



IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 91 of 2007

BETWEEN

JOHANA KIPLANGAT MATWEKAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Koome, J.) dated 24th May, 2007

in

H.C.Cr.C. No. 65 of 2002)

JUDGMENT OF THE COURT

Johana Kiplangat Matwek, the appellant was arraigned in the superior court at Nakuru with three counts of murder contrary to **section 203** as read with **section 204** of the Penal Code. In count I he was charged that on the 13th day of March, 2001 at Esinoni area in Narok District within Rift Valley Province he murdered *Miriam Chebet Matwek*. In counts II and III he was similarly charged that on the same date and place he murdered *Pilato Kibet Matwek* and *Norah Kipkirui Osiemo* respectively. He denied the charges.

The facts giving rise to the charges against the appellant were that the appellant was the husband of *Peninah Kemunto* (PW1) and father of *Miriam Chebet* and *Pilato Kibet*, the deceased. On 13th March, 2001, PW1 was sleeping at the family house at 1.00 a.m. The appellant came home that night, drunk and he was carrying a 5 litre jerrican of busaa, an “*illicit drink*”. When PW1 opened for, welcomed the appellant home and gave him food, he only ate a little of it and then threatened to hit her with that food. When she asked him what she had done to deserve the beatings, the appellant told her she did not know what he had decided and attempted to cut her with a panga but she struggled with him, and when the panga fell down she freed herself. When she ran out, the appellant chased her with the panga up to her parents’ house which was nearby. She called out for help but when her father *John Osiemo* (PW2) came out and tried to accompany the appellant to his house to check on the safety of Miriam and Pilato, the appellant cut him on the neck from behind. He fell down unconscious and was rushed to Nilito Mission Hospital by one Towet. The appellant then went back to his house where he killed the deceased Miriam and Pilato and threw their bodies near the river and on the road respectively. When the two bodies were later recovered by police and members of the public their skulls had been opened and their brain matter tempered with.

PW2 testified and supported PW1 that the appellant chased her with a panga to his house during the night of 13th March, 2001 and when he came out and wanted to accompany the appellant to his house the latter cut him on the neck. PW1 fell down and became

unconscious. He was taken to Narok District Hospital for first aid and then to Tenwek Mission Hospital where he was admitted in serious condition. Another witness **Ezekiel Nyangiri** (PW3) a grandson of PW2 also testified in the case. Though he was 12 years old he testified on oath after the court found him fit to do so after the usual *voire dire* was conducted on him. He testified that he saw the appellant at the house of PW2 when he chased PW1 there. PW3 was also cut on the head by the appellant at the house of PW2. He also saw the appellant cut Nora Kipkirui Osiemo at the same house. And the next day when PW3 was being escorted by one Samuel to hospital, he saw the appellant in the same vehicle he was travelling and informed Samuel about what he, the appellant, had done the previous night. Samuel in turn alerted the driver who stopped where traffic police were and informed them about it. The police then arrested the appellant. Police **Cpl. Joseph Kiruara Korir** (PW4) received a report of this incident while at Narok Police Station. He proceeded to the scene of the incident in company of other police officers from where he recovered bodies of three children, two girls and one boy. They had all been cut on the head and some brain matter removed from the skulls. PW4 found the behaviour of the person involved in those killings strange to the extent that after the appellant's arrest PW4 directed that he be taken to Narok Hospital and Mathari Hospital for psychiatrist check-up and treatment. This took sometime before the appellant was certified fit to plead to the charges. He was then arraigned in court as aforesaid on 13th February, 2003. This was more than one year after the incident.

Dr. Corney Francis Otullo (PW5) completed and signed P3 forms in respect of PW2 and PW3 to assess the injuries sustained by them when they were attacked and injured by the appellant on the night of 13th March, 2001. He also produced postmortem forms in respect of the deceased *Miriam Chebet Matwek*, *Nora Kipkirui Osiemo* and *Pilato Kibet Matwek*, the deceased, completed by **Dr. Wafula** who worked with him at Narok District Hospital where the killing of the deceased was committed by the appellant.

When the appellant was placed to his defence he testified in an unsworn testimony that he did not know what happened on 13th March, 2001 and did not even recall when and why he was arrested. It was on 20th May, 2001 when he was informed that his children had died and he was shocked. He, however, admitted that he used to take illicit brew and smoke bhang until the doctor told him to stop the practice, but although he stopped taking illicit brews, he continued smoking bhang.

The learned Judge (*Koome, J.*) then summed up the case to the assessors who had assisted her in hearing the case as the law then prescribed. They all returned a verdict of guilty of murder for the appellant.

In her judgment delivered on 20th May, 2007, the learned Judge concluded:

“When the case was summed up to the assessors, all the three assessors returned a unanimous verdict of guilty as charged and rightly so as the evidence against the accused person is overwhelming. The accused person did not deny the charges but seemed to plead insanity caused by intoxication. No evidence was adduced to prove the state of insanity and in the circumstances the defence by the accused person was untenable. I find that the prosecution has discharged the burden of prove (sic) against the accused person whom I find guilty of the three counts as charged. The accused person is accordingly convicted of the three counts.”

The appellant was not satisfied with his conviction and he filed his own home-made memorandum of appeal which listed 5 grounds as follows:

“1.

2. That the learned trial Judge erred in law and facts by finding me guilty without considering the fact that at the material time I was mentally sick and thus not conscious of whatever happened good or bad.

3. That it was confirmed by a doctor from Mathare Mental Hospital where I was hospitalized for two

years.

4. That my defence was not considered for what it was worth as required by law.

5. That as I could not apprehend all what transpired in court during the trial therefore humbly request this Court of Appeal to furnish me with a copy of trial proceedings and judgment so as to enable me raise more reasonable grounds during the hearing of the appeal.

Before this Court on 30th March, 2010 Mr. Kipkoech, learned counsel for the appellant submitted that there was sufficient evidence to establish that the appellant was insane as shown by his actions on the night of the incident when he cut the victims on various parts of their bodies, killed the deceased and even consumed their brain matter. According to counsel the appellant went berserk and was not in control of his mental faculties. That after the incident the appellant remained for sometimes under medical observations in various hospitals in order to ascertain his mental state and was only certified fit to stand trial after five years. All this time nobody could say what the appellant's state of mind was. In his view this establishes that the appellant was insane at the time he committed this offence. According to counsel even if the court considered that the appellant came home already drunk and was also carrying a jerrican of busaa, it could have found that he was temporarily insane at the time he committed the offences with which he was charged.

Mr. Mugambi, learned State Counsel supported the conviction of the appellant for the offences of murder as he had no history of mental illness. According to counsel the appellant was taken to Mathare Mental Hospital because of the cruel incident and when he had earlier been taken to the Provincial General Hospital Nakuru he was found drunk and not insane. In his view the appellant bought and carried home a five litre gallon of busaa in contemplation of committing the offences.

This is a first appeal and as such we are under a duty to reconsider and to re-evaluate the evidence adduced before the superior court with a view to deciding if the appellant's conviction should be sustained giving due allowance to the fact that we neither saw nor heard the witnesses testify, see *Okeno v. Republic* [1972] E.A.32 and *Selle v. Associated Motor Boat Co.* [1962] E.A. 123. In our view the appellant's acts on the night of 13th March, 2001 were so sporadic that no reasonable court would believe they were premeditated. The appellant chased PW1 up to her father's home (PW2) whom he cut. Chepkurui was the daughter of PW2. The appellant cut her at PW2's house and carried her away. Her body was later found damped somewhere not clearly explained by the evidence on record. Then he went home and killed his two children, Miriam Chebet and Pilato Kibet, the deceased. He threw their bodies near the river and on the road respectively after opening up the skulls and consuming some of the brain matter. As he committed these acts he said nothing to or about the victims. In his defence he only said he did not know what happened on 13th March, 2001 or why he was arrested. In our view these are not acts of a person in his normal mental status. We hold the view that he was insane at the time he committed these murders and the learned Judge should have recorded a verdict of **"guilty but insane"** pursuant to **section 166(1)** of the Criminal Procedure Code.

It is also trite law that where an accused person is charged with a number of capital offences it is preferable for the prosecution to proceed on one capital charge only and leave the other capital charges in abeyance even though the charges appear to be interlinked; see *Muiruri vs R.* [1980] KLR 70. And in *Abdul Debayo Boy & another v. R.* Criminal Appeal No. 19/2001 (UR) this Court stated as follows:-

"We have repeatedly said that where an accused person is convicted on more than one capital charge the sensible thing to do is to sentence him to death on only one count of the counts and leave the others in abeyance, including any sentence of imprisonment.

The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence was to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on other counts in abeyance ..." see also *Abdihussein Kaimoi v R.* Criminal Appeal No. 47 of 2001.

In the circumstances, we quash the appellant's conviction for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code on the three counts and set aside the sentences of death imposed on him. In its place we enter a special finding of "guilty but insane" under **section 166** of the Criminal Procedure Code for the appellant on the first count while the sentence on the second and third counts remain in abeyance. We further report the case for the order of President under **section 166(2)** of the Criminal Procedure Code and direct that the appellant be confined at Kamiti Maximum Prison at the pleasure of the President.

Dated and delivered at Nakuru this 28th day of May, 2010

E. O. O'KUBASU

.....
JUDGE OF APPEAL

E. M. GITHINJI

.....
JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR