



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 139 OF 2010

FABRIANO UTUKU MUKIRA.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

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

(W. Karanja, J.) dated 5th May, 2010

in

H.C.CR.C. No. 23 of 2003)

RULING OF THE COURT

This Notice of Motion is brought by Fabriano Utuku Mukia (applicant) under **Rules 29(1) (b)** and **31** of the Court of Appeal Rules. The applicant is seeking for leave to adduce additional evidence in respect of his mental status and an order that he be examined by a psychiatrist in order to determine his mental status at the time of the commission of the offences he was charged with before the trial court.

The motion is supported by an affidavit sworn by Mr. S. K. Njuguna on 14th January, 2015, learned counsel for the applicant. The gist of the matters deposed thereto in the said affidavit are that: the applicant was charged with four counts of murder which were committed within an hour or so; the usual practice after an arrest, a murder suspect is taken for psychiatric examination to determine his mental status at the time of the commission of the offence and also to determine his ability to follow proceedings. It is contended the applicant was never taken for a psychiatric examination. According to counsel for the applicant, the applicant had told him the he has no recollection of what happened and he only learnt about the four deaths several days after his arrest.

Further, the applicant informed his counsel that he has never smoked cigarettes or bhang, drunk beer or wine and has never taken drugs; On the day the murders were committed, the applicant was scheduled to take up a position of responsibility of a committee member at the local primary school; the applicant had no quarrel or argument or hatred or any reason whatsoever to harm any of the victims or their relatives;

thus, it was not usual for a normal person to cut the throats of four people without any motive or provocation of any kind as in this case whose unusual nature baffled the trial Judge as per the observations made in the judgment. Counsel also pointed out the proceedings of 21st and 28th May, 2005, where the Judge observed that the applicant was not “**looking well**” and, therefore, ordered that he be taken for treatment. The applicant also applied for an adjournment when he was supposed to give his defence and, therefore, there was no defence on record, a further demonstration that the applicant did not comprehend the nature of the proceedings he was facing.

On the part of the State, this application was opposed: Mr. Job Kaigai, the learned Assistant Director for Public Prosecutions, relied on his affidavit sworn on 9th February, 2015. According to the State, the applicant was represented throughout the trial and he never raised the issue of his inability to follow the proceedings due to his mental status. The applicant only complained of abdominal pains during trial, an adjournment was allowed to allow him get medical treatment before he could give his defence evidence. That notwithstanding the applicant refused to give defence evidence, and his counsel also did not make any submissions. The applicant or his advocate did not put forth a defence of insanity, thus, it is a new matter being introduced in the appeal as an afterthought so as to take a matter that was tried and concluded backwards.

The essential background information in this matter can be stated briefly. On 21st August, 2003, the applicant was charged before the High Court with four counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The applicant pleaded not guilty to all the charges, he was tried before the High Court with about 10 prosecution witnesses giving evidence in support of the charges. At the close of the prosecution’s case, applicant’s counsel sought adjournment on the grounds that the applicant was unwell. The adjournment was allowed but when the matter came up for defence hearing a month later, the applicant declined to proceed with his defence hearing claiming that he was not ready. The learned Judge closed the case as it is discernible from her observations in the judgment:

“On the date for defence hearing, counsel sent somebody to say that he was not ready to proceed saying that the accused was unwell. The accused told the court that he had problems with his stomach. It was then clear that for some undisclosed reasons, the accused person did not wish the matter to proceed. I gave the defence a last adjournment but when the matter came up again a month later, the accused person declined to proceed saying that he was not ready. One would wonder what more time he needed given the matter had been proceeding for over 6 years.

I declined the application for adjournment but the accused person declined to testify. I, therefore, made the inference that he had decided to offer no evidence. His counsel who was in court said he had no submissions to make and so he closed their case”.

The learned Judge proceeded to consider the evidence and by a judgment dated 5th May, 2010, the applicant was found guilty of all the four counts. He was accordingly convicted but sentenced to death in respect of Count 1 while the sentences on the other three counts remained in abeyance.

The applicant has appealed before this court; but before the appeal was heard, he presented the instant application under **Rule 29(1) (a)** and **(b)** of this Court’s Rules which state as follows:

“29 (1) on any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have power -

(a) to re-appraise the evidence and to draw inference of fact; and

(b) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner”.

The principles that guide this Court on whether or not to permit adduction of additional evidence have been articulated in the following cases:

Mzee Wanjie and 93 Others –vs- A. K. Sakwo, A. C. Kanyorati, S. W. Kibogo and William Gachiringa, (1982-88) 1KAR 462, where it was held:

“1 Before the Court of Appeal will permit additional evidence to be adduced under Rule 29, it must be shown that it could not have been obtained by reasonable diligence before and during the hearing. It must be shown that the new evidence would have been likely to have affected the result of the suit”.

The issue we have to determine in this application is whether the above conditions were demonstrated by the material that was put before us. The applicant was represented by counsel throughout the trial in the High Court. The applicant also sought adjournment on medical grounds but no application was made for him to be subjected to a psychiatrist examination. The applicant was given a chance to offer defence evidence but he offered none, his counsel also did not make any submissions. The applicant states that he had no recollection of what happened but was told what happened many days after the arrest:

“That I have talked with the appellant on two occasions at Nyeri Prison and he has told me that he does not know what happened and was only told what he had done many days after the arrest”.

The trial of the applicant went on for over 6 years and he was represented by counsel throughout but never raised an issue of his mental capacity. We are of the view that the examination of the applicant’s mental status is not a new matter. Besides the offences were committed about 12 years ago, the applicant has been incarcerated all this time and he did not present to us any material to show that while in prison he has suffered mental breakdown. Also, the applicant was represented by counsel who had an opportunity to apply for the mental examination and also to adduce the defence of insanity but refused or neglected to do so. We find the applicant and his counsel had an opportunity to seek for mental examination during the trial but they squandered the opportunity they had before the trial court to adduce it or to summon a psychiatrist to give evidence on his part.

As to the second condition, that is whether the new evidence would have altered the outcome, no attempt was made to show that the result of the whole case would have been different if evidence of mental status was adduced. This is because the application is being made 12 years after the offence was committed. We are not told that the applicant has suffered any mental breakdown while in custody, it remains a mystery to us how a mental examination would be conducted in respect of an offence that was committed 12 years ago and what result it would yield. We are thus not sure of its evidential value.

In conclusion, we find no merit in this application which is hereby dismissed.

Dated and delivered at Nyeri this 17th day of March, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

J. OTIENO - ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR