REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 155 of 2008

BETWEEN

LEMUNKE KARINO OLE KITAMANI …… APPELLANT

AND

REPUBLIC …….. RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Nakuru (Kimaru, J0 dated 13th October, 2006

In

H.C.CR.C. NO. 116 OF 2003)
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JUDGMENT OF THE COURT

Luka Kimaru J, sitting with assessors as the law then required, tried the appellant **Lemunke Karino Ole Kitamoni** on an Information which had charged 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 4th day of September, 1998 at Shapatarakwa Village, Olposimoru Location of Narok District, Rift Valley Province, the appellant murdered Kepen Ole Kitamoni, "the deceased" hereinafter.

The facts which the learned Judge and the three assessors appear to have accepted were that the deceased was the father of the appellant and at the time of his demise his age was said to be seventy-five years. His wife Napolos Neintia (PW2) had that day gone out to herd the family cattle, leaving the appellant and the deceased at home. Napolos returned home at around 6.30 p.m. and found her husband lying outside his house and bleeding profusely from his head. The deceased had serious cut wounds on the head. Napolos raised an alarm and her daughter-in-law Eunice Kitamoni (PW3) ran to her aid. Eunice had earlier on seen the appellant go into the house of the deceased and shortly thereafter she heard the screams of Napolos. Joseph Ole Kitamoni (PW5) was another son of the deceased and the husband of Eunice. Joseph had not been at home and learned of his father's death upon arrival. The deceased had been taken to Maasai Hospital but succumbed to his injuries there. On the 6th September, 1998, Joseph reported the matter at Olkurto Police Station. Police constable Mathew Munyi (PW6) accompanied Joseph to their home and arrested the appellant who was traced to some river where he was found washing his clothes. Constable Munyi took him to the house and on searching the house a blood-stained slasher was recovered under the appellant's bed. For some unclear reason constable Munyi did not submit the slasher for examination by the Government Analyst or Chemist.

Though the appellant was arrested on 6th September, 1998, some two days after the crime, he did not appear before the court until the 15th September, 2003. This was explained on the basis that upon being examined as to his mental status he was admitted in hospital and stayed there until the time he was produced in court. Even as late as 7th February, 2005, Kimaru, J still ordered that the Provincial Psychiatrist at the Rift Valley Provincial Hospital should examine the appellant and prepare a report on him. All the family members who testified said the appellant had always been a mental defective.

Having summed-up the case to the assessors, two of them were of the view that the appellant was guilty of the lesser charge of manslaughter, apparently on the basis of his mental health. The third assessor was of the view that the appellant was not guilty because he was insane when he committed the offence. In his judgment dated and delivered on the 13th October, 2006, the learned Judge, acting under ***section 166 (1)*** of the Criminal Procedure Code made a special finding of "*guilty as charged but insane*" and under ***section 166 (2)*** ordered that the appellant be detained at the pleasure of the President. The appellant now appeals to this Court against the Judge's finding. His complaints which are in his "*Grounds of Appeal*" are:-

"1 That the trial judge erred in matters of both law and fact by basing his conviction on hearsay evidence hence occasioning a miscarriage of justice.

2. That he also erred in matters of both law and fact by failing to observe that the neighbours named as eye witnesses during the trial were not called as witnesses.

3. That he also erred in matters of law by holding that my state of mental disorder could be used to link me with the killing of deceased without any evidence either circumstantial or direct to connect me with the same.

4. That he also erred in matters of law by shifting the defence without giving any congent (sic) reasons as provided by section 169 (2) of CPC.

5. ----------."

There were, of course, some lapses on the part of the prosecution and we have already pointed out the failure of Constable Munyi to submit the blood-stained slasher found under the appellant's bed for examination by the Government Chemist to see if the stains on the slasher matched the blood-group of the deceased. Despite those lapses, however, there was the evidence of Eunice that shortly before hearing the screams of Napolos, she (Eunice) had seen the appellant go into the house of the deceased. Nobody else had been at home with the deceased and when the alarm was raised the appellant was nowhere to be seen. A few days later a blood stained slasher was found under his bed. It is true, as he complains in his grounds of appeal, that there was no direct evidence to link him with the crime; nobody actually saw him attack his father. But we do not agree with him that there was also no circumstantial evidence to connect him with the offence. Eunice saw him going into the house of the deceased. Nobody else was with the deceased at home and shortly after Eunice had seen him going into the house of the deceased, Napolos, his mother, came home and found the deceased with deep cut wounds on his head. Upon finding the blood stained slasher under his bed, constable Munyi had no doubt that it was the weapon which had been used to attack the deceased. The appellant himself did not say how the slasher had come to be under his bed and how the blood stains on it had come to be there or where the stains had come from. These, in our view, were circumstances upon which the learned Judge and the assessors were perfectly entitled to draw the inference that it was only the appellant and no one else who could and did in fact attack the deceased. On our own assessment of the recorded evidence, we are satisfied the circumstantial evidence adduced by the prosecution proved beyond any reasonable doubt that it was the appellant who inflicted upon the deceased the deep-cut wounds on the head which resulted in his death.

The evidence that the appellant was insane at the time he killed his father was simply overwhelming. The Judge imposed upon

him the only sentence allowed by the law, namely detention at the pleasure of the President. There is nothing this Court can do about that. In the circumstances, the appeal against the conviction and sentence fails and we order that the appeal be and is hereby dismissed.

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

R.S.C. OMOLO
……..
JUDGE OF APPEAL

E.O. O'KUBASU
…….
JUDGE OF APPEAL

D.K.S. AGANYANYA
……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.