REPUBLIC OF KENYA

THE COURT OF APPEAL

AT KISUMU

(CORAM): MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 104 OF 2014

BETWEEN

LUCY AWUOR ODHIAMBO..APPELLANT

AND

REPUBLIC ....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kisumu Chemitei, J.) dated 27th March 2014,

in

H.C.CR.A No. 28 & 190 of 2007)

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JUDGMENT OF THE COURT

The appellant, Lucy Awuor Odhiambo, was charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The particulars are that on the 12th day of July 2007 at Siru sub location in Ukwala location Siaya district within the former Nyanza Province she murdered ***Gabriel Owuoth Otieno (the deceased)***.

The facts of the case are that on 12th July 2007 the appellant went to visit a relative, ***Mariana Akumu (PW 2)***. In the course of the evening meal, the appellant snatched Mariana's child from her and held her as if she wanted to break the child's neck. Later at around 1.00 am the appellant awoke and again attempted beat the child on the head. When the deceased came out of his house, the appellant attacked and repeatedly bashed his head with a club. The deceased was taken to Siaya Hospital where he was pronounced dead on arrival.

Patrick Oduor Radido, (PW 5), went to the scene at about 1.00am. He found the deceased lying on the ground after having been repeatedly clubbed on the head by the appellant, who he said was wild and out of control. He also saw that the deceased had a wound on his forehead, ribs and back, and stated that he died before reaching the hospital.

Dr. Kendy Rapenda, (PW 1), produced the postmortem report on behalf of Dr. Esieba who conducted the postmortem. According to the report the deceased's cause of death was haemorrage due to fracture and head injury.

In her defence, the appellant testified that there were people fighting her and taking away her things; that Gabriel and Oduor had assaulted her and she was only trying to save her life.

The High Court found that the attack on the deceased by the appellant proved that there was malice aforethought; that the appellant was a visitor to the home and for no apparent reason sought to vent her anger on the deceased. The court further found that the prosecution had established its case beyond reasonable doubt, and in so doing convicted and sentenced the appellant to death for the offence of murder.

Dissatisfied with the decision, the appellant has appealed to this Court on grounds that the ingredients for the charge of murder were not proved; that the appellant was not properly identified; that the High Court failed to evaluate the evidence; and that the High Court fell into error when it shifted the burden of proof.

Mr. Anyumba, learned counsel for the appellant, argued that in arriving at the judgment the learned judge did not determine whether the ingredients of the offence were established, as the prosecution had not established malice aforethought on the appellant's part; that the evidence did not disclose an intent to murder the deceased. Furthermore, the appellant was not fit to stand trial due to her mental state. According to PW2 who knew the appellant, she was mentally sound as a girl, but that she was not mentally stable on the day in question; that the trial court noted that the appellant seemed unable to comprehend the proceedings; and that the trial court failed to take into account the appellant's defence. Counsel urged us to order a retrial of the case.

Ms. Khaemba, Senior Prosecution Counsel, submitted that the appellant was a visitor in the deceased's home, when at 1.00 am the appellant awoke and went to the deceased's house where she beat him to death. Counsel conceded the appeal on the basis of mental illness on the part of the appellant.

We have considered the grounds of appeal, the submissions by counsel on both sides and carefully read the record of appeal. Mr. Anyumba has urged us to reevaluate the evidence to ascertain whether the appellant was of sound mind when the offence was committed and during the conduct of the trial.

This being a first appeal, it is our duty to re-evaluate and re-examine the evidence and make our own conclusion but we must bear in mind the fact that we have not had the opportunity of seeing and hearing the witnesses. In ***Mwangi vs Republic*** [*2004] 2 KLR 28* at page 30 this Court stated:

> ***"In*** *Okeno v R* ***[1972] EA 32 at p. 36 the predecessor of this Court stated, inter alia:***
>
> > ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (****Pandya v R* ***[1975] EA 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see*** *Peters v Sunday Post* ***[1958] EA 424".***

The appellant's mental status was raised during the trial. And in the judgment the learned judge concluded thus;

> ***"Was she of sound mind? No evidence was led to this conclusion. Subsequently the psychiatrist Dr. Onyango put her on medication but there is no evidence to suggest that the accused prior to assaulting the deceased suffered any mental illness. It cannot be said as argued by the defence counsel that she suffered lucid moments and thus there was every likelihood that during the***

incident she suffered from such fit. It would have been in order to place on record any evidence that she had a history of mental illness."

In ascertaining whether the appellant was of sound mind, the record shows that on 14th October 2009, the trial court ordered that the appellant undergo a psychiatric examination to ascertain her mental status. On 15th April 2010 the Court ordered that the appellant proceed to trial, as a medical report had indicated that she was fit to stand trial. This medical report was not produced in court.

On 17th June 2010 Ali- Aroni, J. found that the appellant did not seem to be of sound mind, and ordered that she be admitted at Nyanza General Hospital, whereupon the Provincial Psychiatrist would provide a detailed mental report on the appellant's mental condition. Once again, this medical report was not produced in court.

On 16th November 2010 after learned counsel for the appellant brought it to the attention of the court that she was unable to communicate with the appellant, Mr. Meroka, learned counsel for the State, requested the court to proceed under ***section 166*** of the ***Criminal Procedure Code*** where the appellant pleads the defence of lunacy. At that point, the court declined to proceed on the basis of lunacy and instead ordered that the full trial commences, whereupon the Dr. Kendy Rapenda (PW 1) took the stand.

That is not all. When placed on her defence, her counsel, Mr. Opondo, informed the court that because of her mental illness, the appellant had refused to testify as to the events of the fateful day. This prompted the learned judge to observe;

> ***"The accused seems not to comprehend the proceedings and cannot answer the questions as directed by her counsel".***

Section 162 **of the Criminal Procedure Code empowers a court to inquire into the soundness of mind of an accused person and stipulates;**

> ***"(1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently is incapable of making his defence, it shall inquire into the fact of unsoundness.***
>
> ***(2) If the court is of the opinion that the accused is of unsound mind and consequently is incapable of making his defence, it shall postpone further proceedings in the case."***

From the chronology of events, it is apparent that the issue of the appellant's mental status arose variously before and during the trial. Yet, the learned judge came to the conclusion that there was no evidence to show that the appellant suffered from mental illness. This was despite the existence of two court orders requiring that the appellant be mentally assessed **to enable the court ascertain her ability to conduct her defence**, which reports were never produced in court, and **the learned judge's own observation of the appellant's apparent limitations in advancing her defence.**

On the basis of these manifestations, the learned judge ought to have directed his mind to the question of the appellant's sanity at the time. But, **he failed to appreciate that there was indeed a case made out for the conduct of an inquiry into her mental status.**

In the premise, we agree with the appellant's counsel that there was sufficient material before the court to warrant the conduct of an inquiry into the appellants' mental status as required by *section 162* **of the** *Criminal Procedure Code* **so as to enable the court determine the appellant's soundness of mind before and during the trial. The omission by the court to do resulted in a mistrial.**

Accordingly, the appeal is allowed, the conviction quashed and the sentence imposed set aside. We now direct that the matter be remitted back to the High Court for retrial before any judge other than Chemitei, J. We further direct that prior to retrial the necessary inquiry under ***section 162*** of the ***Criminal***

Procedure Code be undertaken to ascertain the appellant's soundness of mind. We also order that pending retrial, the appellant shall remain in custody.

Orders accordingly.

DATED and delivered at Kisumu this 11th day of October, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR