REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: TUNOI, O'KUBASU & DEVERELL, JJ.A.)

Criminal Appeal 168 of 2002

BETWEEN

RAMADHAN KOMBE ……. APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from conviction and sentence of the High Court of

Kenya at Mombasa (Khaminwa, J.) dated 25th September, 2002 in

H.C.CR. C. NO. 48 of 1994)

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JUDGMENT OF THE COURT

On the 25th day of September, 2002, the High Court of Kenya at Mombasa (Hon. Khaminwa, Commissioner of Assize) after a protracted trial spanning over a period of ten years made a special finding under ***section 166*** of the Criminal Procedure Code to the effect that the appellant RAMADHAN KOMBE was guilty of the act charged but was insane when he did the act. The act complained of was the murder of the appellant's infant children, **Riziki Ramadhan and Juma Ramadhan,** aged 3 and 4 years respectively. We shall hereinafter refer to them as the two deceased.

According to the information filed by the Attorney General the appellant on 31st July 1993 at about 2.00 p.m., at Mnangoni village, Mariakani Location, Kilifi District of the Coast Province, murdered the two deceased.

The case for the prosecution is that Maria Kadzo (PW1) and the appellant are wife and husband respectively. They were blessed with two children, now the deceased. On 24th July, 1993, the couple and their deceased children left Mombasa to visit PW1's parents' home in Mariakani village. All of them stayed there for three days after which the appellant alone returned to Mombasa.

On 31st July, 1993, the appellant went back to Mariakani but had with him a panga which he was offering for sale at Shs.50/- and wanted PW1 to find a purchaser for it. Despite PW1 securing a neighbour to buy the panga the appellant changed his mind and told PW1 that he no longer wished to sell the panga. During the afternoon of the fateful day, the appellant led PW1 and the two deceased outside the house and made

them to kneel down allegedly to pray. Suddenly the appellant took a panga and hacked PW1 severally on the neck, back of the head and on all other parts of her body. The appellant then turned on the two deceased and savagely cut them inflicting deep wounds all over their bodies. It is apparent that they died instantly. The postmortem conducted on their bodies found deep extensive wounds over the head, neck and cervical spine. The cause of death of each deceased was shock due to haemorrhage from deeply inflicted wounds.

The appellant did not stop there. When he saw that his father- in-law (PW2) was approaching, the appellant proceeded to attack him but was repulsed. The appellant then ran away to the home of Pastor Jackson Kahindi (PW3) to whom he confessed that he had killed his children and wife and that he wanted to end his own life. However, PW3 calmed him down and stayed with him until the police were called.

Dr. Eric Maina (PW4), a Psychiatrist in Mombasa, examined the appellant a few days after the killings. He concluded that the appellant had varied psychological problems, suffered from depression and was mentally ill with occasional lapses of total control.

In his defence given on 1st August, 2002, the appellant testified:-

> ***"When this act happened I did not know about it ….. I was receiving treatment . I was then told I had killed that is why I am in prison."***

The appellant continued:-

> ***"I was sick (insane) and I do not recall what happened before I was arrested."***

In his submission before the trial court, the then counsel for the appellant Mr. Ngombo, averred that there was no preparation or planning before the killing and that the act was sudden and without provocation. He contended that the appellant's killing fell under section 12 of the Penal Code and that as his mind was not capable of understanding what he was doing or its quality as to whether it was right or wrong, the appellant was not criminally responsible.

In her reserved judgment the Hon. Commissioner of Assize held:-

> ***"In the circumstances I find that he did the act charged but there is a possibility that he was not in a position to know what he was doing. His case therefore comes under Section 12 of the Penal Code. I accept that the burden of proof as required under Section 12 has been discharged by his statement and also the surrounding circumstances and the Psychiatrist report. In the circumstances, I order that he shall be kept in custody and his case shall be reported to the President as directed under Section 166 Criminal Procedure Code."***

Mr. Jengo, the counsel for the appellant, argued before us that the trial of the appellant in the court before was a nullity because the record shows that less than three assessors were present throughout the proceedings and that as the panga, the weapon used to kill the deceased was not produced as an exhibit, then the special finding is not sustainable since the appellant is entitled to know the weapon used to kill the deceased.

Thus, the complaints relate only to some alleged procedural errors. Mr. Jengo did not in earnest, and we are not surprised, challenge the special finding on the mental illness of the appellant or as to whether the appellant committed the offence for which he was arraigned.

There is ample evidence adduced through PW1, PW2 and PW3 that the appellant viciously and savagely hacked and dismembered his infant children. They died instantly and the appellant was arrested immediately thereafter. The prosecution had further established that the appellant was acting unconsciously and involuntarily when he inflicted the injuries on the deceased. Through Dr. Maina it was possible to conclude on a balance of probabilities that a decease of mind had impaired the appellant's

mental faculties of reason, memory and understanding to an extent that he was incapable of knowing what he was doing or whether it was wrong.

In our view, the appellant's mental deficiency was "a disease of the mind" within the meaning of the **M'Naghten Rules** as enunciated in the celebrated case of **M'Naghten's Case [1843] 4 St. Tr (Ns) 84**7. On the evidence, the appellant was "insane" at the time of his act, and the only possible verdict in the circumstances was that provided for under ***section 166*** of the Criminal Procedure Code.

The records of appeal laid before us show that three assessors were empanelled on 19th November, 1999 and the trial proceeded intermittently thereafter. However, after several adjournments the third assessor failed to turn up on 15th March, 2001 and did not feature again in the trial until its conclusion. There is no explanation on record why he absented himself. However, the remaining two assessors continued to appear and eventually gave their respective opinions at the conclusion of the summing up. In submitting that the trial was a nullity, Mr. Jengo placed much reliance in the decision in **Muiruri v. Republic [2003] KLR 552** where this court held that unless valid and sufficient reasons are advanced and a considered ruling made on record for proceeding with a trial before the High Court with the assistance of two assessors, there must be three assessors as provided by the law. But, the facts of that case are distinguishable from those in the instant case since in the former the attendance by the assessors was alternate and attended only as they desired. This was not the case here whereby the attendance by the two remaining assessors was continuous and was without fail.

Moreover, in the particular circumstances of this case failure to record reasons for proceeding with the remaining two assessors has not prejudiced the appellant in any manner nor has the omission occasioned him a failure of justice.

We now deal with Mr. Jengo's other ground of appeal. He complained that the murder weapon was not produced. In the matter before the trial court and before us the cause of the deaths herein was patently obvious. The weapon used was clearly a panga.

There is no other version of how the deceased were killed, nor by whom. Moreover the counsel for the appellant, as the record shows, told the trial court that he had no questions to ask Dr. Mandalya (PW10), the witness who produced the postmortem reports. The failure by the prosecution to recover the murder weapon was not fatal to the case for the prosecution nor did the failure to produce it prejudice the appellant's defence.

We have no hesitation in rejecting this submission.

In the result, we hold that this appeal is without merit and is ordered dismissed.

ORDER: Appeal dismissed.

Dated and delivered at Mombasa this 29th day of July, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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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.