IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 1 OF 2007

FRANCIS SAISI OMAE.....APPELLENT

AND

REPUBLIC.....RESPONDENT

(*Appeal from a conviction and sentence of the High Court of Kenya*

at Bungoma (Karanja, J.) dated 2nd May 2007

in

H.C.CR.C. No. 14 of 2002)

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JUDGMENT OF THE COURT

The appellant, Francis Saisi Omae, was charged with murder contrary to section 203 as read with section 204 of the Penal code in that on 26th July, 1997 at Matisi Estate in Trans Nzoia District within the Rift Valley Province he murdered Eunice Naliaka. The appellant denied the charge and his trial commenced with the aid of assessors before Karanja, J on 14th October, 2004. A total of eight witnesses testified on behalf of the prosecution, while the appellant testified on oath and called two witnesses. In the end, the assessors returned a unanimous opinion of guilt and the learned Judge agreed with them and convicted him of the said offence. He was given the mandatory sentence of death.

Aggrieved by that decision, he appealed to this Court. He was not represented at that time, and filed the following six home-made grounds of appeal dated 22nd March, 2007:

"**1. That my Lords' the High Court Judge erred in both law and facts by holding that the prosecution had proved their case against the appellant without considering that the prosecution case was not proved beyond reasonable doubt as the investigating officer was not of proper rank.**

2. That my Lords, the High Court Judge erred in both law and facts by convicting the appellant while relying on the evidence of PW2 and PW3 without consideration that this (sic) witnesses had contradicted themselves.

3. That my Lords, the High Court Judge erred in both law and facts by connecting me with the alleged offence while evidence in support was remote and far-fetched evidence thus unreliable.

4. That my Lords, the High Court Judge erred in both law and facts by not intrinsically testing my alibi defence which was unshaken, instead she came (sic) obliged to reject my defence furthermore the ground of objection given had no merit. Kindly see J5 line 3 – 6 where she stated, "DW2 who examined him concluded that he was not fit to plead. He did not none the less (sic) indicate the kind of mental disease the accused person was suffering from which made him unfit to plead.

(a) My Lords, the High Court Judge did not consider that DW2 only specialized in mental assessment and not actually which disease appellant suffered from.

(b) My Lords also see J5 line 9-12 where she stated, "it is noted that the photocopy of the P3 form produced by DW2 did not bear his signature as it appeared to have been cut off during the photocopying process" and further on line 12-13 where she stated." This document though admitted in evidence has very little probative value in my considered opinion." My Lords the trial Judge failed to consider that the photocopying error was by the prosecution and not appellant. My Lords she furthermore did not consider the evidence of PW 7 that suggested appellant was not of sound mind as evidenced on J4 line 9 – 11 where she stated "It was while in the maize plantation that he met PW 7 who (sic) on his way to the latrine. He asked PW7 if he had seen a thug who had killed his wife and child."

5. That my Lords as I cannot recall all that transpired during the trial I urge this honourable court to vanish (sic) me with a copy of the trial proceedings to enable me prepare more (sic) reasonable grounds.

6. That my Lords, I wish to be present during the hearing of this appeal

REASONS WHEREFORE:

(i) I pray that may this appeal be allowed.

(ii) Quash sentence and set me at liberty."

At the hearing of his appeal, he was represented by Mr. K. J. Misoi, Advocate, who adopted and relied upon the above grounds of appeal. Mr. Misoi abandoned grounds 1, 2 and 3 and consolidated grounds 4 and 5 for the purposes of his argument before us. Essentially, Mr. Misoi relied on "insanity" as his principal ground of appeal. Mr Chirchir, Senior State Counsel opposed the appeal and urged us to dismiss it.

This being a first appeal, it is our duty to re-evaluate and re-examine the evidence and make our own conclusion but we must bear in mind the fact that we have not had the opportunity of seeing and hearing the witnesses and give allowance for that. In ***MWANGI V REPUBLIC [2004] 2 KLR 28*** *at page* 30 this Court stated:

"***In Okeno v R [1972] EA 32 at p. 36 the predecessor of this Court stated, inter alia:***

'**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 [1975] EA 336***). 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 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.'"**

Having gone over the evidence adduced in the superior court and re-evaluated the same we find the facts, which are not in any serious dispute, to be as follows:

The appellant and the deceased had been neighbours for about two years. On a Monday preceding the death of the deceased, the latter's hen jumped over into the appellant's shamba and damaged some crops. The appellant apparently killed the hen and threw it back into the deceased's compound. When the deceased went to find out what happened, the appellant rudely replied that if she (the deceased) did not know how to take care of her things, he (the appellant) would do it for her. This prompted the deceased's husband, Dishon Wasike Nato (PW 1) to find out what had happened. He, too, was given a similar rude response. PW1 reported the matter to the village elder, and nothing much really happened after that incident.

A few days later, on the fateful day, the appellant went to the deceased's house armed with a panga, and a lit torch. He did not knock. He stormed in, walked by the deceased and her children who were in the sitting room, and headed straight to the bedroom. He came back, and the deceased asked him what he was looking for, and without saying a word, he simply raised his panga and slashed the deceased's hand. At this time, her son, Levi Nato (PW 3) who was only 14 at the time, ran out screaming. Tom Keroga (PW 2) a neighbour came running and found Levi who told him that the appellant "was killing his mother". The two rushed back to the house, and saw the appellant holding the deceased's injured arm. He then dragged the deceased to his compound, slashed her head three times, opened the skull with the panga, dipped the panga into the open skull, raised it up again, and pronounced "**I have killed you. We shall meet in heaven**." He then challenged PW2 to get closer. PW2 got scared, and ran to report the matter to the village elder, who accompanied him back to the house. On the way, they met the appellant still carrying the panga and torch. On seeing them, he ran into the maize plantation, and there he met, Protus Chemwos (PW 7) a retired prison department officer. He asked PW 7 if he had seen a thug who killed his wife and child. PW 7 said no, and suddenly the appellant hit him at the back of his head. He fell down unconscious. At that point, members of the public caught up with the appellant, arrested him and handed him over to the police. The post mortem carried out on the body of the deceased cited the cause of death to be "**brain damage secondary to the fracture of the skull**".

In finding the appellant guilty of the offence of murder, the learned Judge of the superior court said:

"**She died from the severe cut wounds on her head which caused brain damage and fracture of the skull. Who killed her? We have the evidence of PW2 and PW3 who were actually eye witnesses and who had to flee for their dear lives after the accused person threatened to kill them. All the accused person could say about this is that he could not remember what happened. Indeed in his submission to the court, counsel for the accused person did concede that** *actus reus* **had been established. The court is satisfied from the evidence on record that it was indeed the accused who attacked and killed the deceased in the manner described by PW2 and PW3. This brings us to the issue of malice aforethought which has to be considered along with the accused's defence of insanity."**

With regard to the defence of insanity, the learned Judge did indeed consider it, but rejected the same. This is how she delivered herself:

"**..... in a defence of insanity, the accused person must establish that as at the time he committed the offence in question, he was** "*suffering from the disease affecting his mind***."**

From all the decided cases on insanity I have read, the accused person had put forward the "disease of the mind" he purported to have been suffering from e.g. Epilepsy, schizophrenia, psychosis, arterial-sclerosis, insanity due to intoxication, celebral malaria etc. In this case, the accused person has told the court that he had never suffered from any mental illness, either before the incident or thereafter. Indeed there was no evidence tendered whatsoever either documentary or orally through relatives or people who knew the accused person before to state that he had a history of mental illness of one kind or another. Indeed even DW 3 who produced the controversial P3 form did not indicate what disease the accused person was suffering from. All he said was that he was unfit to plead. He did not say that he was labouring under any disease of the mind. Even the accused person himself did not call any member of his family who could testify to the effect that the deceased ever suffered from any mental disease. His neighbours among them PW 1 and PW 2 and

PW 4 had not seen him behave in a manner to suggest that he suffered from a mental disease before the date in question. The defence seems to be relying on the conduct of the accused person during and after the incident i.e. that he was carrying a lit torch in daytime and that he asked PW 7 if he had seen a thug who had killed his wife and children. Can the court from this conduct infer that the accused suffered from a disease of the mind – while he himself denies suffering from any disease?"

With great respect to the learned Judge, we find that there is sufficient evidence on record to suggest the possibility that the appellant was of unsound mind, and the learned Judge ought to have ordered an inquiry under **section 162** of the Criminal Procedure Code. We agree with the learned counsel for the appellant that the latter's strange behaviour in carrying a lit torch in broad daylight, asking PW 7 if he had seen a "thug", the brutal and bizarre manner in which he killed the deceased, his obsession with the wayward chicken, together with an earlier report that he was not fit to plead, and so forth, were indicative of the need to inquire further into the soundness of the appellant's mind. That is the duty of the trial Judge – to direct himself or herself and the assessors on the issue and if necessary to invoke the provisions of **Section 162(1)** of the *Criminal Procedure Code* which provides:

"**When in the course of a trial or committal proceedings, the Court has reason to believe that the accused is of unsound mind and consequently, incapable of making his defence it shall inquire into the fact of unsoundness."**

In ***Muraya v Republic [2001] KLR 50*** a similar situation was considered when this Court held, *inter alia*, that, if an inquiry is conducted pursuant to ***section 162*** of the Criminal Procedure Code and upon inquiry there is evidence of unsoundness of mind further proceedings must be adjourned and further consequences follow to ensure the accused is medically treated and becomes mentally fit to understand, follow and participate in the trial.

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

"**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."

In view of the foregoing, we think the facts of this case are such that it was quite possible that the superior court sentenced to death a man with possible mental disorder.

Accordingly, we allow this appeal, set aside the conviction and the death sentence passed on the appellant and substitute the same with a special finding to the effect that the appellant was guilty of the offence but insane. We now direct that the appellant shall be detained at the pleasure of the President

pursuant to **section 166** of the *Criminal Procedure Code*.

Dated and delivered at Eldoret this 3rd day of July, 2009.

E. O. O'KUBASU

.....

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR