IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 264 of 2006

G. N. ……..……..…….…….. APPELLANT

AND

REPUBLIC ……..……..… RESPONDENT

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

(Sitati, J) dated 29th June, 2006

In

H.C. Cr. C. No. 20 of 2005)

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JUDGMENT OF THE COURT

On 12th April, 2005, G. N., the appellant herein, appeared before Onyancha, J sitting at Meru High Court on an Information that charged her with murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars in the Information were that on 9th day of January, 2005, at Ex-Lewa village in Meru Central District of the Eastern Province, the appellant murdered Z. M. Z. M. was the mother of the appellant.

When Onyancha, J read out the charge to the appellant her answer in Kimeru was:-

"***I killed her because I was annoyed. I did not intend to kill her."***

The learned Judge rightly entered a plea of not guilty for the appellant. The Judge then made four orders but in this appeal, we are concerned with only two of those orders. These were:-

"***1. …….***

2. ……

3. Accused to be examined for mental fitness, age by arrangement of O.C. Meru GK prison on or before 22.4.2005.

4. The Dr. to file his report on or before 28.4.2005."

Pursuant to these orders the appellant was eventually examined by Dr. F. Ong'echa-Owuor, a psychiatrist

at Meru Central District Hospital. In his brief report dated 24.2.2005, Dr. Ong'echa-Owuor said:-

"***I have to-day the 24th February, 2005, assessed the mental state of the above named in company of P.C. from Subuiga Police Station, and relatives (Siblings and Children).***

Is single mother of 4, 2nd born in a family of 6 siblings. Had been treated several times previously for mental disorder and admitted twice. However, refused medication. There is history of mental illness in the family.

On examination, kempt, coherent, pressured speech with no remorseness. Had hallucinations with paranoid delusions and lack insight.

CONCLUSION:

The above named suffers from mental disorder and is of unsound mind . Needs treatment."

This report was placed before Sitati, J who had taken over the case from Onyancha, J. Sitati , J then proceeded as follows:-

"***COURT:***

On the recommendation of the medical report by Dr. Ong'echa-Owuor of Meru District General Hospital that the accused is of unsound mind and therefore unable to conduct her defence: It is ordered that:-

(1) The case against the accused be and is hereby postponed.

(2) Accused to be referred to Mathari Mental Hospital, Nairobi for treatment.

(3) Mention on 14.12.2005 for progress report."

The learned Judge must have made these orders pursuant to the provisions of ***section 162 (1)*** and ***(4)*** of the Criminal Procedure Code though under ***section 162 (4)*** all the Judge was required to do was to order the appellant detained under appropriate custody and then report the case to the relevant Minister who would in turn report the matter for the consideration of the President. Under ***section 162 (5)*** of the Code, upon such consideration, the President may by order under his hand addressed to the court, direct that the accused be detained in mental hospital or other suitable place of custody and the court shall issue a warrant in accordance with the President's order. The warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in the manner provided by sections ***163*** and ***164***.

The learned Judge however, shortened the process by cutting out the report to the Minister and then to the President and directly ordered the appellant's treatment at Mathari Mental Hospital and ordering that the appellant be produced before her on 14th December, 2005. That short-circuiting of the whole process is now the practice which is probably based on the sound reason that if the whole process is followed to the letter the matter might take a very along time to conclude.

Be that as it may, the matter did not again come before Sitati, J until 3rd April, 2006 when a Mr. Muteti, appeared for the Republic and the appellant was represented by a Mr. Ndobi holding the brief of Mr. V.P. Gituma. Mr. Muteti told the learned Judge that the medical report on the appellant was then ready and that the appellant was then fit to plead to the charge. The learned Judge adjourned the matter to the following day and when the hearing resumed the appellant was represented by Mr. V.P. Gituma himself. The charge of murder was again read to the appellant. The appellant's answer was:-

"***I killed the deceased but I did not kill her. She had wronged me."***

Once again the Judge entered a plea of not guilty for the appellant.

Then strangely, Mr. Gituma told the Judge as follows:-

"***I have instructions from the accused person to offer a plea on the lesser charge of manslaughter."***

Mr. Muteti asked for a mention the following day, but there were other numerous mentions thereafter until 7th June, 2006, when the lesser charge of manslaughter was substituted, read out to the appellant by the Judge and the appellant's answer as recorded by the Judge was:-

"***That is true."***

Mr. Muteti then stated the facts showing that the appellant had attacked and killed her mother over some land measuring ½ an acre. The appellant admitted the facts as being correct and the Judge convicted her.

Despite the fact that Sitati, J had seen the report of Dr. Ong'echa-Owuor and despite the fact that it was the learned Judge herself who had ordered that the appellant be treated for mental disorders contained in Dr. Ong'echa-Owuor's report, the facts stated did not in any way deal with or even mention the appellant's mental state at the time she was said to have killed her mother. The learned Judge herself made no inquiry about this . The learned Judge was probably misled by the report of Dr. Ngugi Gatere, a Psychiatrist at the Mathari Mental Hospital. That report stated, in pertinent parts:-

"***I hereby confirm to you that I did a psychiatric assessment on Grace Nyoroka at Mathari Hospital today, 5th January, 2006 and found her to be of normal mental status. Past medical history doesn't suggest the possibility of mental illness in the past. No hospital treatment is necessary in view of the above findings and she is hereby discharged to your Honourable court to face her trial as she is fit for the same"***

Dr. Gatere's report was dated 6th January, 2006. It came long after Dr. Ong'echa-Owuor's report of 24th February, 2005, almost one year earlier. It is not clear if Dr. Gatere had seen Dr. Ong'echa-Owuor's report. Whatever may be the correct position the learned trial Judge, the appellant's legal advisor and even the prosecuting counsel must have been aware of Dr. Ong'echa-Owuor's report and the assertion of Dr. Gatere in his report that:-

"***Past medical history doesn't suggest the possibility of mental illness in the past."***

was not strictly correct. Dr. Ong'echa-Owuor's report formed part of the appellant's "*Past Medical History*". The learned Judge did not in any way attempt to reconcile the two reports .

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. This appeal must be allowed but before we do so, we must express our profound appreciation to Mr. H. K. Ndirangu who, on the request of the Court at very short notice, took up the prosecution of the appeal by the appellant and made the work of the Court that much easier.

Our final orders in the appeal shall be that we allow the appeal set aside the conviction for the offence of manslaughter and also set aside the sentence of life imprisonment. In place thereof we substitute an order that the appellant shall be tried *de novo* on the original charge of murder. The new trial shall be conducted by a Judge other than Sitati, J. The appellant will continue to be kept in prison custody to await the new trial. Those are our orders in the appeal.

Dated and delivered at Nyeri this 2nd day of November, 2007

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.