



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, M'INOTI & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 245 OF 2011

BETWEEN

KCKAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Odero,J.) dated 25th August, 2011

in

Criminal Case. No.12 of 2006)

JUDGMENT OF THE COURT

In the morning of 20th April 2006 the appellant, in fit of rage stormed the home of his paternal uncle demanding that his uncle refunds him some money. As his uncle was not at home he turned the fury on the uncle’s wife, the deceased. The deceased who had just returned home from tilling her farm was resting under a tree with her daughter in-law when the appellant moved close and picked the hoe from her as he demanded to be told where his uncle was. Sensing danger the deceased left the homestead towards the chief’s office, perhaps for protection, with the appellant in pursuit. Behind them was PW2. But the appellant upon noticing PW2 chased her away. As she ran, PW2 screamed, attracting some villagers, including PW3 and PW6. According to them they saw the appellant with a hoe in his hand standing over the body of the deceased which had severe deep cut injuries on the head and arm. There was no evidence of how these injuries were inflicted. But from the concatenation of the events prior to this stage, the trial court found that they irresistibly pointed to the guilt of the appellant; that he was the last person to be seen chasing the deceased with a hoe; that shortly thereafter the deceased was found dead with injuries and the appellant standing by with the hoe in his hand. The learned Judge found no co-existing evidence that would weaken or destroy the inference that it was indeed the appellant who caused the death of the deceased.

The Judge having properly set out the provisions of **section 203** of the Penal Code and explained the two main elements to prove the offence of murder, namely, the unlawful causing of death with malice aforethought, was satisfied that the first element, the *actus reus*, was proved against the appellant beyond

any reasonable doubt. Regarding malice aforethought, the *mens rea*, the learned Judge relied on the overwhelming evidence by both the prosecution and the appellant himself in defence that he suffered from mental disorder at the time he caused the death of the deceased. The learned Judge then concluded that;

“From the evidence before me I am convinced that prior to his arrest and treatment and more specifically in May 2006 at the time he killed the deceased, the accused was of unsound mind. As such he did not have the mental capacity necessary to form the requisite mens rea for the offence of murder. Therefore in line with section 116 (1) (sic) of the Criminal Procedure Code I make a special finding that the accused was guilty but insane at the time he committed the unlawful act that led to the death of the deceased. As such I do hereby direct that the accused be detained at the pleasure of the President in line with section 166 (2) of the Criminal Procedure Code.” (our emphasis)

Although the appellant has brought this appeal on three grounds, **Mr. Ngumbau**, learned counsel representing him argued only one ground, arising from the conclusion of the learned Judge reproduced above, especially the emphasis. Learned counsel submitted that the learned trial Judge erred in making a special finding that the appellant was guilty but insane after holding that he lacked the requisite malice aforethought; and that without malice aforethought the offence disclosed was manslaughter and not murder.

Mr. Monda learned counsel for the respondent in opposing the appeal submitted that both *actus reus* and *mens rea* were proved; that there was sufficient evidence that the appellant inflicted the fatal injuries on the deceased; that from the nature of those injuries it was clear he had malice aforethought. Thus far he agreed with the learned Judge. In his view the learned Judge made contradictory statements of the law, that the appellant unlawfully caused the death of the deceased without malice aforethought and then proceeded to treat him under **section 166 (1)** aforesaid as if it was a case of murder. To him **section 166** will only be resorted to where it is proved that death was caused with malice aforethought but for the state of mind of the accused, a special finding is made instead of a sentence.

We, for our part are satisfied that there was sufficient evidence that the appellant suffered from unsoundness of the mind at the time he committed the offence, availing himself the defence of insanity under **section 166 (1)** which provides that;

“166. (1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.”

Upon his arrest, it was apparent to PW9 (P.C. Hassan Khomwenge) that the appellant, from his conduct was not normal. He immediately took him to **Dr. Ongeche** a psychiatrist who confirmed that the appellant was indeed mentally unstable and recommended treatment. Specifically he noted that the appellant had been treated for mental illness at the Port Reitz Hospital in September 2005. He concluded that the appellant exhibited a flat mood and delusion of persecution with paranoia. He had impaired cognition with lack of insight. This fact was the main reason for the delay in the taking of his plea until he was certified by another psychiatrist, **Dr Mwangombe** that he was fit to plead. In arriving at the conclusion, Dr. Mwangombe noted from the appellant’s history that he suffered mental illness in March 2006 and that it was believed by family members that he had been bewitched as a result of which he was treated by a traditional doctor. Later on 17th May 2006 he was found to be of unsound mind by a psychiatrist. PW2 also confirmed that for the ten years she was married in the family she had known the appellant to be mentally imbalanced. This fact was common knowledge in the village as demonstrated by statements made by those who were running away from the scene. PW3 told the court that as he approached the scene he met people screaming that “***the mad man***” had killed someone.

By **section 166 (1)** aforesaid, once the trial court found as a fact, that the appellant committed the act charged, and that at the time of doing so he was insane so as not to be responsible for his acts, the only course open to it was to make a special finding to the effect that the appellant was guilty of murder but was at the time insane. See **BGKM v R** Criminal Appeal No.243 of 2011.

Why a special finding?. **Section 11** of the Penal Code makes a general presumption that in criminal law every person is sane and of sound mind at any time which comes in question, until the contrary is proved. By this and other provisions of the law it is recognized that instances may arise where a person may not be responsible for a criminal act or omission if at the time of doing the act or making the omission he is, through a disease affecting his mind, incapable of understanding what he is doing, or knowing that he ought not to do the act or make the omission within the famous English common law **McNaughten Rules**, codified in **section 12** of the Kenya Penal Code. The emphasis in the law is that such a person is not criminally responsible for his acts or omissions as a result of any form of disease that has the effect of impairing his mental faculties of reason, judgment, memory and understanding. Apart from insanity under **section 12, sections 13(2) (a) (b), 14 and 16**, also provide for instances where certain criminal acts or omissions are excusable on account of lack of criminal intention. **Section 9(1)** of the Penal Code stresses this point thus:

“9(1) ... 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 marginal notes to **section 166(1)** uses the word lunacy and reads; **“Defence of lunacy adduced at trial”**, yet the entire section relates to the defence of insanity. It is in all material respects similar to **section 2(1)** of the English Trial of Lunatics Act, 1883 prior to its amendment by Criminal Procedure (Insanity) Act, 1964. Before that amendment the section provided that where there is evidence that, if at the time a person committed an offence he was insane, the court would return a special verdict that *“he was guilty but insane”*. With the 1964 amendment the special verdict was changed to **“not guilty by reason of insanity”**. This Act was ultimately repealed by Criminal Law (Insanity) Act, 2006 which maintained the special verdict of **“not guilty by reason of insanity”**, but it was also subsequently amended by the Criminal Law (Insanity) Act, 2010 without changing the wording of the verdict.

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

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

This Court (Madan, Miller (as they then were) and Potter JJA) in **PMI v Rep**, Criminal Appeal No. 91 of 1981, approved this reasoning and reiterated that there can be no conviction when clearly the accused person was suffering from a disease of mind within the **McNaughten Rules**, hence the special finding of **“guilty”** but insane. The Court then asked the question whether the special finding and the order of detention of the accused person by the President in a mental hospital or prison amounts to a sentence of imprisonment. Its answer was that under **section 166 (1) (b) and (c)** (as repealed and replaced with **section 166 (2) and (3)**) the trial court is enjoined, after making the special finding, to report the case for the order of the President and in the meantime, order the accused to be kept in custody in such a place and manner as it may direct. The President may order the accused person to be detained in a mental hospital, prison or other suitable place of safe custody. The court held;

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

The Court went on to explain that;

“We are of the opinion, however, that in the law of Kenya, as in the law of England, the verdict upon a criminal charge must be a conviction or an acquittal, and there is nothing in between. If the accused is found guilty of the offence charged, he is convicted. If the accused is found “guilty” only of the act charged, as on a special finding, or not guilty of the offence charged, the effect is the same, for the accused has not been convicted of the offence charged.

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

....

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

It is elementary learning that the foundation of criminal responsibility, expressed in Latin as *actus non facit reum nisi mens sit rea*”, is that an act constituting an offence does not make a person guilty unless the mind is also guilty; that for an act or omission to constitute a crime there must be *actus reus* and *mens rea*. The definition of a particular crime under any statute will invariably contain the required *actus reus* and *mens rea* for the offence to be complete save in cases of strict liability. Both elements must be proved at the trial. For instance the proof of the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code requires the presence of the unlawful causing of death and malice aforethought.

In **section 166 (1)** the word “**guilty**” is used only as a confirmation that the appellant was indeed the person who caused death; that he was the person to blame for the death, but this confirmation does not include the mental state with which he did the act. That is why the special finding is treated as an acquittal because one essential element for the commission of the offence of murder contrary to section 203 is absent.

Although the case of **PMI** (supra) was a reference to this Court pursuant to **section 379 (5)** of the Criminal Procedure Code following the “**acquittal**” of the respondent, the Court emphasized that no appeal to this Court lay from a decision made under **section 166(1)** of the Criminal Procedure Code. This Court has however recently in the case of **BGKM v R** Cr. Appeal No.342/2011 expressed some doubt regarding this holding and wondered whether a special finding is indeed an acquittal. That doubt was predicated on the fact that the law in England upon which **PMI** case was decided has since been amended. Secondly, the Court was of the opinion that, in view of the traditional duty of the first appellate court to re-examine the evidence recorded by the trial court in order to come to an independent conclusion of fact and law, there can be no bar to an appellant who seeks to question glaring blunders of law and fact made by the trial Court. It will be recalled that in **PMI** case the Court had reasoned that the verdict upon a criminal charge can only be a conviction or an acquittal but not both on the same charge. An appeal to this Court under **section 379(1)** of the Criminal Procedure Code lie only where the appellant has been convicted, sentenced to death, or to imprisonment or to a fine. There is only one instance where an acquittal by the High Court may be challenged to this Court. Within 1 month from the date of acquittal, the Attorney General (today the Director of Public Prosecutions) may on a certificate seek that the Court reviews the case or part of the case and to make a declaration on a point of law of exceptional public importance regarding the acquittal. The declaratory judgment rendered does not operate to reverse the acquittal, but shall be binding upon all courts subordinate to the Court. See **section 379(5)** and **(6)**.

Since the special finding under **section 166** is neither a conviction nor a sentence, it can, logically, only be an acquittal with the consequence that in terms of **section 379 (1)** no appeal lies to this Court. It cannot amount to a conviction because insanity is recognized in law as an illness requiring treatment and not punishment. When detained at the President’s pleasure the accused is considered a patient and not a prisoner. We have explained the development of the law of insanity defence, tracing it to the Trial of

Lunatics Act, 1883 and the subsequent amendments culminating with the 2010 Criminal Law (Insanity) Act **Felstead's** case (supra) which guided this Court in **PMI** case was decided before the amendment of Trial of Lunatics Act, 1883 by Criminal Procedure (Insanity) Act, 1964. The wording of **section 2 (1)** of the former was *in pari materia* with our section 166 of the Criminal Procedure Act, that where a person commits an offence while insane, there will be a special finding to the effect that that he was **“guilty but insane”**. The subsequent amendment to the English statute of 1883 did not effect this provision and the decisions made under it. We reiterate that a person who is found by a court of law to have committed an offence when suffering from a disease of the mind that renders him incapable of knowing what he is doing or knowing that what he is doing is wrong cannot, in a case of murder be said to do so with malice aforethought.

The learned Judge, therefore properly found that there was no malice aforethought because indeed that was the fact.

In the result we find no substance in the single ground of appeal argued before us and accordingly dismiss the appeal.

Dated and delivered at Mombasa this 26th day of February, 2016

W.OUKO

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JUDGE OF APPEAL

K.M'INOTI

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JUDGE OF APPEAL

ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR