



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & MURGOR J.J.A)

CRIMINAL APPEAL NO. 167 OF 2012

BETWEEN

G W.....APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from a conviction, and sentence of the High Court of Kenya at Nairobi of Justice Apondi dated the 5th day of November, 2010, in

H.C.CR.C No. 86 of 2006)

JUDGMENT OF THE COURT

This is a first appeal. **G W**, the appellant was charged in the High Court at Nairobi with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya**. The particulars of the offence as stated were that on the 31st day of July, 2006 at Bute trading centre in Wajir District within North Eastern province, the appellant murdered **W G**, hereinafter referred to as the deceased. The appellant denied the charge. He was tried. The prosecution called fifteen (15) witnesses, whereas the appellant has the sole witness for the defence.

The facts are that on 31st July 2006, while **H M (PW2)** the deceased's wife and **J M (PW5)** the deceased's daughter were sleeping, at around midnight J screamed, waking H up. According to H, she saw **G W**, the appellant, assaulting her husband, **W G, (the deceased)** with an axe as they slept in the same room. She testified that the appellant had been chewing miraa. She testified that she was able to recognize the appellant as there was a lamp in the room, and that the assault took about a minute. This was also corroborated by J testimony. H testified that she had not heard the deceased and the appellant quarrelling.

Musa Mohammed (PW3) testified that on the 30th of July, 2006 at around 12 O'clock midnight, he heard a neighbour screaming. He later learnt that it was the widow of the deceased who had screamed, as her husband had been assaulted. He went to the scene, and saw the deceased bleeding from the head. He saw the appellant the following day, and called a Kenya Police Reservist **Mohammed Jaldesa (PW7)** to arrest him.

Abdi Mohammed Noor (PW4), the Assistant Chief, testified that on 31st July, 2006 at around midnight

while he was asleep, he heard some people knocking on his door. On opening his door, he found **S M H (PW8)** and H, who told him that the deceased had been assaulted by his son using an axe. With the assistance of a vehicle belonging to the hospital, they went to the home of the deceased where on arrival, they found the deceased lying on the floor in a pool of blood. PW4 also saw an axe which resembled the one produced in court. The deceased was taken to the hospital, and on the following day PW4 learnt that the deceased had passed away. PW4 was later informed that the appellant had been arrested.

PC Leornard Kariuki, (PW9), testified that on the night of 30th and 31st July, 2006 at around 10.00hrs, two members of the public went to Bute Police Station while accompanied by a man who they alleged had assaulted his father. When he later visited the scene with **P C Ernest Anyanga O'Kubasu (PW 11)**, they found two mattresses one which was blood stained, a blood stained axe next to the door and a bunch of Miraa lying in a pool of dried blood. PC O'Kubasu took the blood stained mattress and axe for further investigations, and completed an exhibit memo form, which was accompanied by the shirt of the appellant which he produced in court. He testified that the appellant was later charged with the present offence. **Corporal Henry Chege, (PW10)**, testified that when he went to the hospital, he found the body of the deceased being removed for burial, and instructed the family to return the body to Moyale District Hospital as an autopsy was required to be carried out.

Dr. David Wasambo Aden (PW1), a Medical Officer attached to Moyale District Hospital, testified that on 1st August 2006 he was requested to conduct a postmortem on the body of the deceased. On examining the body, he found a deep cut on the temporal region. From his investigations he formed the opinion that the deceased had died due to cardio vascular arrest and respiratory arrest which was caused by severe haemorrhage.

Stephen Matinde Joel Waibe, (PW13), a Government Analyst testified that on 8th August, 2006 he received a piece of paper, a piece of wood, a dry blood sample an orange short sleeved shirt, and a blood sample of GW. After analyzing the above items, his findings were that, the piece of paper, piece of wood and the shirt were all lightly stained with human blood of group A, the blood sample was found to be of human origin of group A and the blood sample of the suspect was found to be of group O.

Dr. Aluvala Eliud Seme, (PW14), a General Surgeon based in Wajir, testified that on 16th August, 2006 he was requested by police officers to examine and ascertain the mental status of the appellant. After reviewing the appellant's history he discovered that the appellant's sister had puerperal psychosis which was reversible, but that there had been no history of violence in the appellant's family. He established that the appellant had a past history of miraa use, but that aside, the appellant was normal, groomed and well kempt. He was neither aggressive, agitated nor anxious, though he appeared depressed and avoided eye contact. Dr. Seme concluded that the appellant had depression, and recommended that he be examined by a psychiatrist. In the meantime, the appellant was placed on anti-depressants.

The last of the witnesses to testify was **Dr. Monica Mucheru (PW15)**, a psychiatrist based at Mathare hospital, Nairobi. She testified that the appellant had residual Paranoid Schizophrenia and was not found to be epileptic; that, the appellant was admitted to hospital on 17th December, 2007 when found not to be taking his anti-psychotics medication. When Dr. Mucheru examined the appellant on 28th February 2008, she found him to be capable of pleading to the charges. By then the appellant was well oriented and had sense of time and the environment. Dr. Mucheru, advised that the appellant proceed with his court case since the mental illness which she referred to as residual paranoid schizophrenia could be managed. She explained that the above sickness meant that his thoughts were disorganized, his emotions were flat and he would have the belief that people were against him.

In his defence, the appellant testified that prior to his arrest he was a labourer and was building a house for Hassan Dekow, that he could not remember the date that he was brought to court; that though it was alleged that he had killed somebody, this was not correct; that he was arrested in the morning as he was going to the shop. He further stated that though he heard the evidence of all the witnesses, he did not wish to comment on it.

Following a full trial before Apondi, J. the appellant was found guilty as charged and sentenced to death. In arriving at a finding of guilt the trial court delivered itself thus,

“In this particular case, the accused used an axe to assault the deceased on the head. The fact that the accused used an axe which is lethal and dangerous clearly indicated his intentions. That apart, the accused aimed at the head of the deceased which also indicated that he wanted to ensure that only one thing happens. That the deceased must die. The attack was definitely premeditated. The circumstances of the case also clearly show that the deceased was defenseless and was actually asleep when he was attacked by the accused. From the record it is apparent that the alleged offence was committed on 31st July 2006. After slightly more than two weeks the accused was examined by Dr. Seme who found him to be mentally fit to plead to the charges. By then the accused was well oriented with time and place and person. His thought content and process were also normal. The accused also had an insight of what had occurred and its gravity.”

The appellant lodged his appeal in this Court first in person on 10th November, 2010 against his conviction and sentence, he proffered four major grounds supplemented by four major supplementary grounds of appeal as follows:

- 1) *THAT the learned Judge erred in law and facts when he convicted me in this case while relying on circumstantial evidence of PW1.*
- 2) *THAT the learned Judge erred in law and in facts by failing to note that the provision under section 166 of the Criminal Procedure Code was not complied with.*
3. *THAT the learned Judge erred in law and facts by failing to note that the court conducted part of the proceedings in the absence and assistance of assessors.*
4. *THAT the learned Judge erred in law and facts by concluding that the prosecution case was proved beyond reasonable doubt.*

When the appeal came up for hearing before us, learned counsel, **Mr. R. Amutallah**, who appeared for the appellant, stated that he would argue on only grounds 2 and 4. On the issue of the appellant's state of mind, counsel pointed out that Dr. Seme had directed that the appellant be seen by a psychiatrist as he was not fit to stand trial; that the appellant was examined by a psychiatrist, Dr. Monica Mucheru and a report was prepared by one Dr. Awiti, which stated that the appellant had residual paranoid schizophrenia; that in light of the findings, the trial judge failed to note that the appellant had a mental illness of a high degree, and to address himself and the assessors as to the question of the appellant's insanity, and as such, should have found a special verdict as envisaged under **section 166** of the **Criminal Procedure Code**. On the question of the blood samples, he submitted that the prosecution's case was not proven beyond reasonable doubt as the blood sample required by the government analyst was not submitted for examination in order to match the blood samples from the scene of the crime and neither was the axe produced as evidence on the list of the exhibits presented during the trial. Counsel concluded that as the evidence did not support the appellant's conviction, he should be acquitted and set at liberty.

Miss Oundo, learned Assistant Deputy Public Prosecutor, appeared for the respondent. She opposed the appeal, on the grounds of mental illness; that throughout the case, there had been no mention of the appellant's insanity, or his having suffered mental illness; that the offence took place on 31st July 2006, and the mental examination was carried out in August of 2006 which was after the murder had taken place. Counsel referred to Dr. Seme's evidence where he had testified that he had found no prior history of violence or of the appellant's mental illness. In Counsel's view, the learned trial judge took all the evidence into account, evaluated it and reached a correct finding; that, after the appellant was examined he was found to be well groomed, well oriented in time and place and that his perception was also normal. Counsel further observed that though the blood sample results would not have been of much assistance; that even in its absence there was sufficient evidence from the witnesses to place the appellant at the scene of the crime; that, H and J were eye witnesses to the crime and with the aid of a lamp saw the

appellant using the axe to murder the deceased. The injuries sustained by the deceased were corroborated by the evidence of the witnesses, therefore the prosecution had proved its case beyond reasonable doubt. The appellant had malice aforethought by attacking the deceased while he was asleep and defenseless.

As this is a first appeal, the Court is enjoined to re-evaluate the evidence, draw its own inferences and conclusions and make its own deductions and findings from the evidence. We are, however, alive to the fact that the trial court had a vantage position to observe the demeanor of witnesses, having seen and heard their evidence as they testified before it and, therefore, as far as issues of credibility of witnesses are concerned, we shall be less inclined to interfere with the trial court's findings save where it is patently clear that the material and evidence before the trial court does not support its decision in that regard.

This Court in *MWANGI VS REPUBLIC [2004] 2 KLR 28* held thus:

- “1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.*
- 2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.*
- 3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; 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 had the advantage of hearing and seeing the witness.”*

Turning to the first issue, of the appellant's state of mind, it is apparent that this issue first arose when Dr. Seme examined the appellant and found that though he seemed well oriented in time and place, the appellant seemed depressed, and avoided eye contact. He concluded that the appellant should see a psychiatrist, and also placed him on anti-depressants. The doctor also found that there were incidences of mental illness that existed in the family as the appellant's sister suffered from puerperal psychosis. The appellant was then referred to Dr. Mucheru, a psychiatrist, who testified that the appellant had residual Paranoid Schizophrenia. After receiving treatment in hospital for several months, on 28th February 2008, she examined the appellant and found him to be capable of pleading to the charges since the mental illness which she referred to as residual paranoid schizophrenia could be managed.

Mr. Amutallah submitted that having regard to the appellant's mental status had the trial court inquired into his mental status, it would have found that a special verdict as envisioned under section 166 of the Criminal Procedure Code would have been the appropriate verdict to be handed down by the High Court.

Section 166 stipulates:

“Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.”

In *G. N. v Republic* – Criminal Appeal No. 246 of 2006 (unreported) this Court and stated thus:

“On the material placed before the learned Judge, could it be concluded with certainty that, at the time the appellant slashed her mother with a panga on the head and killed her, the appellant was in a sound mental state? We certainly are not able to say so and we think that in the circumstances of the case Sitati, J should have rejected the offered plea of guilty to the offence of manslaughter and proceeded with the trial in accordance with section 164 of the Criminal Procedure Code. It is possible, indeed it is likely, that if she had conducted a trial under the section, she might well have found that the appellant was guilty of the act of killing her mother but was insane at the time she committed the offence. The provisions of section 166 of the code would then apply. The probation officer’s report which the learned Judge called for after convicting the appellant was itself apprehensive that the appellant might still be a danger to her neighbours. The final recommendation in the report was that:

‘She could be tried on probation to oversee her settlement, and her response since the family is willing to maintain her on medication. The neighbours shall be alerted on her mental state to avoid provocation that may be disastrous results.....’

These are the kinds of fear that the provisions of section 166 of the Code are designed to deal with. The learned Judge rejected the report and then sentenced the appellant to life imprisonment. With the greatest respect to the learned Judge this was simply unacceptable. It is quite possible that the learned Judge sentenced a person with mental disorder to life imprisonment.”

From the evidence of H and J, the appellant and the deceased had not quarreled on the fateful evening, and no bad blood existed between them. The appellant simply got up at about midnight and proceeded to launch a vicious attack on the deceased with an axe. In his defence, all the appellant stated was that though it was alleged that he had killed somebody that was not correct; that he was arrested in the morning as he was going to the shop; that though he heard the evidence of all the witnesses, he did not wish to comment on the same.

Dr. Seme’s medical report stated in relevant part thus:-

“I never found any past history of any violence. He also never had any history of being a mental patient. However the accused had a past history of using miraa. I found a family history of mental illness. The sister has puerperal psychosis which was revisable. The same normally occurs at the time of birth.”

The report is insightful, in that it is clear that the appellant had not been treated for mental illness in the past, and yet there was a history of mental illness in the family.

Subsequently, from Dr. Mucheru’s evidence, it is clear that the appellant had residual Paranoid Schizophrenia. As she concluded her evidence in reexamination, Dr. Mucheru stated,

“The treatment is lifelong as the accused has a chronic mental illness”

It is pertinent that, though we did not have sight of Dr. Mucheru’s report, her evidence was strictly concerned with the appellant’s state of mind after the offence had been committed, and it did not indicate whether or not the appellant could have been mentally ill at the time of the attack.

Having regard to the doctors’ findings on the appellant’s “chronic” mental status, the learned judge should have addressed his mind, and that of the assessors to the appellant’s state of mind at the time the offence was committed, through the conduct of an inquiry as required under section 166 of the Criminal Procedure Code. It is instructive that, following the examination of the appellant by Dr. Seme, the record shows that the trial did not proceed for several months as the appellant had been hospitalized at the Mathare Mental Hospital and

was receiving treatment. Yet, the adjournment of the proceedings on account of the appellant's apparent mental disposition, was sadly overlooked by the learned judge. Instead, in his judgment, the learned judge stated,

"After slightly more than two weeks the accused was examined by Dr. Seme who found him to be mentally fit to plead to the charges."

With due respect to the learned judge, this conclusion distinctly differed from Dr. Seme's findings, and was clearly wrong, in that Dr. Seme had found as follows:-

"I concluded that the accused had depression. I concluded that the accused should be seen by a psychiatrist, I also put the accused on antidepressants. At that particular point the accused was not fit to stand trial, I do recommend that the accused be seen by a psychiatrist to assess his mental status." (Underlining ours)

Clearly, the learned judge wrongly evaluated the evidence, and in so doing, failed to see that there was indeed a case for the conduct of an inquiry under *section 166* of the *Criminal Procedure Code* to ascertain the appellant's mental state when committing the offence. The learned judge having failed to do so, makes it impossible for this Court to state with certainty whether or not the appellant was sane at the time of the commission of the crime. We are unable to fathom what could have caused the appellant to launch this random and bizarre attack on the deceased. There is nothing on the record to suggest that the appellant had a grudge against the deceased, or that his actions were premeditated. We find that without the benefit of a mental assessment that would provide some indication of the appellant's state of mind prior to the offence, we can only conclude that the appellant could have been insane at the time he committed the offence.

Consequently, we hold the view that the appellant was insane at the time he committed the assault leading to the death of the deceased, and the learned Judge should have recorded a verdict of *"guilty but insane"* pursuant to *section 166(1)* of the *Criminal Procedure Code*. To that extent only, we must allow this appeal.

We now direct that the appellant shall be detained at the pleasure of the President pursuant to *section 166* of the *Criminal Procedure Code*. We set aside the finding of guilt recorded by the learned Judge. We substitute therefor with the one of guilty but insane.

DATED and DELIVERED at NAIROBI this 13th day of JUNE, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR