



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING IN MERU)**

**(CORAM: GITHINJI, KARANJA & KIAGE, J.J.A)**

**CRIMINAL APPEAL NO 141 OF 2014**

**BETWEEN**

**SILAS MUCHUI M' ITHULA .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.) dated 15<sup>th</sup> August 2013*

in H.C.CR.C No 36 of 2006

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**JUDGMENT OF THE COURT**

**SILAS MUCHUI M'ITHULA** ('the appellant') has lodged this appeal against his conviction for the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence as per the information were that on the 7<sup>th</sup> day of February, 2006 at Mwerongaga village, Thinyaine location in Meru North District of the former Eastern Province, he murdered **M'ITHULA M'ITIRITHIA**. It would be worthwhile to state that the said **M'ITHULA M'ITIRITHIA** ('the deceased') was the appellant's father.

The prosecution called 7 witnesses including: **PW 1 FRANCIS MWINGIRWA (FRANCIS)**, a brother to the appellant who testified that he was with the deceased on the material date at his 1<sup>st</sup> wife's home at about 4.45p.m. Moments later the deceased departed for his 2<sup>nd</sup> wife's home, only for him to be murdered 20 minutes thereafter. Francis testified that he visited the scene of the murder; that the deceased had cuts on his legs and blood all over his body. He testified that the appellant and the deceased had disagreed over felling of trees for purposes of making charcoal. **PW2 GEOFFREY NDEGWA (GEOFFREY)** merely confirmed through his testimony that the deceased was his father; that he had received a telephone call on 8<sup>th</sup> February, 2006 informing him about his father's demise; and that on 14<sup>th</sup> February, 2006 he went to the Meru General Hospital where he witnessed his father's post-mortem.

**PW 3 JULIUS THURANIRA KARIANKI (JULIUS)**, a businessman, resident at Rwanda location, and a neighbour to the appellant testified that on the material date he met the appellant carrying two jerricans and a knife tied to his bicycle. The pair were headed in opposite directions at the time they met. After a

distance of about 50 meters, Julius heard noises, and decided to return and investigate, whereupon he met the appellant riding his bicycle fast towards him in flight. Nearby lay the deceased who was crying saying that the appellant had cut him, a fact which was confirmed by **PW 5 GODFFREY MWITHIRWA (GODFFREY)** who was the sole eyewitness and the first to arrive at the scene. The deceased passed on at the scene of the attack. At about 6p.m. Julius and other passersby proceeded to the appellant's house and found that he had locked himself therein. They called him and he opened the door.

**PW 4 ISAIAH MURURU (ISAIAH)** gave a brief rendition of events by testifying that the appellant was his brother and the deceased was his father; that the duo had hitherto related well save for a disagreement they had three days to the material date. Isaiah testified that the appellant had forcibly felled trees belonging to the deceased; that he received information from Julius about the unfortunate turn of events; that he visited the scene where he found the deceased dead; and that the deceased's body had multiple injuries on the legs. Finally, Isaiah testified that he and the neighbours tracked the appellant to his house where he had locked himself and removed him therefrom before handing him over to the chief. Later, the appellant was handed over to the police.

**PW 6 PC NIXON MALONZA (PC MALONZA)** who was based at Tigania Police Station on the material date recounted the role played by the police and specifically **PC GITAHU** (deceased) who was the investigating officer. He gave an account of their arrival at the crime scene; the investigative processes which followed; collection of the deceased's body; the re-arrest of the appellant from members of the public; his subsequent booking at the Police Station; and the delivery of the deceased's body at the Meru General Hospital Mortuary.

**PW 7 DR ISAAC MACHARIA (DR MACHARIA)** testified on behalf of **DR TITUS MUTHAA (DR MUTHAA)** formerly of Meru General Hospital following a successful application by the prosecution under **Section 33** and **77** of the **Evidence Act**. The latter doctor could not be traced without occasioning delay and considerable expense. Accordingly, **DR MACHARIA** testified with regard to the post-mortem report which his colleague had prepared following the deceased's death. He attributed the cause of death to haemorrhage. The prosecution closed its case thereafter, and the trial court ruled that a *prima facie* case had been established against the appellant.

Prior to the start of the defence hearing, the appellant's counsel requested that the appellant be taken to the Meru District General Hospital for a psychiatric examination to confirm whether he was fit to file a statement in his defence. On its part the prosecution informed the trial court that the appellant had been examined before being formally charged, and that he was said to suffer from mental illness. The trial court granted the defence counsel's request and ordered that the appellant be subjected to a comprehensive psychiatric test at the Meru District General Hospital. Thereafter, a report was to be filed before the trial court for its consideration. The question of the appellant's mental fitness remained pending as from 17<sup>th</sup> November, 2009 to 27<sup>th</sup> September, 2012 when the prosecution returned an answer in the affirmative.

In his defence, the appellant gave a sworn statement whose tenor was that he was woken up at about 10p.m. by people who told him that he had run over a man with his bicycle; that the said person had died; that the person in question was his father; and that he was unwell on the said date. He also tendered a P3 Form in evidence showing that he had been taken to a psychiatric clinic on 7<sup>th</sup> February, 2006 and was diagnosed to be of "abnormal mental status". **DW 2 SILAS MTURIBI M'INYARA (SILAS)** who was an uncle to the appellant testified in his defence and gave a history of mental affliction on the part of his nephew. In its judgment the trial court entered a special finding pursuant to **Section 166 (1)** of the **Penal Code** and ordered that the appellant be detained at the President's pleasure pursuant to **Section 166(2)** of the **Penal Code**.

Aggrieved by the finding of the trial court the appellant lodged a Notice of Appeal against the said decision, followed by a Memorandum of Appeal where he complained that:-

- ***The learned judge erred in law and in fact when (s) he failed to consider that the deceased died of impact between the appellant and himself at a sharp corner when his***

- bicycle's brakes failed.*
- *The learned judge erred in law and in fact when (s) he failed to take into consideration the evidence adduced in court by PW 5 who was at the scene of the crime.*
  - *The learned judge erred in law and in fact when (s)he failed to consider the fact that the evidence adduced in court by PW 4 that he saw the appellant with a bicycle carrying two buckets full of water before the accident happened, but he heard cries from the public that I was hit by the deceased and I was unconscious.*
  - *The learned judge erred in law and in fact and misdirected herself by failing to consider the evidence adduced in court by PW 1 where he said that he was told of accident after it happened and was not at the scene of crime hence making this appeal.*
  - *The learned judge erred in law and in fact and misdirected herself by failing to understand that I had my bicycle and the deceased had his bicycle going at different directions hence making this appeal.*
  - *The learned judge erred in law and in fact when she misdirected herself and imposed a custodial sentence without taking into consideration the evidence adduced in court by the investigation officer but misdirected herself and imposed a custodial sentence hence making this appeal.*
  - *The learned judge erred in law and in fact when s(he) failed to put into consideration the evidence adduced in court by the investigation officer that I was discriminated by the prosecution and that the investigation officer did not know the declamations (sic) and why I was prosecuted in this case hence making this appeal.*
  - *The doctor who conducted the post-mortem of the deceased did not understand that the ground had stones and walls of the road where the deceased fell were sharp and that the stones cut the deceased and that was the main cause of death.*

The Memorandum closed with what we construe as a plea from the appellant to be allowed to appear before us during the hearing. Supplementing the above grounds was a single ground contained in the Supplementary Memorandum of Appeal to the effect that:-

- *The trial court erred in law and in fact by convicting the appellant for the offence of murder in total disregard of the defence of insanity which was satisfactorily proved.*

At the hearing of the appeal, Ms Thibaru, learned counsel appeared for the appellant, while Mr. Evans Onderi, Senior Assistant Deputy Public Prosecutor appeared for the State. Ms Thibaru elected to urge the grounds in the Supplementary Memorandum of Appeal only by submitting that the trial court found the appellant insane at the time he committed the offence. Secondly, under **Section 12** of the **Penal Code** he was not criminally liable and was therefore not guilty. She submitted that the appellant should have been found guilty of manslaughter instead. Thirdly, counsel submitted that **Section 166** of the **Criminal Procedure Code** should apply to lucid moments. No authority was laid before us in support of this submission.

Counsel wound up by submitting that at the time of commission of the offence the appellant was unwell. She posed the rhetorical question as to why somebody who is unwell should be admitted to hospital indefinitely. She concluded by urging us to refer the matter back to the trial court for further directions.

On his part, the learned Senior Assistant Deputy Public Prosecutor opposed the appeal and submitted that the special finding of guilty but insane was not a conviction. He contended that the appellant raised and proved the defence of insanity; that **Section 166** of the **Criminal Procedure Code** captures the essence of **Section 12** of the **Penal Code** in full; and that a special finding is not a conviction or appealable for that matter. Ms Thibaru, learned counsel did not respond to the said submissions.

This is a first appeal and our mandate is set out concisely in the case of ***OKENO V REPUBLIC [1972] EA 32*** which requires us to re-evaluate, re-assess and re-examine the evidence tendered before the trial court with a view to arriving at our own independent conclusion. While at it we should bear in mind that we did not enjoy the benefit of seeing the demeanour of the witnesses as the trial court did; a situation which we should give due allowance for. **Section 203** of the **Penal Code** sets out the two ingredients

which must be proved for the offence of murder to be established namely: *-mens rea* and *actus reus* as follows:-

***“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.***

**Section 206** of the **Penal Code** defines malice aforethought as follows:-

***“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-***

***(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 the death of or grievous harm to some person whether that person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

***(c) ...***

Did the prosecution establish the twin ingredients for the offence of murder? To answer this question, we turn to the testimony of Godfrey who saw the appellant attack the deceased. We note that his testimony remained unshaken during the trial thereby confirming without any hint of doubt that the appellant murdered the deceased. However, of concern to us is that no evidence was tendered by the prosecution to prove malice aforethought as set out at **Section 206** of the Penal Code (supra). Moreover, the appellant was serene as he went about the motions of his heinous act as can be discerned from the testimony of Godfrey to wit:-

***“I did not hear the accused say anything as he attacked (sic) the deceased. It is the deceased who was crying”.***

Godfrey continued as follows:-

***“I asked the accused why he was cutting his father. That is when he began to chase me”.***

Julius testified in part that:-

***“I and others went to the accused house and found him locked in the house. This was at about 6p.m. We called him and he opened the house”.***

Our attention is also drawn to the request by defence counsel prior to the start of the defence hearing that the appellant be subjected to a psychiatric examination; and a court order to that effect. The submission by the State on the appellant's fitness to plead to the charge on the strength of a certificate of capability to make a defence issued pursuant to **section 163(1)** of the **Penal code** is equally compelling in our considered view. We say so as shortly thereafter the appellant tendered his defence before the trial court. Its gist was the defence of insanity which by and large went unchallenged. In the circumstances, can it be said that the appellant had the mental capacity to form the requisite *mens rea* for the offence of murder? We think not, and concur with the special finding entered by the learned trial judge. Having so found we have no hesitation in stating that the learned judge was on a sound legal footing with regard to the sentence she handed down.

**Section 6** of the **Criminal Procedure Code** states as follows:-

***“6. The High Court may pass any sentence authorized by law”***

Would the special finding of guilty but insane qualify as ‘any sentence authorized by law’? It does. We have unwittingly answered the learned Senior Assistant Deputy Public Prosecutor’s submission that a special finding is not appealable notwithstanding its absence from the grounds set out in the appellant’s memoranda of appeal. For the avoidance of doubt such a finding is appealable as was held by this Court in ***WS V REPUBLIC [2016] eKLR***. Be that as it may, nothing turns on our digression. The upshot of our analysis is that this appeal is dismissed and the finding of the High Court is upheld.

This judgment is read under **Rule 32(2)** of the Court of Appeal Rules, 2010 Githinji JA having declined to sign.

***Dated and delivered at Meru this 21<sup>st</sup> day of December, 2016***

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**