SEPTEMBER 22, 2023**

**BETWEEN**

**GEOFREY WANJALA WECHULI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit, J.) delivered on 8th March 2017 in CRIMINAL CASE NO. 104 OF 2013)***

## JUDGMENT

1. The appellant was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on 20th October 2013 at Kawangware, Gatina area within Nairobi County, he murdered Jane Kadogo Mutiso.

2. The appellant pleaded not guilty and upon trial, he was found guilty and sentenced to suffer death.

3. Aggrieved, he has now preferred this and perhaps the last appeal to this Court. He has raised 6 grounds of appeal in a home-made memorandum of appeal which were later amended in a supplementary memorandum of appeal dated 13th December 2022 to one ground, being; that the learned Judge erred in law by failing to properly consider his mental state during the commission of the offence.

4. The case for the prosecution was anchored on the evidence of eleven witnesses. PW1, Lydia Olesi Okonji, testified that she knew the appellant as a neighbour and a traditional healer. On 20th January 2013 she heard the appellant telling the deceased to kneel down and ask for forgiveness. She peeped through a crack in the door and saw that both were naked. The appellant then told the deceased to close her eyes whilst holding a knife in his hand. She went and told her mother PW2, Damaris Atek Okonji what she had seen. Soon after, the appellant left the house with his children. This prompted PW1 and PW2 to go and peep through the door again. Using a torch, they were able to see a leg and

thus called PW3, Christopher Anyone, the watchman who called the landlord's son PW5, Njenga A. Njuguna and flashed a torchlight through a hole in a broken window pane and saw the legs too. He broke the padlock and on entering into the house found a naked body of a woman who was headless. The stomach was cut and the intestines exposed. There was a knife next to the body traditional healer like paraphernalia at the corner of the house. They went to Muthangari Police Station where they reported the incident.

5. PW4, Joseph Mutiso Nguli, the deceased's father identified the head as that belonging to his daughter. PW6, Brian Muchesia testified to ferrying the appellant who was in the company of a woman to his house on the material day and two days later he learnt that a woman had been murdered in the appellant's house.

6. PW7, Dr Georgina Wangui Kamunge, a consultant Psychiatrist examined the appellant on 12th November 2013 as regards his fitness to plead. After the examination, she concluded that his mental state was normal and therefore fit to plead. She further stated that the appellant's father had claimed that the appellant suffered a mental illness while he was 12 years old but the same had been cured through traditional methods.

7. PW8, PC David Kipchumba attached to Scenes of Crime, Kasarani visited the scene on 22nd October 2013. He observed a deceased body which was beheaded and the head placed in a basket, stabbed in the stomach and the head was placed in a basket; there was a calabash and ritual materials, being a feather, twigs and sorghum stick. Beside the body there was a knife with blood stains. He took photographs of the scene which he produced in evidence alongside a certificate for processing the photograph prints. PW9, Dr. Henry Kipto Sang, a Government analyst based at Government Chemist laboratories in Nairobi, testified that on 25th October 2013 he received some items, being a knife, blood sample for the deceased, and a buccal swab sample from the appellant. He analyzed them and found that the knife was moderately stained with human blood which matched the DNA profile generated from the deceased.

8. On 21st October 2013, PW10, SGT Silas Kubai was accompanied by PC Kisemba to Muthangari Police Station where they met Sgt Kiia who was the initial investigating officer. He was handed over a knife which had blood stains, a small gourd, a basket with feathers, which items Sgt Kiia had recovered from the murder scene. They then escorted the appellant to their offices where they preferred the charges against him. On 23rd October 2013 he revisited the scene with Cpl. Shukri where he drew a rough sketch plan. On 24th October 2013 he escorted the appellant to the police surgeon for examination. On 25th October 2013 he witnessed the post mortem exercise which was conducted by Dr. Njeru at City Mortuary. The doctor, who did not testify formed the opinion that the cause of death was neck and abdominal injuries due to sharp force trauma. He also collected blood samples which were subjected to DNA analysis. PW10 adduced the Post Mortem Report in evidence.

9. PW11, Violet Nangida Wanjala, the appellant's daughter aged 13 years gave a sworn testimony after a voire dire examination. She testified that in the year 2013 she was living with her younger brother aged 8 years and her father, the appellant. The appellant used to work as a traditional healer and used to treat people inside the house. On 20th October 2013, the appellant came with a woman and they went to the bedroom to sleep. Later, he called her to give him a knife and after sometime he woke her and her brother and told them to go out. The visitor did not go with them. He took them to the bus station and told them to go to their mother's place in Kibera as she was sick with malaria.

10. After the close of the prosecution case, the appellant was placed on his defence and he gave a sworn testimony. He stated that he used to heal people using traditional medicines. He stated that he was with the deceased on 20th October 2013 whom he had known for four months as his girlfriend, and he intended to marry her. As they were making love that evening, he felt tired and nauseated but the

deceased insisted they continue. He felt pain and lay on her chest whereupon the deceased's voice changed to that of an epileptic person. He then saw a big hand coming towards him and himself holding a big knife which he used to cut it. He saw himself in a desert, a corrugated house and light, and on looking down he saw a vision of a headless body and thereafter the head in his hand. When he came to, he actually saw he had a head in his hand. He threw it where his paraphernalia was, and then told his children that they should go away. On the way he felt the smell of alcohol and was nauseated. On reaching his house, he saw a big crowd. He was told by a woman that "guka ameua mtu" meaning that "the grandfather has killed somebody". He told a bodaboda (motorcycle) man to take him to Muthangari Police Station. He showed police his hands which had blood on them. He was later transferred to Kabete Police Station then to the police surgery and Mathari Hospital for mental assessment. The police surgeon recommended treatment of his private parts which were injured. He went on to state that sometime in 1986, he was a mental health patient, but he was treated traditionally and was cured. According to him, if he was in his right mind, he would not have murdered the deceased. He pleaded that he had no intention of committing the offence.

11. The trial court (Lesiit, J.), (as she was then), held that all the circumstances, portrayed a man who knew exactly what he was doing, from asking for a knife, relocating his children in the wee hours of the morning and surrendering himself to the police. His intention to cause death was quite obvious. Further, he had not established the defence of insanity on a balance of probabilities. The court proceeded to convict him, sentencing him to suffer death.

12. When the matter came up for virtual hearing before us on the 19th December 2022, learned counsel, Mr. Mutiso appeared for the appellant while learned prosecution counsel, Mr. Muriithi appeared for the respondent. They both relied on their filed submissions dated 14th December 2022 and 27th October 2022 respectively.

13. We have carefully considered the record of appeal, submissions by the counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty as a first appellate court which was well articulated by this Court in *Erick Otieno Arum v Republic* [2006] eKLR as follows:

> "It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same"

14. As to proof of the offence charged, the appellant was charged with the offence of murder. Section 203 of the *Penal Code* provides for the ingredients of the charge of murder to include, the fact and cause of the death of the deceased person; that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; and that such unlawful act or omission was committed with malice aforethought.

15. The fact and cause of the death of the deceased are not in dispute in this case. Indeed, we need not belabor on the first two ingredients, as the appellant does not deny committing the offence, rather he asserts that he lacked culpability based on his mental illness. This is also an issue he also raised in his defence, stating that he did not intend to kill the deceased save for his mental illness. The only issue for our determination therefore, is whether the appellant's defence was cogent and plausible.

16. The law is settled that, the defence of insanity is an affirmative defence that exculpates an accused person from any criminal liability if it is established that at the time of the crime, the accused person did not appreciate the nature, quality or wrongfulness of his actions.

17. The doctrine of the presumption of sanity is provided for under section 11 of the *Penal Code* as follows:

> Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.

18. In our jurisdiction, defence of insanity is a defence to a criminal charge under section 12 of the *Penal Code*. It provides as follows:

> 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.

19. In dealing with section 12 of the *Penal Code*, this Court in *Leonard Mwangemi Munyasia vs. Republic* [2015] eKLR stated that:

> Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under section 167 (1) (b) of the Criminal Procedure Code he would be convicted and ordered to be detained during the President's pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.
>
> ... The test is strictly on the time when the offence was committed and no other."

20. From the foregoing, it is clear that every accused person is presumed to be of sound mind unless the contrary is proved.

    Therefore, if an accused person is to advance the defence of insanity, he/she must demonstrate that at the time of the commission of the act, he/she was labouring under a disease of the mind which prevented him from knowing that what he/she was doing was wrong.

21. Ultimately, the burden of proving this fact squarely lies on the accused person. The appellant having alluded to the fact that at the time he murdered the deceased, he was labouring from a disease of the mind means that the burden was upon him to show that the disease prevented him from knowing that it was wrong to kill the deceased. In settling this principle, this Court in *C N M vs. Republic* [1985] eKLR stated 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 not have formed the intent to kill the deceased.

22. The appellant argued and placed reliance on the testimony of Dr. Georgina Wangui Kamunge (PW7) and his father who provided his health history, indicating that he suffered from a mental illness when he was at the age of 12 years.

23. A perusal of the court proceedings shows that PW7 testified that she evaluated the appellant on 12th November 2013 who was well groomed, had no abnormal mannerisms at the time, no perception of disturbances, was in a normal mood with appropriate and coherent speech, was well oriented in time and place, good recent and remote memory, good concentration, normal mental state and was fit to plead. Immediately after her testimony, Mr. Konga, counsel for the State made an application to have the appellant taken for further examination, which application was allowed.

24. It would appear that the said mental examination never took place and when the matter came up for mitigation Mr. Ochako, learned counsel for the appellant sought to arrest the judgment on the ground that the mental examination conducted by PW7 was not complete or conclusive. The trial court in its ruling denied this application on the ground that the appellant's counsel had previously adamantly opposed the prosecution's similar application, thus the application coming too late in the day was an afterthought.

25. As already stated above, it is trite that insanity would only be a defence if it is proved that at the time of the commission of the offence, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he was committing or was incapable of knowing that what he was doing was wrong or contrary to law. The test is strictly about the time when the offence was committed and no other.

26. PW11, the appellant's daughter gave a graphic chronology of the events that led to the death of the deceased. She testified that it was the appellant who asked her to pass the knife, which was the murder weapon to him which she did and went back to bed. PW1 testified that she saw the deceased kneeling down in front on the appellant who was holding a knife and was asking her to ask for forgiveness. Immediately following the incident, the appellant woke them up and escorted them to catch a vehicle to their mother's place, averring that she was not feeling well. Upon returning to his residence and finding a crowd, he took himself to the police station and surrendered. It is notable that, after PW1 saw what was happening and went to call PW2, they returned to the scene only to see some legs on the floor of the house. As fate would have it, after the house was broken into, the beheaded lifeless body of the deceased was found lying on the floor.

27. We ask ourselves one question: Are these the actions of a person who did not know what he was doing? We think not. The appellant was still cognizant and conscious enough to know what he was doing and that it was wrong. His actions after beheading the deceased betray him all the more. He evacuated his children from the scene. He also surrendered himself to the police. Of course, he did this because his conscience reflected that he had killed the deceased and probably would have been lynched by the crowd. The insinuation that he suffered from a mental illness when he was 12 years old remains nothing more than a mere unsubstantiated statement. He failed to produce any medical records or evidence to prove previous alleged medical illnesses. The allegation that he may have suffered from a mental illness in 1986, some 27 years before the instant incident is not proof of his mental status as at the time of the commission of the offence. Furthermore, his assertion that he was mentally ill was rebutted by PW7 who stated that he had no mental sickness before he took the plea. We accordingly find and hold that he was mentally fit when he killed the deceased. This leads us to the inescapable conclusion that we must reject this ground of appeal.

28. From the evidence on record we are satisfied beyond any reasonable doubt just like the trial court that the amount of force used in viciously attacking the deceased with a knife was only meant to serve one purpose; to kill the deceased. In effect, malice aforethought was demonstrated by the nature of the attack meted out on the deceased. We are therefore satisfied that the prosecution proved their case against the appellant beyond reasonable doubt. In the circumstances, we are equally satisfied that the learned Judge correctly directed herself as to the evidence on record and the law in finding the appellant guilty of murder. The appeal against conviction is therefore without merit and is dismissed.

29. On sentence, the appellant was sentenced to suffer death. The trial court while sentencing the appellant considered the circumstances under which the offence was committed. The deceased was viciously attacked without any provocation. She died in the most bizarre manner which to our minds constituted an aggravating factor to warrant a stringent sentence. Accordingly, there is no basis to warrant our interference with the sentence meted by the trial court.

30. In the upshot, we find that the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**.....**

**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**