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

Criminal Appeal 261 of 2006

JULIUS WARIOMBA GITHUA …….…..…… APPELLANT

AND

REPUBLIC ……..…....…….. RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya

Malindi (OukoJ) dated 15th April, 2004

in

H.C.CR.C. NO. 15 OF 2003)

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JUDGMENT OF THE COURT

This appeal has caused us considerable anxiety. Even the learned Assistant Deputy Public Prosecutor Mr. J. N. Ondari did not have a firm stand on whether he supported both conviction and sentence or not. In his submissions, Mr. Ondari started by telling us that he supported the appellant's conviction. But in the course of his submission, Mr. Ondari said:

"***I am not comfortable with the issue of insanity: The Court could find him guilty but insane".***

Mr. A. N. Noorani, the learned counsel for the appellant made brief submissions in which he asked us to review the evidence as this was a first appeal and for that reason this Court had to be guided by the holding in ***OKENO V REPUBLIC*** [1972] E.A 32. The second issue raised by Mr. Noorani was that from the evidence adduced the appellant's behaviour was abnormal and yet this was not raised by the prosecution.

What are the facts in this matter? The appellant herein, ***Julius Wariomba Githua,*** was charged with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code in that on 19th April, 2002 at about 7.00 a.m. at Hongwe Location in Lamu District within Coast Province, he murdered Mercy Wanjiku. The appellant denied the charge and his trial commenced before Ouko J on 19th May, 2004. A total of nine witnesses testified on behalf of the prosecution and it would appear that from their evidence there was no doubt that the appellant, acting in rather abnormal manner, attacked the family of the deceased with panga, bow and arrows. It would appear from the recorded evidence that the appellant did not have any particular target as he randomly attacked the family of the deceased and in the process killed the deceased, a young child aged only 1½ years, and in the process seriously injured other members of

that family. In the course of his judgment the learned Judge stated:

"***The accused, in my view, was clearly and positively identified by PW1, PW2 and PW3 who are members of the deceased family. He was also identified by PW4, who saw him being chased from the scene where the deceased was lying on the ground with injuries. She testified that she had known the accused for the last twenty (20) years.***

PW5 has known the accused since his (PW5's) birth. He saw the accused cut PW1 and then the deceased with a panga. He chased the accused but was not able to catch up with him and was at the same time scared of him because he was armed.

The accused was arrested after about one hour with the panga. The panga had no blood.

I find, from the foregoing analysis that the accused inflicted the injuries which caused the death of the deceased. The circumstances were such that there could not have been any mistake in the identification of the accused person. The defence that he was not at the scene at the material time is not convincing. The manner in which the accused armed himself with a bow, arrows and panga, was in itself a manifestation of his intention to do grievous harm to the Gitura family. It is not clear who in particular he was targeting as he shot the mother of the deceased (PW2) cut the sister (PW1) and shot at the brother (PW3). Whether or not he intended to cause the death of the deceased or do grievous harm to anybody else is immaterial".

From the foregoing, there can be no doubt that it was the appellant who caused the death of the deceased, Mercy. The learned Judge and the assessors were so satisfied and the Judge proceeded to convict the appellant of the offence as charged and sentenced him to death.

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. 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 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 have now gone over the evidence adduced in the superior court and as already observed earlier in this judgment it would appear that the facts of the case were not in any serious dispute. The appellant simply armed himself on that fateful morning and directed his unexplained anger towards the family of the deceased. The learned Judge was quite certain that this was a clear case of murder in which the appellant's conduct manifested his intention to do grievous harm to the family of the deceased.

In this appeal the issue of the appellant's mental status has been raised and, in fairness to the learned Judge, this issue was never raised during the trial. But taking into account the conduct of the appellant that morning one is left wondering as to why a man in full control of his faculties can behave in such a manner. What type of a person was the appellant? Grace Gathoni (PW4) testified that she knew the appellant as he was her neighbour and that she had known him for about twenty years. On being cross-examined by the appellant's then advocate Mr. Mwadilo, this witness stated, *inter alia*:

"***The accused lived alone. He used to act in a strange manner. He would not respond to a greeting".***

In view of the foregoing, we think that the learned Judge ought to have directed himself and the

assessors on the issue of the appellant's sanity, though that issue was not raised by the appellant himself. Even when an accused person fails to raise the issue of his sanity but the evidence of the prosecution witnesses suggest that the accused may in fact have been insane, it is the duty of the trial Judge to direct himself and the assessors on the issue and if necessary, invoke the provision 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 the present appeal, we were not shown any medical report on the mental status of the appellant. It was stated from the bar that the appellant's medical report had been filed but this has never been shown to us.

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 have 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 disorders to life imprisonment".

In view of all the foregoing, we think that the facts of this case are such that it was quite likely that the superior court sentenced to death a man with possible mental disorder. We would therefore agree with Mr. Ondari that the appellant ought to have been found guilty of the offence but insane.

For the foregoing reasons, we now 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 Mombasa this 18th day of January, 2008.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR