



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: WAKI, NAMBUYE & KIAGE, J.J.A.)

CRIMINAL APPEAL NO. 243 OF 2011

BETWEEN

BGKM.....APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru

(Lesiit J.) dated 30th June, 2011

in

H. C. CR. A No 65 of 2000

JUDGMENT OF THE COURT

1. The crucial issue that lies for our consideration in this appeal is whether the appellant was “guilty of murder” and was deserving of the death penalty or, as the trial court found, he was “guilty but insane” and shall continue to be detained at the President’s pleasure.
2. On the 14th September 2006 at about 6.00 pm, six young children aged between 3 and 11 years were playing and looking after the family goats outside their home in Meru North District. Two of them were the appellant’s brothers while the others were his cousins. Then the appellant appeared on the scene. He called the younger children and led them to an empty mud-walled, timber-house nearby promising them that he would give them sweets. According to DM (PW1) who was his brother and the older of the six at the age of 11, the appellant was normal and DM followed the other children in the hope of getting some sweets too. But then the appellant suddenly locked the door as soon as they went in and flashed out a bolted club/rungu which he had hidden inside his jacket. He got hold of EM (PW4) and clobbered him on the head. EM fell down unconscious. DM jumped and held the appellant’s waist from the back and all the children started screaming. The appellant grabbed three other children in turns and hit them on their heads rendering them unconscious before turning to the youngest, RM, whom he hit in the middle of the head and back inflicting fatal injuries. He also turned on DM and hit him on the side of his head. Just then, a

- neighbour heard the screams and knocked on the door. As DM opened for him, the appellant broke through the mud-walled house at the back and escaped.
3. The children were taken to Maua Methodist Hospital by, among others, the father of the appellant, **FM (PW5)** (F) who had earlier received information of the attack and rushed home. Four of the children were admitted for treatment and one was treated and discharged. Medical reports later confirmed that they had been maimed and suffered grievous harm, one of them irretrievably as she became stunted and lost her memory. However, 4-year old RM (the deceased) died shortly on arrival while undergoing treatment. A post mortem carried out on her body confirmed that she had sustained a depressed skull fracture at the occipital area about 5cm in diameter, a scalp laceration in the same area, subdural and extradural haematoma, with intracerebral bleeding marked on the occipital lobe. The cause of death was severe head injury. The incident was reported to Maua Police station.
 4. The next time the appellant was seen was at 3.00 am the following morning when his father, F, returned home and found him outside crying. The appellant had no trousers, jacket or shoes. F asked the appellant what he had done but the appellant said he did not know. F asked some young people to clothe the appellant and he led him to the chief's camp where he left him. He was handed over to Kathelwa Administration Police post from where **P.C Ben Wafula** (PW2) of Maua Police Station rearrested him on 15th September 2006. PC Wafula, who was the investigating officer, visited the scene and drew a sketch plan, recorded statements, recovered the murder weapon, and obtained the report on the mental assessment of the appellant before charging him with the offence of the murder of the deceased.
 5. According to the mental assessment report made by Dr Mburugu of Nyambene District Hospital on 9th October 2006, the appellant was confirmed to be of sound mental status and above 18 years of age. Nevertheless, some evidence was extracted from some prosecution witnesses suggesting that all was not well with the appellant mentally. We may sample some of them:-
 6. DM was 16 years old when he testified in 2011 and stated:

“Before this incident B did not have a stable mind. He used to go to the shamba and dig holes and would remove lice from his body and bury them in the holes.[...]When I asked B why he was beating us he never replied. He has never been violent before[....].That day he looked normal”.

7. When P.C Wafula went to rearrest him on 15th September, he found him:

“..rough and unkempt. I do not mean he was violent, it was his appearance which was dirty, hair was not combed [...] I conversed with the accused and he appeared a normal person”.

8. Finally his father, F:-

“Before this incident many of his age mates told me several times that his mental status was deteriorating. I considered him and found he had a fault. I was looking for money to take him to hospital but the incident happened before I did. The accused was unkempt, wore dirty clothes. He was going to primary school in Standard 7. He was not abusing drugs. [..] He looks normal.”

9. In his sworn defence, the appellant said he could not recall where he was on 14th September 2006. He just found himself in prison in 2008 and cannot remember how he ended up there. It was his father who went there at a time he could not remember and told him that he had been charged with the offence of killing the deceased whose relationship with her he knew and he was shocked. In cross examination he said:

“My father told me that when he saw me he thought I did not have a normal mind. I do not know if I was having abnormal head or not. No, I have not always had an abnormal mind. I was told of the abnormality in 2008.”

10. The trial Court (**Lesiit J.**) considered and evaluated all that evidence and found that although the fact of death of the deceased was proved as well as the involvement of the appellant in the death, the appellant's defence amounted to one of insanity; that he was not aware of what he was doing at the time the incident occurred. It was upon the appellant therefore to prove on a balance of probability, that it was likely that due to mental disease he did not know what he was doing at the material time, or that what he was doing was wrong, and so he could not have formed the intent to kill the deceased.
11. In the end the trial court found the appellant had not discharged that burden of proof and reasoned as follows:-

“The Court has to decide on a balance of probabilities whether the accused proved the defence of insanity. Having carefully considered the accused's own defence and the evidence of Denis and Francis; and having taken into account the circumstances under which the offence was committed, I find that it seemed more likely that the accused was behaving in an abnormal manner. However the accused was taken for mental assessment soon after the incident and found to be normal. I also considered that he escaped soon after attacking the children when an adult went to their rescue. In the circumstances, my finding is that the accused, even though mentally disturbed was not so unwell as not to be unaware that what he was doing was wrong. I therefore find that the accused cannot benefit from the provisions of Section 12 of the Penal Code.”

12. Having so found, the trial court entered a special finding of **“guilty but insane”** and subsequently ordered that the appellant be **“detained at the President’s pleasure”**. The appeal before us is against those findings.
13. Before we consider the submissions made by learned counsel on both sides, we must observe at once that the findings made by the trial court appear to be contradictory and furthermore raise a fundamental issue of jurisdiction. Contradictory because in finding that the appellant was in full control of his faculties when he committed the offence, the trial court in effect dismissed any notion of insanity and the logical verdict that would have followed was a conviction for murder. But none was entered. Instead of a sentence that should have followed a conviction, a special finding of ‘guilty but insane’ was made without invoking **section 166** of the **Criminal Procedure Code (CPC)** which would be the only justification for making the order. In sum, the court did not expressly refer to a conviction, an acquittal or sentence.
14. This Court, differently constituted (**Madan, Miller and Potter JJA**) in the case of **PMI v Republic [1982] eKLR** grappled with a similar issue and ultimately held:

“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.

And therein lies the jurisdictional issue.

15. The jurisdiction of this Court to hear appeals from criminal trials in the High Court is derived exclusively from **Section 379** of the **CPC**. The material words of the section are -

"379(1) Any person convicted on a trial, held by the High Court and sentenced ... to imprisonment for a term exceeding twelve months ... may appeal to the Court of Appeal - ..."

In the **PMI case**, the Court posed a specific question, thus:-

“Does an appeal to this Court lie from a special finding under Section 166 of the Code by the High Court of guilty of the act charged but insane. And is such a special finding a conviction or an acquittal for the purposes of Section 379 of the Code?”

16. In answering the question, the Court referred to a similar provision in England, **Section 3 of the Criminal Appeal Act, 1907**, which provided in effect that only *“a person convicted on indictment may appeal under this Act to the Court of Criminal Appeal”*; the question therefore being whether by reason of the special verdict under the Act of 1883 the accused was *“a person convicted on indictment.”*

17. This Court then accepted the answer given by the House of Lords to the question in the case of ***Felstead v Rex [1914] AC 534*** where it was held:

*“..that the accused was not “A person convicted ... “ It was also held that the special verdict was one and indivisible and was a verdict of acquittal. In relation to an earlier decision of the Court of Criminal Appeal in *Rex v Ireland [1910] 1 KB 654*, in which the Court held that a person in reference to whom a special verdict was found was “a person convicted ... “, Lord Reading said at page 543 –*

“The Court was largely influenced to their conclusion by reason of the use of the word “guilty” in the special verdict. It is unfortunate that this word is there used, as it suggests the responsibility for a 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.”

18. In the end, this Court answered the question posed earlier as follows:-

“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.”

As already seen, there was neither a conviction nor sentence in the matter before us and we would have declined to hear the appeal if we were to be faithful to the decision in the PMI case. But the law in England upon which the decision was predicated has since changed, specifically casting doubts that a special finding was an acquittal. We find no reason to hold that it is. Indeed, in view of the traditional duty of the first appellate court to re-examine the trial court record exhaustively and make its own conclusions on matters of fact and law, we find no reason to bar an intending appellant who seeks to question glaring blunders of law and fact which a trial court may have made. We shall revert to the issue shortly.

19. The appellant intended to challenge the decision of the trial court on five grounds drawn up by his Advocates on record M/s Wamache & Co as follows:-

1. ***THAT*** the learned trial Judge erred in law and in fact in not finding that the prosecution did not prove motive for the alleged murder, nor was there malice aforethought as required by law to warrant the trial court to issue the judgment it did.
2. ***THAT*** the learned Judge erred in law and in fact in not arriving at a finding that Section 166 of the Criminal Procedure Code Cap 63 Laws of Kenya did not augur well (sic) with the provisions of Article 24 (1) and (2) of the Constitution of Kenya, hence the finding in the judgment concerning the President’s pleasure is unlawful.
3. ***THAT*** the learned Judge erred in law and in fact in not finding that the accused had Cerebral malaria when the act was allegedly committed, hence the accused was not in control of his mental faculties.
4. ***THAT*** the accused rights as envisaged under Article 49 (1) (f) of the Constitution of Kenya 2010 were grossly violated in that he was detained in police custody for more than two months before

he was arraigned in court to take his plea.

5. **THAT the detainment (sic) of the accused violated Articles 24, 25 & 52 of the Constitution of Kenya 2010.**

20. At the hearing of the appeal, learned counsel for the appellant **Mr. Amos Wamache** informed the Court that he had discussed the matter with the appellant and would wish to withdraw the appeal. The appellant however resisted the withdrawal reminding the Court that he had a constitutional right to be heard before this Court, and so he was. Mr. Wamache chose as the backbone of the appeal the submission that no malice aforethought was proved since the appellant's state of mind was not normal. He referred to the various pieces of evidence attributed to the prosecution witnesses and the appellant's own plea of ignorance of what he was accused of doing, and submitted that it was erroneous for the trial court to make a finding that he was aware of what he was doing and that it was wrong.
21. In response, learned senior prosecution counsel, **Mr. Kariuki Mugo** supported the finding of the trial court on the appellant's state of mind observing that the appellant in a calculated move lured the children away from their playground, ensured that the murder weapon was safely hidden from them, and had the presence of mind to break a wall and escape when someone else came to the children's rescue. He referred to the mental assessment record of the appellant which confirmed he was normal at the time the offence was committed. Although the prosecution would have insisted on a conviction for murder, Mr. Kariuki defended the special finding made by the trial court and sought dismissal of the appeal. As for alleged breach of the appellant's constitutional rights to a fair trial by reason of prolonged pre-plea detention, counsel submitted, correctly in our view, that the new Constitution was not applicable in this matter and that, in any event, the issue was tried as a preliminary one and the explanation given by the prosecution was upheld. At any rate, the right forum to pursue the issue was a civil court, he concluded.
22. We have anxiously considered this appeal which raises substantive issues of law as well as procedural issues. As the first appellate court we are not restricted to any number of issues but have a duty to re-evaluate and re-assess the recorded evidence in the manner of a retrial. See **Selle vs. Associated Motor Boat Co. Ltd [1968] EA 123**. In doing so we must give allowance for the fact that the trial court was better placed to assess the credibility of the witnesses who appeared before it.
23. The most crucial finding made by the trial court was that the appellant's sanity was still intact when he committed the offence. There is always a presumption that every person is of sound mind and accountable for their actions until the contrary is shown. That is declared expressly in **Section 11** of the **Penal Code. Section 12**, however, absolves a person of criminal responsibility under certain specific conditions, thus:-

“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

(Emphasis added)

24. We agree with the trial court that the burden lies on the accused to prove, on a balance of probabilities, that he was insane before he committed the offence. The case of **Marii v/s Republic [1985] KLR 710** emphasized that approach, thus:-

“The burden on the Accused to prove insanity is not as heavy as the one on the prosecution. The burden is discharged by proving on a balance of probabilities that it seemed more likely that due to mental disease the Accused did not know what he was doing at the material time or that what he was doing was wrong, and so could not have formed the intent to kill the deceased.”

25. With respect however, before an accused is called upon to discharge the burden, he must put forward the defence of insanity. That requirement was set by this Court in the **PMI case** (supra) when it posed the question:

“The accused not having raised the defence of insanity under section 12 of the Penal Code at the trial, was the trial judge entitled to make a special finding of insanity. Or, is it exclusively for the accused to raise the defence of insanity?”

26. The Court considered the question at length and set out the procedure, thus:-

“The marginal note to section 166 of the Criminal Procedure Code reads - "Defence of lunacy adduced at trial." Legal insanity is defined by section 12 of the Penal Code, and it is a matter of defence which under section 166 of the Procedure Code has to be proved by what "is given in evidence on the trial ...”

In Muswi s/o Musela v Reg [1956] EACA 622, the Court of Appeal for Eastern Africa held (in relation to a Kenya appeal) that as a general rule evidence of the state of mind of the accused should be called by the defence. The English procedure as set out in 33rd edition Archbold p 20 should be followed unless there are special reasons to the contrary (where for instance, the accused is not represented it might be in the interests of justice that evidence as to his state of mind should be called by the prosecution)

Archbold 33 edn at p 20 states:

"The procedure that the defence should call any witness whose evidence is directed to that issue should be strictly followed, the duty of the prosecution being limited to supplying the defence with a copy of any report or statement of any prison medical officer who can give evidence on that issue and to making such person available as witness for the defence; R v Casey, 32 Cr Appeal R 91: ICLC 2171. Where evidence to establish insanity has been called for the defence, the prosecution may call rebutting evidence, R v Smith, 8 Cr App R 72. And where it is clear from the cross examination of witnesses for the prosecution that the defence of insanity will be raised and it is ascertained that no evidence will be called to establish this defence, the Crown may, before closing its own case, call evidence to negative insanity, R v Abramovitch, 7 Cr App R 145."

(Emphasis added)

27. The record herein shows that the appellant was represented by counsel at the trial but at no time was it stated that the appellant would raise the defence of insanity. His plea was simply “not guilty” to the charge of murder and the prosecution went ahead to prove that charge. The pieces of evidence that suggested that he acted abnormally at times, but which did not dislodge the presumption of sanity, came from the prosecution. It is our finding therefore that the trial court had no legal or factual basis for making the finding that the appellant had set up a defence under **section 12** which he did not prove.

28. More importantly, it is our finding that the appellant committed the offence charged of malice aforethought as defined by **Section 206** of the **Penal Code**, Cap 63 Laws of Kenya, and on this the trial court was right. That is because, as submitted by the state counsel, there was evidence of meticulous preparation for the crime. The appellant had the presence of mind to hide the murder weapon under his jacket only to produce it after ensuring that the victims were helpless. The murder weapon was a club reinforced with a metal nut for maximum effect. He made sense to the victims when they fell for his ruse that he would give them sweets. He was able to lock the door of the death chamber to prevent escape of the children and when he sensed his own life was in danger, he made a sensible decision to escape through the back by demolishing a mud wall. Whatever other abnormal or unusual behavior the appellant may have exhibited at different times, it is our finding that he was in control of his mental faculties at the time of commission of this

offence. The Doctor who examined him confirmed so. His brother, DM, confirmed that he looked normal and his father, F had found no reason to refer or confine him to a mental hospital before or after the incident.

29. For those reasons, we must interfere with the orders of the trial court to the extent that it found that the appellant had put forward the defence of insanity which he failed to prove. We set aside that finding and substitute therefor a finding that the prosecution proved the charge of murder beyond reasonable doubt and convict him accordingly. We further set aside the order directing that the appellant shall be detained at the pleasure of the President and substitute therefor a sentence of death as by law provided. The appeal is dismissed subject to those changes.

Orders accordingly.

Dated and delivered at Meru this 9th day of July 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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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