IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, GATEMBU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 246 OF 2008

BETWEEN

MOHAMOOD MOHAMMED ALI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Muga Apondi, J.) dated 27th September, 2007

in

H.C.CR.C. NO. 94 0F 2005

****

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (Muga Apondi J) given on 27th September 2007 in which the appellant, Mohamood Mohamed Ali, was found guilty of murder but insane. The High Court then directed, under Section 166(2) of the Criminal Procedure Code, that the matter be reported to the order of the President of the Republic of Kenya.

Background

2. The appellant was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that, on the 1st day of May 2003 at Danyere Location of Balambala Division in Garissa District within the North Eastern Province the appellant murdered **Gavoi Gure**.
3. The appellant was arraigned before the High Court of Kenya at Nairobi and on 13th October 2005 pleaded not guilty to the charge. The prosecution assembled five witnesses. The evidence as narrated to the trial court by the witnesses is as follows: Ali Abdi, PW 1, resides at Danyere in Garissa District. During the night of 30th April 2003 at about midnight he heard screams emanating from his auntie's house. He proceeded to the house. He entered his auntie's house. He had a torch. He flashed the torch and saw the appellant holding a panga. His aunt, the deceased, was in bed. He observed that she had multiple cuts on both hands and leg and a cut on the throat. He tried to get hold of the panga and to wrestle it from the appellant and in the process sustained a

cut on his finger on the left arm. He raised an alarm. Neighbours came to his rescue. With the assistance of the neighbours, the appellant was restrained and tied with a rope and thereafter taken to Danyere Police station where he was detained. The deceased was buried the following morning in accordance with Muslim rites.

4. Ali Abdi Dubow, PW2, received a report on 30th April 2003, that his neighbor Gavoi Gure, the deceased had been killed. He was thereafter involved in the burial arrangements for the deceased, which took place the following morning on 1st May 2013.
5. Ibrahim Abdi, PW 3, was in his house in Danyare Township on the night of 30th April 2003 when, at about midnight, he heard a scream. In response to the scream, he proceeded to the deceased's house where the scream emanated from and found, he says, the deceased being assaulted with a panga by the appellant. He found five children of the deceased at the scene. In the same breath he stated that he found the appellant naked at the scene while his brother, PW 1, was holding a panga. Under cross-examination however he clarified that when he got to the deceased's house he found the appellant and PW 1, struggling over a panga. The appellant, a madrassa teacher whom he had known for about a month, was restrained and tied with a rope and escorted to the police station. While at the police station he received information that the deceased had died. The following day on 1st May 2003, the police did not show up at the deceased's house by 9.00 am. The deceased was buried that morning.
6. Mohammed Omar Ali, PW 4, an administration police officer who was working at Danyere at the time, received a report from PW3 that a woman had been killed. He relayed that information by telephone to Balambala Police Station, which is some seven kilometers or so from Danyere. He directed that the body of the deceased should not be buried before the police officers get to the scene. The appellant, who was tied by rope on both hands and wearing only a Kikoy and who was shouting was delivered to his custody. By the time he went to the scene on 2nd May 2003, the deceased had already been buried. Police from Balambala Police Station collected the appellant on 6th May 2003.
7. Dr. Frederick Owiti, PW 5, a consultant psychiatrist at Mathare Hospital examined the appellant on 9th June 2003. The appellant could not talk properly even with the help of an interpreter. He saw him again two weeks later. The appellant was talking to himself. Even at the time Dr. Owiti was testifying before the High court on 5th April 2006, the appellant was still talking to himself. Dr. Owiti also reviewed the appellant's history as given in a letter by one Dr. Galgalo who had previously attended to the appellant at Garissa Hospital on several occasions and according to whom the appellant used to strip naked, talked to himself, refused to eat and bath, was violent and destructive and acted as if he was hearing voices. He diagnosed the appellant's condition as chronic schizophrenia. In this condition, besides hearing voices, the patient develops false beliefs about persons near him. The appellant was detained at Mathare Hospital until 6th December 2005 when he was discharged, as, in Dr. Owiti's opinion, he was fit to plead. The appellant was required to take medication for his illness upon discharge. At the time of his testimony before the High Court on 5th April 2006, Dr. Owiti was of the view that the appellant was relapsing.
8. In his defence, the appellant gave a sworn statement in which he stated that he hails from Garissa and that he knew the deceased as he was teaching her children; that deceased was like his mother and used to give him food; that he could not remember anything that happened on the material day; that he did not know whether he killed the deceased and only God knows whether he did; that he was beaten by members of the family of the deceased; that he was arrested and taken to Garissa Hospital and also remembered being taken to Mathare Mental Hospital.
9. After the hearing and on considering the evidence and submissions the learned trial judge convicted the appellant in a judgment delivered on 27th September 2007. The trial judge concluded as follows:

> ***"From the above evidence it is explicit that both PW1 and PW3 saw the accused at the scene of the incident while armed with a panga. Specifically, the PW3 saw the accused assaulting the deceased while using the said panga. Apart from the above, the evidence on record also shows that by then, the deceased who was nearby was already dead and and the accused was naked with the exception of a 'kikoy'. Though the accused stated that he did not know what happened, the defence counsel viz, Ms Sirma,***

urged this Court to find the accused 'guilty' but insane. The medical evidence of Dr. Owiti, Consultant psychiatrist clearly shows that the accused was suffering from chronic schizophrenia. In addition to the above, the conduct of the accused at the scene and also during the trial clearly shows that he is mentally challenged. In view of the above, I hereby concur with the verdict of the assessors that the accused is 'guilty' of murder, but insane. In view of the above, the accused is hereby committed to Mathare Mental Hospital for further treatment. In compliance with Section 166 (2) of the Criminal Procedure Code, I hereby direct that the case be reported to the order of His Excellency the President."

Grounds of appeal

10. Aggrieved by that decision the appellant has appealed to this Court on the grounds that the High Court erred in convicting the appellant contrary to section 12 of the Penal Code; failing to comply with section 77(2)(b) and (f) of the repealed Constitution; in basing the conviction on hearsay evidence and on insufficient circumstantial evidence that did not meet the required legal standard; failing to comply with section 306 of the Criminal Procedure Code; failing to take the appellant's defence into account as well as in drawing wrong inferences, and that the identification of the appellant did not meet the required standard;

Submissions by counsel

11. At the hearing of the appeal before this Court, Mr. Evans Ondieki learned counsel for the appellant submitted that the finding of guilty but insane has no basis as the appellant was a mental patient with a disease of mind that rendered him incapable of understanding anything and the court could not therefore, under Section 12 of Penal Code, convict him; that the diagnosis of chronic schizophrenia brought the appellant within Section 12 of the Penal Code; and the appellant is not criminally liable under that provision and should have been acquitted and sent home.
12. With regard to the contention that the prosecution violated the appellant's rights under section 77 of the repealed Constitution, Mr. Ondieki submitted that the record indicates that the court clerk who was present during the trial was named as one Oloiputari. There is no indication that he understood the appellant's language, which is Somali language and the appellant did not therefore get a fair trial.
13. On the question of identification, Mr. Ondieki submitted that PW 1 said in his evidence that he did not know the appellant. Citing the case of **Kiarie v R [1984] KLR 741** Mr. Ondieki submitted that it is possible for a witness to be honest but mistaken; that no postmortem was undertaken in this case as the deceased was buried soon after her death and that the relatives of the deceased could have been the culprits. On the strength of the case of **Kipkering Arap Koske v R. [EACA] 16, 135,** Mr. Ondieki submitted that the appellant's conviction was based purely on circumstantial evidence and the theory or hypothesis that the death was caused by persons other than the appellant was never displaced or excluded.
14. Mr. Ondieki also referred us to the case of **Mary Wanjiku Gichira v R Criminal Appeal No. 17 of 1998** on the danger of basing a conviction on circumstantial evidence and for the further proposition that suspicion cannot provide a basis for inferring guilt that must be proved by evidence. He went on to say that the prosecution should have called the deceased's children as witnesses to testify as they were at the scene and were said to have run away from the scene and this creates sufficient doubt in favour of the appellant. This being a first appeal, Mr. Ondieki urged us to re-evaluate the evidence and conclude that the appellant should have been acquitted. Finally Mr. Ondieki submitted that the order of court to commit the appellant to the pleasure of the president is inhuman and degrading under Articles 25 (a), 28 and 29 of the Constitution.
15. Opposing the appeal, Mr. Kioko Kamula, learned counsel for the State, submitted that the appellant's rights under section 77 of the repealed Constitution were not violated as a special interpreter was provided; that his identification was not an issue before the trial court as PW 1 found the appellant naked holding a panga and sustained a cut in his finger while trying to wrestle the panga from the appellant; that PW 1 clarified that he knew the appellant as he had stayed with him for a month when teaching children the Quran; that PW 3 who knew the appellant before as a

Madrassa teacher found him at the scene of crime, naked assaulting the deceased before the appellant was restrained and tied with rope; and that in those circumstances the issue of identification does not arise.

16. As regards the contention that the sons of the deceased should have been called by the prosecution as witnesses, Mr. Kamula submitted that it was not necessary for the prosecution to produce all persons who were at the scene. The observation by the trial judge that the sons of the deceased were running away from the scene is not supported by the record as Pw 3 did not say in his evidence that he saw the sons of the deceased running away and that there was no point in calling redundant witnesses and there is no basis for concluding the sons lived in the same house with the deceased.
17. On the complaint that the appellant could not in any event be criminally liable by reason Section 12 of Penal Code, counsel submitted that PW 1 and PW3 did not see anything wrong with appellant mentally and that Dr. Owiti concluded in his medical report that the appellant was fit to plead to the charge and that it was on that basis that the trial proceeded; that there is nothing to suggest that the appellant was not lucid at the time of committing the offence that it was clear in course of trial that the appellant suffered occasionally from schizophrenia and the judge correctly applied section 166 of Criminal Procedure Code in reaching the conclusion that the appellant was guilty but insane as it was the safe thing to do.
18. Finally Mr. Kamula submitted that there is no basis for the appellant's contention that Article 25(a), 28 and 29 of the Constitution were breached and urged us to uphold the conviction and sentence.
19. In his brief reply Mr. Ondieki reiterated that in view of the contradictory account by PW 1, his evidence is not reliable and the evidence of PW 3 required corroboration as he said he found five people in the deceased's house; that the court made a finding that the five people were running away and they were therefore suspects who, had they testified, would have cleared the air on what happened; that considering the medical evidence on the appellant's mental health, the element of mens rea was absent and the appellant could not therefore be convicted of the offence of murder.

Analysis

20. This is a first appeal. Our task is therefore to re-evaluate and analyze the evidence and to draw our own conclusions bearing in mind that we have not had the opportunity to see and observe the witnesses' demeanor. In **Okeno v Republic [1972] E A 32** the Court stated:

> "***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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions… 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 conclusion; it must make its own finding and draw its own conclusions… In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses…***"

21. The issues that arise for our determination are: First, whether or not the evidence of identification met the required standard and whether or not the appellant was convicted on circumstantial evidence and if so whether such evidence established the appellant's guilt beyond a reasonable doubt: Secondly, whether the appellant's rights under section 77 of the repealed Constitution were violated. Thirdly, whether or not the conviction was contrary to section 12 of the Penal Code.
22. In light of the evidence, was the appellant properly identified? The learned trial judge found that both PW 1 and PW 3 saw the appellant at the scene of the incident armed with a panga and that PW 3 specifically saw the appellant assault the deceased using that panga.
23. Based on the evidence of PW 1 and PW 3, we are satisfied that the appellant was at the scene. It is however unclear whether either PW 1 or PW 3 witnessed the appellant assault or attack the deceased. PW 1 was not consistent in his evidence. In his evidence in chief, he stated, "***I don't know the accused. That was my first time to see the accused***." Under cross examination he again stated, "***prior to the incident, I did not know the accused.***" Shortly thereafter, he contradicted

himself and said that "***the accused was an employee of the deceased***." Under re-examination, he stated that the "***accused had stayed with me for a month. By then, he was teaching our children Quran. When I met the accused on that night-that was not the first time***."

24. In his evidence in chief, PW 1 made no reference to having seen the appellant attack or assault the deceased. But under cross-examination he stated, "***when the accused attacked my aunt, he was completely naked***."
25. P W 3 on his part stated that when he arrived he "***found my step-mother being assaulted by the accused who was using a panga***" and that he "***actually saw the accused assaulting my step-mother***." Later in his evidence he stated that "***accused was the person who assaulted the deceased. It was the PW 1 who first reached the scene. I confirm seeing five people running away from the scene***." Under cross-examination, he stated, "*I* ***found the accused and my brother struggling over a panga***."
26. There is clearly lack of clarity, and indeed contradictions in the evidence. PW 1 makes absolutely no reference in his evidence in chief to having witnessed the appellant attack or assault the deceased. What he said he found was the appellant holding a panga and that the deceased had cuts. It was during cross-examination that he first mentioned that the appellant attacked the deceased. PW 3, who arrived at the scene after PW 1, on his part, stated that he found the appellant attacking the deceased. Later under cross-examination he said he found the appellant and his brother struggling over the panga. The overall effect of the inconsistencies and contradictions is that there is no direct evidence, in our view, on the basis of which we can conclusively state that the appellant assaulted the deceased. What we have is circumstantial evidence consisting of the testimony that the appellant was holding a panga; that the deceased had cuts and that the deceased and the appellant were in the same room. There was also no evidence that the deceased died from the cuts.
27. The learned trial judge did not analyze the evidence for if he had done so would have noted the contradictions and inconsistencies. We are not satisfied that the circumstances pointed irresistibly to the appellant as the only one, to the exclusion of others, with the opportunity to commit the offence. The circumstances pointed to strong suspicion, which in the words of this Court in the case of **Mary Wanjiku Gichira v R** (supra) cannot provide a basis for inferring guilt, which must be proved by evidence. The evidence of PW 3 that "***I confirm seeing five people running away from the scene***" introduces doubt that could have been eliminated by calling the sons or one or some of them to shed light on the circumstances under which they were running away from the scene.
28. The circumstances in the present case are not dissimilar to those in the case of **R v Kipkering Arap Koske and others** (supra) to which we were referred where the Court stated that:

> "***the evidence against the appellants was purely circumstantial. There was no eyewitness to the circumstance in which the deceased received his fatal injury…As said in Wills on "Circumstantial Evidence" 6th edition, p.311, "in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused***."

29. In our view it was incumbent upon the prosecution to displace the reasonable hypothesis that those running away from the scene may not have caused the death of the deceased. Absent that, a reasonable doubt is raised in favour of the appellant. In effect we are not satisfied that the evidence presented before the trial court established the appellant's guilt beyond a reasonable doubt.
30. The next issue for consideration is whether the appellant's rights under Section 77(2)(b) and (f) of the repealed Constitution were violated. Section 77(2)(b) and (f) of the repealed Constitution provided that every person who is charged with a criminal offence shall be informed in a language he understands and in detail of the nature of the offence with which he is charged and to the provision of an interpreter if he cannot understand the language used at the trial.

31. Counsel for the appellant submitted that there was not indication from the record that the court clerk present throughout the proceedings before the trial court could interprete Swahili or English into Somali language, the only language the appellant speaks and understands. We have reviewed the record. The presence of a translator with knowledge of the Somali language is noted in some instances. Invariably at the end of each day's proceedings, there is a direction or order by the court for the Somali interpreter to be paid. Indeed there are occasions when it is indicated that proceedings were adjourned to enable the Somali translator to be present. We are satisfied that there was interpretation into Somali language and the appellant's rights under Section 77(2)(b) and (f) of the repealed Constitution were not violated.
32. The last issue for our consideration is whether the conviction was contrary to section 12 of the Penal Code. Having held, as we have, that the appellant's guilt was not established beyond a reasonable doubt, it is not necessary to consider this issue. We will however do so for completeness. Section 12 of the Penal Code provides that:

> ***"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***."

33. According to Mr. Ondieki, by reason of that provision, even if, for purposes of argument, the appellant committed the act that resulted in the death of the deceased, the appellant cannot be criminally responsible on account of the appellant's disease of mind and should have been acquitted.
34. In **Chemagong v R [1984] KLR 611**, this Court held that:

> "***The burden of proving an averment of insanity, once raised, lies upon the accused person to show on the balance of probabilities: that at the time of killing the deceased was (a) suffering from disease affecting his mind; (b) through such disease incapable- (i) of understanding what he was doing, or (ii) of knowing that he ought not to kill the deceased***."

35. Having found, as a fact, that the appellant in Chemagong case was legally insane at the time he killed the deceased, this Court quashed the conviction, set aside the sentence of death and substituted therefor a special finding that the appellant did the act charged but that he was insane at the time he did it. The Court then ordered, like the trial judge did in the instant case, that the case be reported for the order of His Excellency, the President, and that meanwhile the appellant shall be kept in appropriate custody.
36. The holding in **Chemagong v R** is consistent with the provisions of section 166 of the Criminal Procedure Code that provides:

> **"166.** (1) ***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***."

37. In **Marii v R [1985] KLR 710** this Court stated that:

> "…***where an accused raises the defence of insanity, the burden of proving insanity rests with the accused, because a man is presumed to be sane and accountable for his actions until the contrary is shown. But while the burden rests with him, it is not such a heavy***

one as rests on the prosecution, and indeed after considering the evidence it is to be decided on the balance of probability, whether it seems 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. Whether the defence has proved the case of insanity is a matter of fact."

The Court went on to say that if the accused is found to have been insane, then a special verdict should be entered.

38. On the basis of the finding by the trial judge in the present case that the appellant was insane at the time of the alleged act, we are satisfied that the trial judge was correct to make a special finding as he did and the appellant was not entitled, as submitted, by the appellant's counsel, to an acquittal.
39. However, considering as we do, upon a re-evaluation and analysis of the evidence that the prosecution did not prove its case against the appellant to the required standard, the appeal succeeds and is allowed. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 8th day October, of 2013.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. MOHAMMED

…….…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR