



REPUBLIC OF KENYA



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**MMK v Republic (Criminal Appeal 113 of 2020)
[2023] KECA 1395 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1395 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 113 OF 2020
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA
NOVEMBER 24, 2023**

BETWEEN

MMK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of the High Court at Machakos (B. Thurania, J.) delivered on 23rd March 2016 in HCCRA No. 11 of 2007)

JUDGMENT

1. The appellant, MMK was charged with the offence of murder contrary to section 203, as read with section 204 of the *Penal Code*. The information stated that on the 12th February, 2007, in Makueni District within the former Eastern Province, he murdered MM (the deceased).
2. At the commencement of the trial on 20th March 2007, counsel for the prosecution by way of an application requested the court to ascertain the appellant's soundness of mind under section 162 (1) of the *Criminal Procedure Code* and for the court to appoint an advocate for him under section 162 (2) of the *Criminal Procedure Code*. The trial judge ordered that the appellant be sent to Mathari Mental Hospital (currently Mathari National Teaching and Referral Hospital) for psychiatric examination, and for a report to be presented to the court.
3. When the matter was mentioned on 7th February 2008, Dr D. A Kokonya presented a report dated 16th January 2008 indicating that the appellant was not in any position to plead in a court of law. The trial judge postponed the trial and ordered that the appellant receive treatment until such time that he could plead. The appellant who was represented by learned counsel, Makau Mutua was detained in safe custody and again referred to Mathari Hospital.



4. On 14th July 2008, the prosecution notified the court that it intended to proceed with the case against the appellant pursuant to the provisions of section 163 (2) of the *Criminal Procedure Code*. Prior to commencement of the trial, the court ordered that the appellant be subjected to another medical examination to confirm his mental status. On 31st January 2010 pursuant to a medical report from the hospital, the appellant was declared fit to stand trial, and the proceedings commenced.
5. The prosecution called 4 witnesses and thereafter, the appellant was placed on his defence. Upon considering the evidence in a judgment dated 23rd March 2016, the trial court made a special finding that the appellant was guilty, but insane and ordered that he remain in custody and a report be made to the President in accordance with section 166(2) of the *Criminal Procedure Code*.
6. Aggrieved by the High Court's decision, the appellant filed this appeal on grounds that the learned judge; failed to evaluate the evidence as a whole and as a result reached a decision which was not supported by the evidence; failed to find that the prosecution evidence was inconsistent and contradictory; failed to reach an independent conclusion on the burden of proof and in shifting the burden onto the appellant; in convicting him on the evidence of a single identifying witness; failing to find that the prosecution did not call two crucial witnesses to testify; in convicting and sentencing the appellant without observing that the entire prosecution case was impeachable under section 163(1) of the *Evidence Act*; and in failing to consider his defense.
7. Both the appellant and the respondent filed written submissions. When the appeal came up for hearing on a virtual platform, learned counsel Ms. Kerubo holding brief for Mr. Arati for the appellant briefly highlighted the appellant's submissions. It was submitted that NMM, PW1 (N) who was called as an eye witness stated that she did not know what happened to the deceased; that none of the persons she named as having been present at the scene were called to corroborate her evidence which was fatal, as they were crucial witnesses.
8. It was further submitted that N did not give a clear account of the events pertaining to the deceased's death; that she did not state where the deceased was injured, or the murder weapon was used, or whether it was the door that fell on him that killed him; that essentially, N's evidence was merely hearsay. In addition, it was submitted that the prosecution relied on circumstantial evidence that was not sufficient to sustain a conviction.
9. Counsel further submitted that none of the ingredients for the offence of murder were proved; that no motive or malice aforethought for the alleged murder was established; that the court disregarded the appellant's evidence that he was a witness to the child's death; that since the prosecution was unable to lead evidence to show what happened to the deceased, the court wrongly convicted him on insufficient, contradictory and unreliable evidence and therefore the prosecution did not prove its case beyond reasonable doubt.
10. Counsel finally submitted that the appellant was sentenced under section 166 which provision was declared unconstitutional by the High Court, and therefore should not have been applied to the appellant in this case.
11. Mr. Okachi, learned prosecution counsel for the State opposed the appeal and submitted that the appeal was based on the defence of insanity of the appellant; that the prosecution had proved its case to the required standard and the evidence pointed to the appellant as the person who murdered the deceased; that he had an opportunity to mitigate and was acquitted due to insanity; that therefore the sentence should be upheld.



12. We have considered the appeal and the parties' submissions. This being a first appeal, this Court is mindful of its duty that was well articulated in the case of *Erick Otieno Arum v Republic* [2006] eKLR thus;

“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”

13. Guided as such, we consider that the issues that fall for determination, are;

- i. whether the offence of murder was proved to the required standard
- ii. whether crucial witnesses were not called;
- iii. whether there were contradictions and inconsistencies in the prosecution's case;
- iv. whether the appellant's defence was taken into account; and
- v. whether the sentence meted out is manifestly harsh and excessive owing to the appellant's mental status.

14. To address the issues raised, it is necessary to set out the context in which they arise. N PW1 testified that the appellant was married to NMM, her daughter who died in March 2008. They were blessed with two children, M and M, and that M is the deceased who was killed by the appellant.

15. On 12th February, 2007 at about 11.00 a.m, she was at M's, the appellant father's home where she had gone to visit her grandchildren. On arrival, the appellant told her to join his mother at a nearby school. She went to the school accompanied by M, but his mother told her to return home and wait for her. At the home, the appellant had locked himself, M and M in the house. She was with KM when they heard M screaming inside the house. When they tried to open the door, the appellant pushed it back, to keep it closed. K then kicked the door, and M fell on top of it. The appellant who was inside then ran away. M also came out of the house. When they checked the deceased, he was dead.

16. She reiterated that when they left for the school, they left M with the appellant and he was fine. After the appellant ran away, people heard her screams and chased him. He was apprehended where he went to hide about 70 metres away. N confirmed that the appellant was married to her daughter for 8 years before her death. She was not aware of his mental status.

17. In cross examination, she stated that she was at the scene when the door was opened, but could not tell what had happened to the deceased.

18. Dr. John Mutinda, PW2, a pathologist was requested by the OCS, Mbooni to perform a post mortem on the body of the deceased on 12th February, 2007. Phoebe Ndulu Muinde, PW3, Peter Mbuli and PC. Francis Muigai identified the body. His observations were that the clothing a green shirt and shorts were blood-stained, and externally he had a severed trachea at the major vessels of the neck. Internally, the trachea was severed and the external jugular vein and carotid vein were all cut through. It was his evidence that the cause of death was due to cardio-pulmonary arrest secondary to haemorrhagic shock.



19. PW 4, IP Josphat Kimutai, formerly in charge of Tawa Police Station was on duty at Tawa Police Patrol Base on the material day when he received a suspect by the name MMK, the appellant. He was brought in by members of public. The report was that the appellant had murdered his child, the deceased. The appellant had been thoroughly beaten by the members of public. He was escorted to Tawa Health Centre for treatment and then discharged.
20. Accompanied by one PC Kitonga, IP Kimutai, he proceeded to the scene in Katuma village of Kilela location where they found the body of a boy aged about 4 years lying in a pool of blood, with a deep cut at the throat. Besides the body, there was a kitchen knife (MFI2) that he collected. The body was moved to Machakos District Hospital Mortuary. After investigations the appellant was charged with the deceased's murder.
21. When placed on his defence, the appellant stated that on the material day, he woke up early in the morning and went to his farm with the deceased while his daughter went to school with his mother. He worked in the farm up to 10.30 a. m, after which he returned home. His in- laws came to visit and as he was sitting with them outside the house, the deceased requested for food, and went to eat in the house. He then decided to take his in- laws and wife to his uncle's home which was a walking distance away. Before they reached the home, they heard screams coming from his home. He quickly rushed back and found that the deceased had fallen down. The other family members found him in the house where the deceased had fallen, and they began to scream attracting a crowd. He was beaten by members of the public and subsequently arrested, and detained at the police station.
22. Turning to the first issue raised, in order for the offence of murder to be established, the prosecution must establish three elements. Firstly, the death of the deceased and its cause; secondly, that the death of the deceased was caused by an unlawful act or omission by the accused person(s); and finally, that the accused persons committed the unlawful act or omission with malice aforethought.
23. In the instant case, the fact of the deceased's death is not in dispute. A post-mortem report of Dr. Mutinda, the pathologist who examined the deceased's body, indicated that externally, the deceased had a severed trachea at the major vessels of the neck and internally the trachea was severed and the external jugular vein and carotid vein were all cut through. It was his evidence that the cause of death was due to cardio-pulmonary arrest secondary to haemorrhagic shock resulting to his death.
24. Was the appellant responsible for the deceased's death? In determining this issue, the trial court had this to say;

“The evidence of PW1 is that of an eye witness, evidence of PW 1 places the accused at the scene. PW1's evidence is that the accused was the only person inside the house with the two children. PW 1's evidence is that of recognition in broad daylight at close proximity.

The circumstantial evidence by PW 1 points a finger at the accused as the culprit. The running away is a sign of guilt.”
25. It can be seen from the above that the trial court relied on circumstantial evidence that the prosecution adduced to conclude that the appellant murdered the deceased.
26. This Court has variously stated that, where circumstantial evidence is relied upon, the applicable principles to be demonstrated are that; the inculpatory facts are incompatible with the innocence of the accused; they must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused; there are no other co-existing circumstances weakening or destroying the inference; and that every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.



27. In the case of *Makau v Republic* [2010] 2 EA 283 this Court explained circumstantial evidence thus;

“Circumstantial evidence is evidence of surrounding circumstances, from which an inference may be drawn as to the commission of a criminal offence. It has been held in previous decisions of this and other courts that such evidence may in some cases prove a fact with the accuracy of mathematics”.

And in the case of *Aggrey Mang'ong'o Amugune v Republic*, [2020] eKLR this Court cited the case of *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 that identified the conditions of the circumstantial evidence necessary to point to the accused person, and to no other person as the perpetrator of the offence in the following terms;

“It is settled law that, when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii) the circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion, that within all human probability, the crime was committed by the accused and none else.”

In the case of *Mwangi and Another v Republic* [2004] 2 KLR 32, this Court reiterated that;

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge”

See also *Regina v Exall and Others* [1866] 176 ER 850 that emphasized that all pieces of circumstantial evidence ought to be viewed as individual links which when combined together, constituted a chain so complete that the only inference that could be drawn was the accused's guilt.

28. N's evidence is clear that the appellant had locked himself together with the children in the house. Soon thereafter, she heard the deceased screaming, and the next time they saw him, he was dead. IP Kimutai went to the scene where he saw the deceased lying on the ground in a pool of blood. Beside him was a knife which he retrieved. The medical report showed that externally, the deceased had a severed trachea at the major vessels of the neck and internally the trachea was severed and the external jugular vein and carotid vein were all cut through. The appellant also confirmed that he was with the deceased, who then went into the house to eat some food. His evidence was that he then left the deceased in the house to go to his uncle's house, only to come back and find him lying unconscious.
29. Our analysis of the evidence is that; it is not in dispute that the appellant was the last person to be with the deceased on the fateful day. N saw him call the deceased into the house, where he locked himself, together with the two children. It is also not in dispute that they heard the deceased scream, and when the door was kicked open, the deceased fell to the ground. At that point, N confirmed that he was dead. When IP Kimutai came to the scene, he found the deceased in a pool of blood. A knife was lying beside him. Subsequently, Dr. Kokonya confirmed that he died from a severed trachea, and that the cause of death was cardio-pulmonary arrest secondary to haemorrhagic shock.



30. The appellant also confirmed that he was with the deceased, who then went into the house to eat some food. But he then claimed to have left the deceased in the house to visit his uncle's house, only to come back and find him lying unconscious. We find the assertion that he was at his uncle's house to be farfetched as, he then tried to escape, but was caught and beaten up by members of the public. Just like the trial court, we are satisfied that, the chain of events unerringly pointed to the appellant's guilt.
31. The appellant has complained that crucial witnesses, that is, KM and the deceased's sister were not called, and that N's evidence did not describe the deceased's condition when she checked and found that he was dead. In particular, that she did not state that his neck was cut, with the knife that was found at the scene. This notwithstanding, as was the High Court, we too are satisfied that N's eyewitness account of what transpired on the day in question was sufficient to point to the appellant as having been responsible for the deceased's death. Further, IP Kimutai's and Dr. Kokonya's description of the deceased's body corroborated her evidence. In totality, N's evidence together with the other witnesses' evidence, pointed to the appellant as having been responsible for slitting the deceased's throat with a knife.
32. We would add that section 143 of the *Evidence Act* specifically provides that, "...No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." And therefore, the prosecution is not obliged to call a superfluity of witnesses. See *Keter v Republic* [2007] EA 135. So that, the prosecution having called the witnesses whose evidence pointed to the appellant as having been responsible for killing the deceased, it was superfluous and unnecessary to call KM and the deceased's sister to also testify. On this basis, the complaints are without merit and are dismissed.
33. After considering his defence, the learned judge stated that it was evasive taking into account the psychiatrist's report; that he had no capacity at the time to form the intention to kill. No doubt, the judge took into account his defence, weighed it out against the circumstances of the case, and came to the conclusion that he was mentally impaired at the time he committed the offence.
34. This would lead us into the issue of whether malice aforethought was proved. In addressing this question, the High Court stated thus;

"However, taking into account the psychiatrist's report herein, the accused had no capacity at the material time to form the intention to kill. He is therefore not responsible for his actions...That being the case, section 166 (1) *Criminal Procedure Code* applies. Consequently, I make a special finding that the accused is guilty but insane. I order that the accused be kept in custody and a report be made to His Excellency the President in accordance with section 166 (2) *Criminal Procedure Code*".
35. From the above, upon consideration of the psychiatrist's report, the High Court reached a special finding that the appellant was guilty but insane and ordered that he remain in custody. For our part, we would agree with the trial court that on the basis of the psychiatrist's report, the inescapable conclusion is that, when the offence was committed, the appellant was guilty but insane.
36. This brings us to the final issue, where it is alleged that in view of the High Court having declared section 166 of the *Criminal Procedure Act* to be unconstitutional, the appellant should be released.

Section 166 specifies;

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.

2. When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.
 3. The President may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.
 4. The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report.
 5. On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.
 6. Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.
 7. The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.
37. In short, when a special finding is made, the court is required to report the case for an order of the President, and in the meantime, order that the accused be kept in custody in such place, and in such manner as the court shall direct. Thereafter, based on regular reports by the officer in charge in respect of the condition, history and circumstances of the person so detained made to the Minister responsible for consideration of the President, the accused person's fate is thereafter left to the President.
38. We begin by observing that the appellant did not raise the issue of the unconstitutionality of section 166 in his appeal to the High Court. But having said that, it is not lost on us that section 166 has



come under heavy scrutiny by courts in the recent past. As can be discerned from recent jurisprudence, various aspects stand out. Firstly, its constitutionality, or not in so far as it concerns persons with mental health challenges in conflict with the law; secondly, the role of courts in imposing sentences on persons with mental issues, and thirdly, the supervisory role of the executive in such cases. See Leonard Mwangemi Munyasia v Republic [2015] eKLR; Nyawa Mwajowa v Republic [2016] eKLR; GW v Republic [2014] eKLR; Julius Wariomba Githua v Republic [2008] eKLR; CNM v Republic [1985] eKLR and Republic v S O M [2018] eKLR and Republic v ENW [2019] eKLR. But the decisions notwithstanding, what is generally agreed is that there is need for urgent reform in the emerging area of mental health and the manner in which persons in conflict with the law arising from mental health challenges should be handled. See Wakesho v Republic [2021] KECA 233 (KLR) and RWB v Republic [2021] KECA 329 (KLR). As such, we too would urge that the provision be holistically reviewed to ensure that such persons are appropriately provided for, notwithstanding the offences committed.

39. The appellant is sentenced to 30 years' imprisonment, save that he shall serve his term at a mental institution until such time as the Psychiatrist in charge shall be satisfied that he is well enough and has certified that he is no longer a danger to society or to himself. Depending on the term served by then, he shall either be transferred back to Prison to complete his term or be discharged.

40. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

G. W. NGENYE–MACHARIA

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR

