REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Criminal Appeal 288 of 2006
EDWARD MAINA THUO ……..…… APPELLANT

AND
REPUBLIC ……..…… RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Kimaru, J.) dated 18th March, 2005 in H.C.CR.C. NO. 66 OF 2001)
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JUDGMENT OF THE COURT

EDWARD MAINA THUO, the appellant herein, was tried by the High Court of Kenya at Nakuru on an information charging him with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the offence were that on the *24th day of October, 2000* at Nyakinyua Farm-Solai in Nakuru District of the Rift Valley Province the appellant murdered ***ELISHIBA WANJIRU***.

The trial of the appellant commenced before Kimaru, J. on *27th April, 2004* with the aid of assessors (as the law then provided). The prosecution called a total of *nine witnesses* and after considering the prosecution case and the defence put forth by the appellant, the learned judge found the appellant guilty but insane, hence directing that the appellant would be detained at the President's pleasure. In concluding his judgment delivered at Nakuru on *18th March, 2005*, the learned judge said:-

> ***"Having found the accused guilty but insane, the accused is ordered detained at the pleasure of the President in accordance with the provisions of Section 166 of the Criminal Procedure Code. The accused shall be detained by the prison authorities pending further order of the President. It is so ordered."***

It is from the foregoing that the appellant comes to this Court challenging the decision of the learned judge.

This being a first appeal, it is our duty to subject the evidence adduced at the trial to a fresh and exhaustive scrutiny. In ***KINYUA V. R.*** [2003] KLR 301 at pp. 303-304, this Court said:-

> ***"This being the first (and last) appeal it is our duty to subject the evidence adduced to a fresh and exhaustive scrutiny so that we can draw our own conclusions on the conflicting evidence. In OKENO V. R. [1972] EA the predecessor of this Court made the following observation as regards the function of the first Appellate Court.***

*"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**PANDYA V. R.** [1957] EA 336) 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. (**SHANTILEL M. RUWAL V. R.** [1957] EA 570). 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 conclusions, 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 has had the advantage of hearing and seeing the witnesses, see **PETERS V. SUNDAY POST** [1958] EA 424."*

We shall be guided by the above stated principles as we consider this appeal. What was the evidence adduced in the superior court? ***Grace Wangui*** (PW1) testified that she was married to the appellant in *1997* when she already had

one child. She offered to testify against her husband on her own free will. It was her evidence that on the *23rd October, 2000,* she developed labour pains when she was with her sister ***Zipporah Waweru*** (PW2) and her brother ***Joel Mwangi Njoroge*** (PW3). The appellant who was present sought assistance of two more neighbours who assisted Wangoi to safely deliver the baby girl named ***Elishiba Wanjiru***. The baby was delivered in the morning of *24th October, 2000*. After the delivery of the baby, Wangoi fell deeply asleep in the bedroom due to the exhaustion caused by spending a sleepless night while in labour. She was, however, woken up suddenly and discovered that she had been slashed with a panga on the head and shoulders by none other than the appellant! She screamed and rushed out of the house. As she ran out of the house the appellant chased her claiming that the baby she had given birth to was not sired by him as the child had been born six days beyond the due date of the *18th October, 2000*. Wangoi ran and hid at a neighbour's house and was later taken to hospital at Solai Centre and later transferred to the Nakuru Provincial General Hospital where she was admitted for one week. It was after she was discharged from the hospital that she was informed that her baby had been killed. It was her testimony that she had named the baby ***Elishiba Wanjiru*** after the mother of the appellant in accordance with Kikuyu custom.

Zipporah Wanjiru (PW2) testified that on the material date she was with ***Wangui*** (PW1) who was expecting and that the whole night Wangoi was in labour. She delivered a baby girl named ***Elishiba Wanjiru***. At about 10:00 a.m. the appellant asked ***Wanjiru*** (PW2) to give him a panga so that he could construct a bathroom. Wanjiru fetched the panga and gave it to the appellant. While Wanjiru was in the kitchen she heard Wangui screaming and when she went to check she saw Wangui bleeding. Then the appellant started slashing the two ladies who escaped from the house as their brother ***Joel Mwangi Njoroge*** (PW3) came to their rescue. But ***Njoroge*** (PW3) was also attacked by the appellant. The members of the public came to the scene and when they found that the appellant had not only attacked and injured the two women and their brother but also slashed the baby to death, they set upon him (appellant), beat him up and then took him to the hospital.

It was the evidence of ***Irungu Mwangi*** (PW4) that on *24th October, 2000* he rushed to the appellant's house when he heard screams and on reaching there found the appellant thoroughly beaten and tied with ropes by members of the public.

Joseph Kariuki Thuo (PW5) testified that he was a brother to the appellant and that on *2nd November, 2000* he witnessed the postmortem examination performed on the body of the baby Elishiba Wanjiru. It was his evidence that when he visited the appellant at the hospital, the appellant was aggressive and quarrelsome. The appellant did not seem to be aware of what had taken place at his house on *24th October, 2000*.

Njoroge Ndathi (PW6) was one of those who went to the appellant's home after hearing the screams. PW6 found the appellant having been beaten up by members of the public.

Senior Sergeant Charles Mukee (PW7) of Solai Police Station received the report about the baby that had been killed and as a result PW7 proceeded to the scene via the hospital where Wangoi had been admitted. He saw the injuries inflicted on Wangoi and he then proceeded to the home of the appellant where he found the appellant having been thoroughly beaten by members of the public leading to serious injuries. PW7 saw the new born baby's injuries on the head and neck. PW7 who was the investigating officer of the case carried out all the necessary investigations by collecting the exhibits (panga) and sketch plan of the homestead.

Pc Richard Mamai (PW8) witnessed the post mortem examination performed on the body of the deceased by ***Dr. Gachunga*** (PW9) at the Municipal Mortuary Nakuru. According to Dr. Gachunga the deceased had a cut on the head which affected the brain. There was also a deep cut wound on the occipital region which led to medulla oblongata being severely damaged. Dr. Gachunga formed the opinion that cause of death was cardiopulmonary collapse due to severe head injury. He produced the post mortem report as exhibit 3. He further produced the report prepared by Dr. Vilibwa in respect of the appellant. According to Dr. Vilibwa's report, the appellant appeared depressed with elements of speech dyslexia and was incoherent. Dr. Vilibwa found the appellant's behavior to correspond to Schizophrenia and maniac depression. That report was produced in evidence as Exhibit 4.

When put to his defence, the appellant testified on oath that four months before the fateful day, the father of Wangui (PW1) had visited him and demanded the outstanding dowry which was put at ***Kshs.50,000/=*** which the father in law demanded should be paid by September, 2000. He further testified that on *23rd October, 2000,* ***Wanjiru*** (PW2) and ***Njoroge*** (PW3) visited him having been sent by their father to collect Wangoi as the appellant had failed to pay the outstanding dowry by *September, 2000*. The appellant would not allow his wife to be taken away and that night the wife went into labour pain ending up with the delivery of a baby girl named Elishiba Wanjiru. The following day, PW2 and PW3 still demanded to take away Wangoi but the appellant resisted their attempts.

There was a struggle between the appellant and PW2 and PW3 intervened. PW2 and PW3 hit the appellant with an iron bar. PW3 then got hold of a panga and slashed the appellant on the stomach. From that time the appellant lost consciousness only to regain consciousness when he was at the Provincial General Hospital Nakuru. According to the appellant it was PW3 who caused the death of the deceased.

The learned judge summed up the evidence and the law to the three assessors who after considering what had been summed up to them were each of the view that the appellant was not guilty.

The learned judge considered the evidence, the legal submissions and in his view there was sufficient evidence to find that it was the appellant who killed the deceased.

When the appeal came up for hearing before us on *23rd February, 2010*, Mr. J.J. Ombati appeared for the appellant, while Mr. Njogu (Senior State Counsel), appeared for the State. Mr. Ombati submitted that the learned judge

erred when he rejected the sworn statement of the appellant which was to the effect that he (appellant) was beaten by PW2 and PW3. Mr. Ombati pointed out that the learned judge ought to have considered the appellant's conduct before and after the delivery of the baby. Finally, Mr. Ombati submitted that the prosecution did not prove its case beyond reasonable doubt.

In supporting both conviction and sentence, Mr. Njogu submitted that the appellant's conduct after the birth of the child was not that of a normal man, and in view of the evidence adduced in the superior court, this appeal ought to be dismissed.

We have gone over the evidence in the superior court, the judgment of that court and the submissions by Mr. Ombati and Mr. Njogu and it is our view that this is a sad case in which the delivery of a baby, which in normal circumstances, would be a source of celebration, turned tragic in that the baby's life was cut short when it died only a few hours after its arrival in this world. There was evidence from ***Grace Wangui*** (PW1), ***Zipporah Wanjiru*** (PW2) and ***Joel Mwangi Njoroge*** (PW3) as to what happened on the morning of *24th October, 2000*. It is not in dispute that these witnesses were present when the appellant for no apparent reason, ran amok and started slashing whoever came his way. In the process the appellant seriously injured Wangui, and her baby leading to the baby's most unfortunate and uncalled for death. The other two witnesses PW2 and PW3 did not escape the appellant's wrath, as they too were injured by the appellant. In the course of his judgment the learned judge said:-

> ***"In the light of the above decision, the prosecution established that the accused, having attacked PW1, PW2 and PW3 with a panga, in most (sic) probability attacked the deceased and fatally injured her. The evidence adduced by the prosecution pointed to the fact that the accused could have killed PW1 if she had not managed to make good her escape. PW1 was further assisted by PW2 and PW3, her siblings. The two were also slashed with a panga by the accused. PW1 testified that the accused said that the newborn child had been born six days beyond its due date."***

The learned judge considered the appellant's motive in so attacking these witnesses and then said:-

> ***"The circumstances of the case clearly show that the accused had the motive, the opportunity and the means to kill the deceased. In his rage the accused slashed PW2 and PW3 when they tried to rescue PW1."***

We respectfully agree with these findings by the learned judge.
The only remaining issue to be considered was whether the appellant had the requisite *mens rea* for him to be convicted of murder. There was the report prepared by Dr. Vilibwa to the effect that the appellant suffered from manic depression and schizophrenia. From that report, it would appear that the appellant was of unsound mind when he fatally injured the deceased. We therefore agree with the learned judge's conclusions that the appellant was guilty but insane. In concluding his judgment, the learned judge stated:-

> ***"Dr. Feksi the Provincial Psychiatrist who examined the accused formed the opinion that the accused suffered from mental illness. Dr. Feksi certified the accused to be fit to stand trial nearly two years after the incident leading to the death of the deceased. Dr. Feksi advised that the accused be attended to by a psychiatrist during the hearing of the case. For the reasons stated above, it is clearly evident that the accused was of unsound mind when he attacked the deceased and fatally injured her. His conduct prior to attacking PW1, PW2, PW3 and the deceased was not consistent with that of a sane person. His conduct can only be explained by the fact that he did not have control of his mental faculties. The accused lacked the requisite*** *men's rea* ***and malice aforethought to commit the offence of murder. I therefore enter a special finding that the accused is found to be guilty but insane."***

We entirely agree with the foregoing and for that reason we find no merit in this appeal which we order that it be and is hereby dismissed.

Dated and delivered at Nakuru this 16th day of April, 2010.

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is
a true copy of the original

DEPUTY REGISTRAR