



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO, & M'INOTI, J.J.A.)

CRIMINAL APPEAL NO. 46 OF 2015

BETWEEN

NYAWA MWAJOWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa

(Muya, J.) dated 8th May 2013

in

H.C.CR. C. No. 14 of 2010)

JUDGMENT OF THE COURT

On 29th May 2012, the appellant, *Nyawa Mwajowa* pleaded guilty to an information charging him with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. *Nzioka, J.* convicted him and ordered for a pre-sentence report from the Probation and After Care Services to determine the appropriate sentence to mete out. The learned judge was unable to complete the proceedings and on 2nd May 2013, after duly complying with **section 200** of the **Criminal Procedure Code**, *Muya, J.* took over and concluded the proceedings. On 8th May 2013, after considering a pre-sentence report prepared by the Senior Probation Officer, Mombasa, the learned judge was satisfied that the appellant suffered flashes of mental instability. Accordingly, he ordered the appellant to be detained during the pleasure of the President.

Aggrieved by his conviction and sentence, the appellant preferred this appeal in which he has impugned his conviction on two grounds, namely that the trial court, having found him to be of unsound mind, erred by failing to comply with **section 162(4)** of the Criminal Procedure Code and further that the trial court erred by convicting him of murder instead of proceeding as provided in **section 167** of the Criminal Procedure Code.

The particulars of the charge as set out in the information were that on 2nd June 2010 at Bofu Village, Mtaa Location in Kinango within the former Coast Province, the appellant murdered *Mwajowa*

Muhambo. The facts presented by the prosecution after the appellant entered a plea of guilty were that on the material day, at about 5.30 pm the deceased, who was the appellant's father, was walking home from Bofu market when the appellant attacked him from behind with a sharp object suspected to be *panga*. According to the postmortem report, which was produced as an exhibit, the head of the deceased was chopped off above the eyebrow and all the brain matter and proximal part of the skull were separated. According to the report, the cause of death was the cut on the head, which extended to the brain.

From the record of the proceedings, the appellant's sanity was called into question right from his first appearance in court. When the appellant took plea on 19th July 2010 before Odera, J., he pleaded not guilty to the charge and his trial was scheduled on 13th and 14th October 2010. On 13th October, the appellant's court-assigned advocate informed the court that the appellant seemed mentally unstable, a fact confirmed by the court after it noted that he was shouting in court. The court accordingly ordered that the appellant be subjected to mental assessment.

A medical report dated 24th February 2011 was presented to the court indicating that the appellant required medical attention as he was suffering from psychiatric ailment. On 19th September 2011 the prosecutor informed the court that the appellant was mentally unstable while the appellant's advocate told the court that he was unable to take instructions from him. Invoking **section 162(2)** of the Criminal Procedure Code, the learned judge postponed the appellant's trial and pursuant to section 162(4) of the Criminal Procedure Code directed that the appellant be taken to Port Reitz Hospital for treatment.

Instead of making an order transmitting the court record to the Cabinet Secretary for consideration by the President as required by section 162(4) of the Criminal Procedure Code, the learned judge ordered a medical report in respect of the appellant be prepared and filed in court and the case to be mentioned on 9th December 2011. The effect of the court's failure to follow all the requirements of section 162(4) of the Criminal Procedure Code was that section 162(5) of the Code which sets out how the case against the appellant was to proceed after postponement of the proceedings as well as other relevant procedures prescribed by sections 163 and 164 of the Criminal Procedure Code were not complied with.

Section 162(5) requires the President, upon considering the report, to make an order under his hand addressed to the Court, directing that the accused be detained in a mental hospital or other suitable place of custody. In turn the court is required to issue a warrant to that effect until the President makes a further order or until the court orders the accused person to be brought before it. Where the accused person is subsequently found to be capable of making his defence, **section 163 (1)** requires the medical officer in charge of his place of detention to forward a certificate to that effect to the Director of Public Prosecutions who is required to inform the court whether the Republic intends to pursue the prosecution or not. Where the Republic does not wish to proceed with the matter, the accused person is to be discharged and released from custody and where the Republic wishes to pursue the prosecution, the trial of the accused person shall resume as prescribed in section 164 of the Criminal Procedure Code.

On 9th December 2011, a report from a psychiatrist dated 23rd September 2011 was before the court showing that the appellant's behaviour, mood, speech and cognition appeared normal. Accordingly the Court set down the case for hearing. However, the court ordered for a fresh medical report before the trial could proceed. The record indicates that such a report was produced on 7th May 2012, which showed that the appellant was fit to plead. On 11th May 2012 the Court ordered the appellant to take the plea afresh on account of the medical reports that had showed that he was mentally unstable and the time that had elapsed since he took the initial plea on 19th July 2010. When the information was read to him, the appellant replied "**its true**". After putting several questions to him, the court ordered that investigations be conducted to determine whether the appellant had a history of mental illness before the commission of the offence.

On 6th June 2012, the Court is recorded making the following order:

"Court: I am still of the view that the accused does not fully appreciate the offence levelled against him and the magnitude of the offence. I direct Dr. Mahero of Doctor's Plaza at Aga

Khan to give a medical report on the mental status of the accused before I can fully start with the plea by the accused. A psychiatrist report be availed on 12th June 2012. The Deputy Registrar and the In Charge Shimo la Tewa to facilitate the same.”

Dr. Mahero’s report, dated 20th September 2012 was availed to the Court on 25th September 2012. It concluded that although the appellant was calm and co-operative, his attention and concentration were relatively impaired. He had suffered mental illness on account of his abnormal belief and on account of his recollection of his behaviour. However he was found to be in remission and could therefore stand trial.

The court then read the information afresh to the appellant who pleaded guilty in Kiswahili. The prosecutor presented the facts, which we have already set out above, and the appellant admitted the same, again in Kiswahili. The learned judge then convicted the appellant on his own plea of guilty.

Mr. Ole Kina, learned counsel for the appellant attacked the conviction of the appellant for murder, contending that there was evidence that the appellant was mentally unsound when he committed the offence, which was not considered by the High Court. Counsel also faulted the trial court for failure to follow the procedure prescribed by the Criminal procedure Code in cases of insanity. Relying on the decision of this Court in ***Karisa Masha v. Republic, Cr. App. No. 78 of 2014***, learned counsel urged us to find that the conviction was a nullity and to allow the appeal. **Mr. Musyoki**, learned Senior State Counsel conceded the appeal on the grounds that the prescribed procedure was not followed and urged us to make appropriate orders as would have been made by the High Court had it followed the procedure.

Before we consider the merits of this appeal, we wish to make two quick preliminary observations. Firstly, as a general rule, by dint of **section 348** of the Criminal Procedure Code, no appeal is allowed from a conviction arising from a plea of guilty. However, it is settled that the provision is not an absolute bar to all and sundry appeals challenging conviction from a plea of guilty. Where for example the appellant has pleaded guilty to a non-existent offence; where the facts admitted by the appellant do not disclose the offence; or where there are unusual circumstances surrounding the plea of guilty, the appellant is not precluded from appealing. See ***Ndede v. Republic, (1991) KLR 567***; ***John Muendo v. Republic, Cr. App. No. 365 of 2011*** and ***Kilingo Ngome v. Republic, Cr. App. No. 69 of 2014 (Malindi)***. Secondly, although the respondent concedes the appeal, we are not bound by its views and are obliged to satisfy ourselves that the concession is well founded. (See ***Norman Ambich Miero & Another v. Republic Cr. App. No. 279 of 2005 (Nyeri)*** and ***Samuel Kimenju Mbuthi & 2 Others v. Republic, Cr. App No. 44 of 2014***).

Two issues have caused us considerable anxiety in this appeal. The first is the failure by the Court to follow the procedure prescribed by the Criminal Procedure Code when it postponed his trial after concluding that he was of unsound mind and incapable of conducting his defence. In ***Leonard Mwangemi Munyasia v. Republic, Cr. App. No. 112 of 2014*** and ***Karisa Masha v. Republic (supra)***, this Court emphasized that it was of critical importance to follow strictly the procedure prescribed by the Criminal Procedure Code in cases of insanity because those procedures are calculated to ensure that a person suffering a mental disorder, either when he committed the act complained of or at the time of his trial when he cannot competently put forward his defence, is not convicted. In the later case the Court stated as follows which we quote in *extenso*:

“When the trial judge made the order of 20th September 2011 postponing the trial of the appellant and committing him to Port Reitz Hospital, it was pursuant to section 162 of the Criminal Procedure Code. By invoking that provision the court was proceeding on the basis that the appellant was of unsound mind and incapable of making his defence. Instead of the order which it made committing the appellant to Port Reitz Hospital, section 162 (4) obliged the court to order the appellant to be detained in such place and manner as it may think fit (including Port Reitz Hospital) and to transmit the court record or certified copy thereof to the Cabinet Secretary responsible for the Kenya Prison Service for consideration by the President. Upon considering the record the President would, by order, direct the appellant to be detained in a mental hospital or other suitable place of custody until such time as the President makes a further order or until the court, upon receiving a certificate from the relevant medical officer that the appellant was

capable of making his defence and upon hearing the Director of Public Prosecutions on whether he wished to proceed against the appellant or not, orders the appellant to be brought before it for further proceedings...We would add that courts of law should discourage emergence of a practice that is contrary to statutory provisions and procedure unless the provisions or procedures are first expressly invalidated by the court, amended or repealed. In this case, it must be borne in mind that under section 162(5), apart from making an order for the detention of the accused person in a mental hospital or any other suitable place, the President is empowered to make any further order in the matter. Such an order could be an order that is potentially for the benefit of the accused person, including possibly regarding his or her further trial or non-trial. By short-circuiting the prescribed procedure, the trial court could therefore unwittingly be denying an accused person an order that could be to his or her benefit. We are of the view that the provisions ought to be strictly followed and if they have outlived their purpose, they should be properly invalidated or repealed instead of encouraging a practice that is in direct conflict with statutory provisions. While we understand the basis of the practice of sidestepping the legal requirements involving the Cabinet Secretary and the President to be a desire to speed up the trial or conclusion of the issue of the accused person's mental status which is otherwise delayed by the bureaucracy of the two offices, we must emphasize that these are requirements of the law in respect of which no office can claim to be too busy. The solution, in our opinion, lies not in short-circuiting the requirements of the law; but in insisting that the concerned offices discharge their legal duties with due dispatch as expected under the Constitution and the Criminal Procedure Code."

The second matter of concern is that although there was evidence that the appellant could have been of unsound mind at the time of commission of the offence, the High Court restricted its consideration of his mental status only to the time of the appellant's trial. In *Leonard Mwangemi Munyasia v. Republic (supra)*, this Court reiterated that it is the duty of the trial court where the defence of insanity is raised or where it becomes apparent from the accused person's history and antecedent, to inquire specifically into the question and that the trial court cannot ignore evidence on record suggestive of the appellant's insanity merely because the defence has not specially raised it. (See also *Julius Wariomba Githua v. Republic, Cr App. No. 261 of 2006* and *Marii v. Republic [1985] KLR 710*).

The evidence on record, and in particular from Dr. Mahero's report and the Probation Officer's presentence report show that the appellant started suffering mental illness in class three at Gona Primary School after which he dropped out of school. Thereafter he was taken, for a long period of time, to traditional witchdoctors for treatment, one of whom took him in and literally turned him into a slave, working in his farm and performing other household chores without any pay. The appellant detested this treatment and escaped several times, but his father had him captured and returned to the witchdoctors, which completely alienated him from the father. All these facts strongly suggests that the appellant could have been suffering from a disease of the mind and could have been entitled to a defence under the *M'Naghten Rules*, namely that by reason of unsoundness of mind at the time of commission of the offence, the appellant was either incapable of knowing the nature of the act or was incapable of knowing that it was wrong or contrary to the law.

In our view, the trial court should have invoked **section 166** of the Criminal Procedure Code under which, if the accused person was insane at the time of commission of the act charged so as not to be responsible for his acts, and it appears to the court that he did the act charged but was insane at the time, the court is to make a special finding to the effect that the accused was guilty of the act charged but was insane when he committed it. Upon making a special finding, the court is required to make an order that the accused be kept in custody or other safe place of custody and to report the case for the order of the President, who may order the accused to be detained in a mental hospital or other safe place of custody. Thereafter, the procedure prescribed by **section 166 (4), (5), (6) and (7)** of the Criminal Procedure Code takes effect.

Having carefully considered this appeal, the order that best commends itself to us is to allow the appeal, quash the conviction of the appellant and set aside the sentence imposed on 8th May 2013 and substitute therefor a special finding, under section 166(1) of the Criminal Procedure Code to the effect that the appellant was guilty of murder but was insane when he committed the offence. We further direct the

Deputy Registrar, pursuant to **section 166(2)** of the Criminal Procedure Code, to have this special finding reported for the order of the President. In the meantime, the appellant shall be kept in custody at Port Reitz Hospital Mombasa, where he shall continue to receive treatment. It is so ordered.

Dated and delivered at Malindi this 29th day of July, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR