IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK. JJ.A)

CRIMINAL APPEAL NO. 21 OF 2016

BETWEEN

ELISHA ANDAI KARANI .....APPELLANT

AND

REPUBLIC.....RESPONDENT

***(Being an appeal from the Judgment of the High Court of Kenya at Kakamega, (R.N. Sitati, J) dated 12th November, 2015* in**

HCCRC NO. 44 OF 2010)

JUDGMENT OF THE COURT

Disputes in families are not a rare occurrence. Sometimes they escalate so much so that family members end up hurting each other even fatally. In the present appeal we are faced with the unfortunate scenario of daylight bloodshed in a family set up that can only be equated to a "game of thrones". The day was almost over at around 5:00pm and it was raining. No one would have anticipated the turn of events that took place that evening. Following those events, the appellant, **Elisha Andai Karani** was arrested and charged in the High Court in Kakamega with the murder of his mother **Alice Karani**, ***(Alice)*** and sister in law **Grace Ishmael*, (Grace)*** contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the information were that on 18th October, 2010 at Ebusembe village, Central Bunyore location, Vihiga District within Western Province the appellant murdered Alice in count 1 and Grace in count 2.

The appellant pleaded not guilty to the information but before his trial could commence, he was subjected to two mental assessment tests to ascertain his state of mind at the request of his counsel. At some point, he was taken to Mathare Hospital for treatment. Under unclear circumstances, however, on 11th November, 2013 the appellant informed the court that he was ready to proceed with the trial and soon thereafter his trial ensued. The prosecution called a total of eight (8) witnesses in a bid to prove its case against the appellant.

According to PW1, **Joy Omenda Omukhango,** it was raining at around 5:00pm on 18th October, 2010. She was seated in the veranda of her house with her mother in law, Alice when the appellant came to the house with a panga threatening to attack Alice. She stopped him and he left. After a while, Alice went to untether her cows. That is when the appellant accosted and assaulted her with the panga. The police were informed and the appellant ran away but was later arrested at about 9:30pm. She knew the appellant very well as he was her brother in law and Alice was his mother.

PW1's evidence was corroborated by that of PW7, **Reuben Angalo Sikuku,** a neighbor and clan member of the appellant. On the material day he was going to milk his cows at about 5:00pm when he heard screams from the appellant's home. He rushed there and was welcomed with the scene of the appellant cutting Alice with a panga and hitting her with stones. Alice fell down and the appellant continued to cut her with the panga. He went closer and even beat the appellant in abid to rescue Alice but without much success. The appellant continued cutting Alice until she died. He then ran to the neighbour's house and informed them of what he had witnessed. He was later informed that the appellant had also killed Grace**.**

PW2, **Noel Atuor,** the appellant's other sister in law on the fateful evening, heard screams and rushed in the direction of the screams. She found the appellant assaulting Grace with a panga. She took Grace and locked her in her house. After a while, Grace left to go check on her children. She later followed Grace to her house but on entering she did not see her. That was when she saw the appellant assault Grace who then fell on the ground and died immediately. She reported the incident to PW4**, David Olocho**, Chief of Central Bunyore location who then informed the police. The police came and took the bodies and also arrested the appellant from the neighbour's compound.

PW3, **Elijah Resa Ombete,** a son to Alice and brother in law to Grace and PW5, **Ishmael Ombete,** the husband to Grace both identified the bodies and witnessed the post mortem examination on 23rd October, 2010 performed by PW6, **Dr. Awino Bob.** Following the post mortem,

PW6 formed the opinion that the cause of death of Alice was massive intracranial haemorrage and lacerated brain tissue secondary to assault while that of Grace was intracranial haemorrage due to head injury secondary to assault.

According to PW4, he received a call on 18th October, 2010 at around 5:45 pm informing him that the appellant had disagreed with Alice earlier in the day and had killed her. He went to the scene with two police officers. On arrival they learnt that the appellant had also killed Grace as she tried to stop him from assaulting Alice. They did not find the appellant at the scene but they went back at 8:00pm after receiving information that he had returned home and arrested him and took him to Luanda police station.

PW8, **PC Daniel Odongo,** the investigating officer received information about the killings at about 6:40pm on the material day from PW4. He visited the scene with the OCS. They found the bodies of the deceased lying on a footpath. They found the appellant whom he re-arrested from PW4. They evacuated the bodies to Sagam Hospital Mortuary and after the post mortem, charged the appellant with the murder of the two deceased persons based on the direct evidence of PW1, PW2 and PW7. He later learnt that the appellant was mentally unstable.

Put to his defence, the appellant gave sworn testimony. He stated that he knew the deceased persons as his mother and sister in law respectively. However, he did not know where the two ladies were. He went on to state that on 18th October, 2010 some unknown people beat up Alice and Grace but he was the one who was arrested. He had been taken for psychiatric treatment while in custody but at home he was just fine.

The trial court evaluated the evidence by the parties and found the appellant guilty of murder on both counts. In her judgment, the learned Judge observed that the fact and cause of death was proved as Alice and Grace died and their bodies were identified by PW3 and PW5. The cause of their death was also confirmed by PW6 to have resulted from assault. In determining whether the appellant caused the deaths, the learned judge relied on the testimony of PW1, PW2 and PW7 who saw the appellant assault both Alice and Grace as well as the evidence by PW4 and PW8 who went to the scene and found the dead bodies and also arrested the appellant. There was therefore no doubt he was the one who caused the deaths. As regards malice aforethought, the trial court held that all the ingredients of murder had been proved beyond reasonable doubt. The appellant intended to kill the deceased when he used excessive force on them without any provocation going by the injuriessustained. The appellant must have known that his acts of repeatedly cutting the deceased on the head would probably cause the death of or grievous harm to the deceased persons.

The trial court also addressed the defence of insanity as raised by the appellant's counsel. PW1, PW2 and PW7 knew the appellant and maintained that he was sober and had the right frame of mind. He had been sent for mental examination twice and found fit to stand trial. He also understood the contents of the information when the plea was taken to which he pleaded not guilty. The learned Judge also considered the appellant's testimony to the extent that he had never been taken for psychiatric treatment while at home because he was fine and as such he was of sound mind as at the time he committed the crime. The defence of insanity was therefore rejected. Consequently, the appellant was sentenced to death.

Aggrieved by the conviction and sentence the appellant lodged the present appeal in which he raised four (4) grounds to wit; that the learned trial Judge erred in law and fact by; failing to find that the appellant was of unsound mind and therefore not capable of knowing what he was doing; handing down death sentence on the appellant that was contrary to the requirements of the law; not finding that the appellant was of unsound mind and therefore not capable of taking plea and following the proceedings; and proceeding with the trial when it was not safe to do so in accordance with the law.

At the plenary hearing of the appeal, the appellant was represented by **Mr. Bagada,** learned counsel holding brief for **Mr. Onyango,** learned counsel while **Ms. Gathu,** senior prosecution counsel appeared for the state. Counsel relied on their written submissions which they opted not to highlight.

The appellant reiterated that the issue of insanity was first raised after taking of the plea when counsel realized the appellant had a mental problem. On 20th June, 2012 counsel informed the trial court that he had liaised with the prisons department and it appeared that the appellant was of unsound mind and that PW4 confirmed that he had been informed that the appellant was mentally unstable. PW4 had further conceded that the appellant had started demolishing his house after committing the offence, which was not a normal occurrence or behaviour. He pointed out further that the conduct of the appellant was critical in determining whether he was of unsound mind. He relied on the case of **Leonard Mwangemi Munyasia v Republic [2015] eKLR)** for this proposition. That the burden of proving insanity rested on the appellant and it was on a balance of probabilities as was stated in the case of **CNM v Republic [1985] eKLR,** and that there was sufficient evidence to show that the appellant was not of sound mind. His behavior at the time of committing the offence was such that when PW8 came to arrest him,they found him wailing which was strange, to say the least, and he only came to learn afterwards that the appellant was mentally unstable and had been treated at Mathare Hospital. Counsel maintained that there was no dispute between the appellant and the victims that could have led to the commission of the crime. He faulted the Judge for failing to evaluate the evidence regarding the appellant's state of mind. His view was that the appellant should not have been sentenced to death but rather he should have been dealt with in accordance with Section 166 of the Criminal Procedure Code.

The appellant further faulted the trial court for proceeding with the trial when the appellant could not understand the proceedings. That the learned Judge noted from his observations that the appellant was mentally unstable and directed that he be taken for treatment. However, while still on treatment and without confirmation from the hospital that the appellant was fit to stand trial, the court proceeded with the hearing on 11th November, 2013 when in fact the case was coming up for mention to ascertain the mental status of the appellant. This was contrary to Section 162 of the Criminal Procedure Code. To further buttress this point, counsel relied on the case **Leonard Mwangemi Munyasia case** (supra). Counsel argued that the appellant did not understand the gravity of the charge he was facing when he was put on his defence which was a clear indicator that he was of unsound mind. Finally, counsel remarked that the only rational explanation of the appellant's conduct was insanity and therefore, a proper verdict should have been not guilty of murder but rather guilty but insane.

The appeal was opposed. Ms. Gathu argued that malice aforethought had been proved under subsections (a), (b) and (c) of Section 206 of the Penal Code. This was with regard to the extent of injuries sustained by the deceased as confirmed by PW6 who produced the post mortem report. He had concluded that the cause of death was massive intracranial hemorrhage and lacerated brain tissue secondary to assault for

Alice and for Grace, intracranial hemorrhage due to head injury secondary to assault. On identification of the appellant, counsel submitted that the incident was witnessed by PW1, PW2 and PW7 all of whom were related to the appellant. It was about 5:00 pm and hence the identity of the appellant cannot be in doubt.

As regards the defence of insanity, the respondent argued that PW1, PW2 and PW7 testified that the appellant was sober and had the right frame of mind at the time he committed the crime. That the two times he was sent for mental examination the psychiatric reports showed that he was fit to stand trial. His defence was considered by the trial court and dismissed and rightly so, according to counsel. The appellant had no history of mental illness and knew what he was doing when he waited until it was raining to kill Alice and Grace.

This is a first appeal. It is our duty as set out in rule 29(1) of this Court's Rules to re-appraise the evidence tendered before the trial court and draw inferences of fact on the guilt or otherwise of the appellant. The appellant is entitled to have our own consideration and view of the evidence as a whole and our own conclusions thereon. However in doing so we must bear in mind that we did not have the occasion to observe the demeanor of the witnesses. In the case **of Issac Ng'ang'a** alias **Peter Ng'ang'a Kahiga v Republic Criminal Appeal No. 272 of 2005** this court held that:

> ***"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has 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 of the same."***

We have anxiously perused the record of appeal, submissions by counsel and the law. The issue for determination is whether the appellant was insane at the time of the commission of the offence.

It is not in dispute that all the ingredients of murder were proved in this case. Those essential ingredients are death of the victim; cause of death; identification of the perpetrator and malice aforethought. There is no doubt that the deceased persons died. Post mortem was conducted on their bodies which confirmed death.

The trial court relied on the evidence of PW1, PW2 and PW7 in convicting the appellant as they were key eye witnesses. They testified to having seen the appellant assault the two deceased persons until they died at different times. PW1 first stopped the appellant from attacking Alice and then witnessed as he assaulted her with a panga. PW7 testified that as he approached the scene he saw the appellant whom he knew very well cutting Alice with a panga. He even tried to stop him to no avail. PW2 saw the appellant hack Grace to death when she went to check on her. This was about 5:00pm. The appellant and the three witnesses were all related. This narration of events was not disputed by the appellant. We are therefore satisfied just like the trial, that the fact of death, the cause thereof and the perpetrator is not in dispute and we need not dwell on it.

Malice aforethought is defined under section 206 of the Penal Code as follows:

> **(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.**
>
> **(b) Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.**
>
> **(c) An intention to commit a felony.**
>
> **(d) An intention by an act to facilitate the flight or escape from custody of any person who attempted to commit a felony.**

From the post mortem reports it was evident that the deceased persons died as a result of the injuries that the appellant inflicted upon them. In the course of assaulting the deceased persons, the appellant ought to have known that the injuries he was inflicting on them would cause death or grievous harm to the deceased. Furthermore, the fact that the appellant was armed with a panga which he used to cut the deceased on the vital parts of the body, that is the head was a clear indication that he had the intent to kill them. The evidence was therefore sufficient to establish malice aforethought on the part of the appellant.

From the foregoing, it is clear that the prosecution case was proved beyond reasonable doubt. However, the question that arises is whether the appellant was of sound mind at the time of the commission of the offence. The defence of insanity was raised by the appellant's counsel at the earliest possible opportunity; that is,

immediately after the appellant had taken the plea. It is a rule of universal application and of criminal responsibility that a man cannot be condemned if it can be proved that at the time of the perpetration of the criminal act he was not master of his mind. However, and as a matter of general rule, the law presumes that every person is sane and responsible for his actions at all times including when he is alleged to have committed an offence because sanity is the normal and usual condition of mankind. Section 11 of the Penal Code captures the presumption thus:

> **"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."**

The presumption of sanity is, from the above provision, rebuttable, hence the recognition in criminal law of the defence of insanity. Section 12 of the Penal Code provides for the application of the defence of insanity 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 is 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."**

This essence was also captured in the famous English McNaughten Rules following **Mc Naughten case, 1843 – 10 C & F 200** thus:-

> **"…insanity is a defence if at the time of the commission of the act, the accused person was labouring under such 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, he did not know that what he was doing was wrong."**

Finally, Section 9(1) of the Penal Code provides that:

> **"Subject to the express provisions of this Code relating to negligent acts and omissions, 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."**

The burden of proving insanity rests on the accused. In the case of **Muswi s/o Musela v R [1956] EACA 622** the court stated that evidence of the state of mind of the accused should be called by the defence. However, the English procedure as set out in the 33rd edition Archbold p20 should be followed unless there are special reasons to the contrary thus:

> **"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 or 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, 32 Cr Appeal R 91: ICLC 2171. Where evidence to establish insanity has been called for the defence, the prosecution may call rebutting evidence, R v Smith, 8 Cr App R 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 Abramovitich, 7 Cr App R 145."**

In the instant appeal, it is clear from the record that the appellant killed the deceased persons. What is not clear is whether he knew what he was doing. The appellant's counsel relied on the testimony of PW4 who stated that the appellant started demolishing his house after committing the offence, which was not a normal occurrence and pointed out that the conduct of the appellant was very important in determining whether he was of unsound mind. He also relied on the evidence by PW8 who came to arrest the appellant and found him wailing. His view was that this was strange behavior to say the least. He reiterated that there had been no dispute that would have provoked the commission of the offence by the appellant. In the case of **Leonard Mwangemi Munyasia** (supra), this Court held that:

> **"We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person."**

The respondent on the other hand challenged the appellant's claim to mental instability and relied on the evidence adduced by PW1, PW2 and PW7 that the appellant was sober and had the right frame of mind at the time he committed the crime. She maintained that the two psychiatric reports showed that the appellant was fit to stand trial and that he had no history of mental illness. He sought an opportune time while it was raining to kill his victims. It is not contested that on 20th June, 2012 **Chitembwe, J.** formed the opinion after observing the appellant that he was mentally unstable and directed that he undergoes treatment at Mathare Mental Hospital. On 5th December, 2012 the court was informed that the appellant had been taken to Mathare Hospital where he was to remain until 11th November, 2013. This by all means removes any doubt that the appellant was not of sound mind. The question to be answered then is, why was his trial not postponed as stipulated in law? Why was his trial commenced a year later without medical evidence that he was fit to stand trial. Similar questions were asked by this Court in the case of **Grace Nyoroka v Republic [2007] eKLR** where the court addressed itself thus:

> ***"On the material placed before the learned Judge, could it be concluded with certainty that, at the time the appellant slashed her mother with a panga on the head and killed her, the appellant was in a sound mental state? We certainly are not able to say so and we think that in the circumstances of the case Sitati, J should have rejected the offered plea of guilty to the offence of manslaughter and proceeded with the trial in accordance with section 164 of the Criminal Procedure Code. It is possible, indeed it is likely, that if she had conducted a trial under the section, she might well have found that the appellant was guilty of the act of killing her mother but was insane at the time she committed the offence. The provisions of section 166 of the Code would then apply."***

The law recognizes, as we have said before, that the society has people like the appellant who may fall in this category of the population and therefore provides for the procedures to be followed by the court in two instances where the question of insanity arises during the trial. In the first instance, Sections 162 to 164 of the Criminal Procedure Code provide for situations where, if in the course of a trial it becomes apparent, after the trial court has inquired into the issue, that the accused person is of unsound mind and is therefore not able to understand the proceedings or make his defence as was the case here, the court is required to adjourn the proceedings. Given that in the circumstances of this case the appellant could not be released on bail/bond the court was required to order for his detention in safe custody in such a place as it may think fit, (in this case the appellant was sent to Mathare Hospital), and thereafter transmit the court record or certified copy thereof to the Cabinet Secretary for the time being responsible for prisons, who shall, in turn transmit it for the President's consideration. However, detention at the mental hospital should have been directed by the President until such time when the President would have satisfied himself

from the report of the medical officer of the mental hospital that the appellant was capable of participating in the trial. The Director of Public Prosecution was also required to indicate whether or not the State wished to press on with the case against the appellant. In the case of **Grace Nyoroka v Republic** (supra), the High Court upon satisfying itself as to the accused person's state of mind straight away committed her without the order of the President to a mental hospital, a procedure, which this Court on appeal described as short-circuit, and justified it on account of saving time. For our part, and granted the provisions of the law, we think the court without an order of the President would have no powers to commit an accused to a mental hospital directly.

The second scenario under which the appellant falls is provided for under Section 166 which states:

> **"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."**

From the many instances we have enumerated, we have come to the conclusion that the learned Judge having found that the conduct of the appellant could not have been that of a normal person, she should have warned herself on the likelihood of convicting and sentencing a person with a mental disorder. She should have then proceeded with the trial in accordance with Section 164 of the Criminal Procedure Code. It is possible, indeed it is likely, that she had conducted a trial under the section, **Sitati, J.** might well have found that the appellant was guilty of the act of killing his mother and sister in-law but was insane at the time he committed the offence. The provisions of section 166 of the Code would then have come into play. Therefore, the learned Judge having correctly found that the appellant committed the offence of murder and convicting him, she ought not, as was properly submitted before us by Mr. Bagada, to have imposed the death sentence but instead should have made a special finding of guilty but insane and ordered for his detention in custody pending the President's further orders.

The law having not been complied with by the learned Judge, we find the subsequent proceedings to be a nullity. We therefore allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellant. We have given anxious consideration to what should follow from our finding of nullity. In the full circumstances of this case as set out herein, and considering the length of time, the appellant has been in custody, we think it would be prejudicial to him for us to order a retrial. The more first order, which we hereby make is that the appellant should be set at liberty forthwith unless otherwise lawfully held.

This judgment has been delivered pursuant to rule 32(2) of the Court of Appeal rules since Odek, J.A. passed on before he could sign the judgment.

Dated and delivered at Kisumu this 3rd day of April , 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL