RWB v Republic (Criminal Appeal 57 of 2017)
[2021] KECA 329 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 329 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 57 OF 2017

PO KIAGE, J MOHAMMED & M NGUGI, JJA

DECEMBER 17, 2021

BETWEEN

RWB ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Kitale (J. R. Karanja, J.) dated 15th July, 2015 in HCCC NO. 35 OF 2011)

JUDGMENT

1. By this appeal the appellant RWB seeks to overturn the judgment of the High Court at Kitale (J. R. Karanja J.) by which he was convicted and sentenced to fifty (50) years imprisonment for the offence of manslaughter, the learned judge having found that the offence of murder as charged against the appellant had not been established and proved by the prosecution. The particulars of the offence were that on the 18th June, 2011 at Perekera farm in Trans Nzoia County, the appellant murdered JC.

2. The prosecution case, as mounted through nine (9) witnesses, was that on the 18th June, 2011 in the evening, the appellant, a herdsboy to the deceased's family, assaulted and injured the deceased, her mother, Prisca Chelimo (PW8) and their house help, Michelle Chepchumba (PW5) with a panga. PW5 testified that on the material day, while at the home of the deceased's family at Perekera farm in Trans-Nzoia County, and after picking the pullovers of the deceased and her minor sibling FK (PW3) from the bedroom, she heard footsteps. When she checked, she saw that it was the appellant, who was holding a panga. The appellant confronted PW5 and cut her with the panga above her left ear. She ran out into a neighbours house and on her return with neighbours, she found PW8 and her deceased daughter injured. The deceased succumbed to the injuries.

3. The evidence of PW5 was corroborated by that of PW8, the mother to the deceased. PW8 stated that on the fateful day she was in the kitchen preparing dinner when she heard her children, the deceased

who was 6 years old at the time, and PW3, screaming from the bedroom. On rushing to the bedroom, she was immediately cut by a sharp object and she fell down unconscious. She later found herself in hospital. Six-year-old PW3 also testified that on the material day she was at home with PW5, PW8, her deceased sister and the appellant when they heard her deceased sister and PW5 screaming from another section of the house. While her mother rushed to check what was happening, the wife to the appellant locked her and her sisters in the kitchen. Later people came and released them from the kitchen, and she saw her injured mother lying on the ground. Her sister had also suffered injuries and she later succumbed to them.

4. Jacob Kipkorir (PW1), the father to the deceased and husband to PW8 also testified that on the said date he was on his way to Eldoret when he received a telephone call from his neighbor informing him that there were screams coming from his house. On his return he was told to go to Mt. Elgon Hospital where he found his wife and deceased daughter together with their house help. They had been assaulted with a panga and injured. PW2, PW6 and PW7, neighbours to PW1's family, also testified that on being alerted of the incident at PW1's home, they went there and found PW5, PW8 and the deceased seriously injured. They rushed them to hospital for treatment but the deceased succumbed to her injuries.

5. According to the testimony of Dr. Blastus Kakundi (PW4) the doctor who performed a post-mortem on the body of the deceased, the cause of death was cardio pulmonary failure secondary to haemorrhage from a deep cervical cut with spinal cord injury. PW4's comparison of samples of blood from the body and those found at the scene revealed that the appellant was the suspect. Further, upon examination of the appellant's mental status at Kitale District Hospital, it was found that the appellant was suffering from a mental disease called Schizophrenia, six (6) months prior to the offence. The investigating officer, P.C Chels Were (PW9) testified that when they inspected the scene of the incident, they saw blood stains in some rooms and the bedroom particularly had a lot of blood stains.

6. When placed on his defence, the appellant confirmed that he was a herdsman at the farm of PW1 and that on the material day he was at the farm but he could not remember what happened. He only found himself at his home in Sirisia where he was arrested and told that he had slashed people with a panga. After his arrest he learnt from his father that he had a mental problem.

7. We have set out the evidence that was tendered before the trial court in some detail in keeping with our duty as a first appellate court to subject the whole evidence to a fresh and exhaustive re-examination and re-evaluation so as to arrive at our own independent conclusions on the appellant's guilt or otherwise. See Rule 29(1) of the *Court of Appeal Rules*, *Okeno vs. Republic [1972] EA 32* ; *Pandya vs. Republic [1957] 570.*

8. We have done so bearing in mind also the appellant's complaints herein as contained initially in the memorandum of appeal drawn by the appellant himself and subsequently in a supplementary memorandum of appeal drawn by counsel. In summary, the complaints are that the learned judge erred in law and fact by convicting and sentencing the appellant;

    While relying on contradictory statements and evidence;

    Against the medical report concerning his status of health;

    Without considering that the prosecution failed to prove and establish the case beyond reasonable doubt;

    Of the offence of manslaughter without making a finding on the mental capacity of the appellant as at the time of commission of the offence under McNaughton rules on insanity;

And in imposing a sentence that is excessive consistent with life imprisonment without regard to the age limit of the appellant and time spent in custody awaiting trial.

9. Arguing the appeal before us, Mr. Kitigin, the appellant's learned counsel contended that the trial court having found that the appellant committed the offence but was mentally sick, it ought to have been directed by the Mcnaughton rules on insanity. Counsel further faulted the learned judge for failing to call as witness, Dr. Judy Kamau, the doctor who conducted the mental assessment of the appellant. He dismissed the medical report of Dr. Christopher Wanyonyi which found the appellant to be of normal mental health, as being careless in substance and content. Counsel reproved the trial court for convicting the appellant for manslaughter when the requisite state of mind had not been proved. Further, the sentence of 50 years in prison was excessive. Counsel urged as to make a proper finding of guilty but insane.

10. In written submissions dated 15th April 2019, Mr. Kitigin submits that according to the medical report by Dr. Judy Kamau, a psychiatrist, the accused had a short history of paranoid delusions and auditory hallucinations consistent with mental insanity. This assessment, asserts counsel, is corroborated by the report of the probation officer which indicates that the appellant had a history of mental problems but had no formal treatment. Mr. Kitigin further draws our attention to the provisions of section 162(1) of the *Criminal Procedure Code* on what a court ought to do when it suspects that an accused is of unsound mind. Counsel urges us to find that the appellant underwent an unprocedural hearing, quash the conviction and sentence, and accordingly set the appellant free unless lawfully held.

11. For the respondent, the learned Prosecution Counsel Ms. Gacau opposed the appeal asserting that no evidence was availed indicating that the appellant had a history of mental illness. She posited that insanity is a defence only if proved that the appellant was incapable of knowing the nature of the act he is charged with, and that it was wrong. To counsel, the appellant's mental acuity was not impaired in any way. Counsel went further and made some rather contradictory remarks to wit; "He had a history of mental illness but at the time of commission of the offense he was okay. There is no medical report that speaks to his mental state as at commission".Referring us to this Court's decision in *Leonard Mwangemi Munyasia vs Republic [2015] eKLR* , counsel submitted that the test of insanity is strictly at the time when the offence was committed and no other.

12. In written submissions dated 4th March, 2021 Ms Gacau further contends that, the fact that the accused had a panga which he used to inflict injuries on the deceased and PW5, indicates a clear intention to do grievous harm. Ultimately, counsel prays that the appeal be dismissed.

13. Mr. Kitigin's brief reply to those submissions was that the prosecution should have produced evidence to show that the appellant was mentally sound.

14. Having perused the record of appeal, submissions by counsel and the law, the primary issue for determination is whether the appellant was insane at the time of commission of the offence. From the evidence adduced in the trial court, there is no doubt that the offence of murder was committed and that the appellant was the perpetrator of the said offence. The family of PW1 narrated how they were attacked by the appellant, a person known to them. The post-mortem report described the nature of injuries the deceased suffered being, a deep cut on the left side of the neck through internal and jugular veins, neck muscles to the spinal column transecting the spinal cord. Further, the mental status report for the appellant, dated 23rd June 2011 and prepared by Dr. Judy Kamau, a psychiatrist, indicates that the appellant admitted to committing the offence, but could not explain the circumstances clearly. In his defense statement the appellant stated, "If I committed the offence then it is because I was sick mentally". The foregoing evidence overwhelmingly evinces the event of death, the cause thereof and

the perpetrator. The fact that the appellant was armed with a panga when he attacked PW1's family is also a clear indication that he had the intention to cause harm to them.

15. However, the question that arises is whether the appellant was mentally sound when he committed the offence. The appellant argues that following the trial court's determination that he had committed the offence but that he was mentally sick, the court ought to have been guided by McNaughton rules in its decision.

16. In this respect we note the learned judge's conclusion at paragraph 7 and 8 of the judgment;

> "8. The accused did not produce any medical report to confirm that he was suffering from a mental illness at the time of the offence. However, the medical report produced by Dr. Kakundi in his respect clearly showed that, he had a history of mental illness known as schizophrenia. It is therefore possible that at the time he committed the offence he was indeed mentally sick such that he could not comprehend the consequences of his action nor was he in control of his mental faculties as to distinguish right from wrong. In the circumstances, it cannot be said that he was possessed of the necessary malice aforethought for him to be found guilty of murder.
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> 9. The offence established and proved by the prosecution against the accused was not that of murder but manslaughter. Consequently, the accused is hereby found guilty of manslaughter, contrary to s. 202(1) of the Penal Code and is convicted accordingly".

17. This Court expounded the scope of the McNaughton Rules of insanity, also rendered as McNaughten Rules in the decision of Leonard Mwangemi Munyasia (supra).The Court stated thus;

> "The law on the defence of insanity was refined in 1843 following the trial of Daniel McNaughten, who, operating under the delusion that Sir Robert Peel, Prime Minister, wanted to kill him, set on a mission to kill the Prime Minister first. Executing this intention, McNaughten in an attempt to assassinate the Prime Minister shot his secretary, Edward Drummond and killed him instead. McNaughten's trial at the old Bailey was high profile attracting two solicitors, four barristers and nine medical experts. Medical evidence in the trial indicated that McNaughten was psychotic, suffering from what would today be described as paranoia and delusion. Consequently, the court acquitted him by reason of insanity. This provoked considerable public furor followed by a debate in the House of Lords culminating with a direction to a panel of Justices of the Queen's Bench Division presided by Chief Justice of the Common Pleas, Sir Nicholas Tindal to craft new rules on the defence of insanity based on a series of hypothetical questions framed by the House. The principles developed by the panel have come to be known as the McNaughten Rules. That marked the beginning of forensic psychology. 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".

18. The McNaughton Rules are codified in our *Penal Code*, Chapter 63 of the Laws of Kenya under section 12 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. The trial court's decision in the matter, and we have already cited the relevant part, clearly shows that the learned judge was satisfied that the appellant was mentally sick at the time of commission of the offence, and, that he could not comprehend the consequences of his actions. After making that finding, the learned Judge went ahead and found the appellant guilty of the offence of manslaughter contrary to section 202(1) of the Penal Code, Chapter 63 of the Laws of Kenya. With respect, the learned Judge misdirected himself in the matter. The relevant section that he should have invoked is section 166(1) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya. The section reads;

> "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".
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> (emphasis ours)

20. In accordance with the foregoing provision, the trial court ought to have held the appellant guilty of the offence of murder but insane. We note that the succeeding provisions to section 166(1) of the Criminal Procedure Code, particularly section 166(2), enjoin the court to report such a case for the order of the President, eventually resulting in an accused being held at the pleasure of the President. We further observe that this Court has in the past given that effect to section 166(2) in for instance; Leonard Mwangemi Munyasia (supra); *Nyawa Mwajowa vs Republic [2016] eKLR*; *GW vs Republic [2014] eKLR* J*ulius Wariomba Githua vs Republic [2008] eKLR*;and *CNM vs Republic [1985] eKLR*.

21. We, however, hold a different view from the foregoing decisions which we respectfully consider to be now inappropriate to follow. Persons who are mentally ill require treatment not punishment. Their indeterminate incarceration negates their dignity and should not be countenanced. Moreover, it is a sure way of having them forgotten in jail. Further, as held by Majanja J. in *Republic vs S O M [2018] eKLR*,the effect of the provisions of section 166 is that they take away the courts discretionary power to determine the nature and extent of a sentence, and vests it in the President. Majanja J. expressed himself as follows in that case;

> "Section 166 of the CPC comes under the heading, "Procedure in Lunacy ...." which underpins the 18th Century foundations of the current law. Modern Psychiatry has brought new insights to the human mental condition while human rights standards have influenced the improvement of the conditions and treatment of persons with mental disability in the criminal justice system. I therefore direct that the Deputy Registrar to forward this decision to the National Council on Administration of Justice (NCAJ) Committee on Criminal Justice Reform (NCCJR) appointed by the Chief Justice Vide Gazette Notice No. 5857 of 19th June 2017 to review various aspects of the criminal justice system in order to inform further reforms in this area of law and procedure.
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> 19. In conclusion, I now make the following orders:
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> a. I declare that the provisions of section 166 of the Criminal Procedure Code are unconstitutional to the extent that they take away the judicial function to determine the nature of the sentence or consequence of the special finding

contrary to Article 160 of the Constitution by vesting the discretionary power to the President to determine the nature and extent of the sentence". (emphasis ours)

22. We endorse the above decision. This Court sitting in Mombasa (Gatembu, Mbogholi, Nyamweya, JJA) has recently re-affirmed the above position of the High Court, calling for reforms to the provisions of section 166 of the Criminal Procedure Code , in *Mwachia Wakesho vs Republic Mombasa Criminal Appeal No. 8 of 2016.* The Court stated thus;

> "57. We can only add our voice to the many on the reforms that are needed to the provisions of section 166 of the Criminal Procedure Code in two respects. First, in our view, it is a legal paradox to find a person guilty but insane, in light of the requirements of criminal responsibility and culpability, which require that for a person to be criminally liable, it must be established beyond reasonable doubt that he or she committed the offence or omitted to act voluntarily and with a blameworthy mind. A finding of not guilty for reason of insanity would be more legally sound in circumstances where an accused person is suffering from a defect of reason caused by disease of the mind at the time of commission of an offence. In addition, it is our view that the Court should be granted discretion to impose appropriate measures to suit the circumstances of each case, upon a finding of not guilty for reason of insanity.
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> 58.Second, the subs-stratum of the provisions as regards the right to fair trial in criminal cases in Article 50(2) of the Constitution is that an accused person should be fully informed, understands, and thereby effectively participates in a criminal trial. To go through the motions of a trial whose nature and effect an accused person does not from the outset understand or appreciate, and further still to be convicted on the basis of such a trial as is provided for in section 166 of the Criminal Procedure Act, is in our view manifestly unfair in light of our current constitutional dispensation. We therefore direct the Registrar of the Court send a copy of this judgment for the attention of the Attorney General. Enough said on that".

23. We are in agreement that the provisions of section 166 of the Criminal Procedure Code are paradoxical and in dire need of reforms. We direct the Registrar of the Court to send a copy of this judgment for the attention of the Attorney General.

24. Ultimately, we find this appeal meritorious and quash the appellant's conviction for manslaughter. We set aside the sentence of 50 years imprisonment and make the following orders;

    a. The appellant is guilty but insane.

    b. The appellant shall immediately be committed to a mental institution, namely, Mathari Mental Hospital for treatment until such time as the Psychiatrist in charge shall be satisfied that he is well enough to be discharged. The Hospital is directed to prepare and file in Court periodic reports on the appellant's condition at intervals of two (2) years until he is so discharged.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR