IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:OMOLO,TUNOI & LAKHA JJ.A)

CRIMINAL APPEAL NO. 36 OF 1994

BETWEEN

E N K.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Khamoni J) dated 10th December, 1993)

JUDGMENT OF THE COURT

Once upon a time, E N K, hereinafter called “the appellant”, had a daughter whose name was N N. We shall hereinafter refer to her simply as N. The appellant conceived N out of wedlock and by around 15th April, 1991, N was about twelve years old. The appellant lived and worked with a firm called [Particulars Withheld] in Nairobi while N lived with the appellant’s parents in Murang’ a and went to school there. So mother and daughter did not live together. On 13th April, 1991, G K K (PW 2) who is the brother of the appellant and who lived at [Particulars Withheld] Mlango Kubwa in Nairobi went to visit his parents at home in Murang’a. On the 14th April, 1991, PW 2 returned to Nairobi with N. The daughter had come to visit her mother during the school holidays. That same day, PW 2 took N to the place where her mother was residing. The appellant was not present. PW 2 found two neighbours of the appellant, Cecilia Wambui Gacibu (PW 10) and Susan Mwihaki Kanyi (PW 17). PW 2 handed little N to these two neighbours and asked them to hand over N to the appellant. The two neighbours did so, for when PW 2 visited appellant on 16th April, 1991 and found N absent, the appellant told PW 2 that N had gone to visit her aunt. The last person to see the appellant and N together was apparently Janet Atieno (PW 7) who alleged that she saw the appellant go out with N at around 2 pm on 15th April, 1991. That was the last time N was seen alive. Patrick Odero Ochilo (PW 1) who worked as a watchman with [Particulars Withheld] , found the body of N in a bush at Dandora on 15th April, 1991 at about 4 pm. According to PW 5, when the appellant was asked about N, the appellant said she had taken N to a brother at Huruma and that brother was to take N to Langata. M W K (PW 4) is another brother of the appellant. He lived and worked in Thika. PW 4 said that she went with the appellant to their home in Murang’a because the appellant asked him to take her there so that she could report that N had been run over and killed by a vehicle. These conflicting reports, and the obvious absence of N from the appellant’s residence led the neighbours into arresting the appellant and handing her over to the police. The body of N which PW 1 had discovered in a bush was being kept at a mortuary. The police remembered about it and it was not surprising that on 13th June, 1996, the appellant appeared before the late Mr Justice Mango charged with

the murder of N. The information preferred against her by the Republic stated in its particulars that on the 15th April, 1991, at Dandora in Nairobi,the appellant murdered N N N. Mr Justice Khamoni, tried the appellant with the aid of three assessors. Having heard the evidence of the Republic and that of the appellant, two of the assessors, Mr Leonard Gitau and Mr Peter Maina Njoroge were of the opinion that the appellant was guilty of the manslaughter of her daughter. The two assessors rejected the evidence of the appellant and that of Dr Mark Manase Okonji (DW 1), a Deputy Director of Mental Health and a consultant psychiatrist at Mathare Mental Hospital, to the effect that the appellant was suffering from what Dr Okonji called "affective illness" or mood disorder and that in that state, the appellant would not be in a position to know that what she was doing was wrong. The third assessor, Mrs Rose Karuga, thought otherwise. She told the learned judge:-

> "In my opinion the accused killed the deceased. The prosecution did not bring medical evidence on the state of the mind of the accused. We have medical evidence of Dr Okonji which says the accused was mentally sick when she committed the offence. I agree with that.
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> Even the people she told the watchman that she had seen and had attacked, those may have been people in her imagination. In the last verdict, the accused is not guilty of any offence because she was not in control of her mind. That is all."

For his part, the learned trial judge agreed with the first two assessors in rejecting the evidence of Dr Okonji but convicted the appellant of the murder of N and sentenced her to death. The appellant now appeals to this Court against the conviction and sentence and Mr Keriako Tobiko who ably argued his appeal before us, filed a total of nine grounds of appeal in their supplementary grounds of appeal and it was those grounds which were argued before us, and not those which had been filed by the appellant herself.

Mr Tobiko argued the grounds on two broad propositions, namely:-

> 1.That the prosecution failed to prove beyond any reasonable doubt that the appellant was guilty of the charge brought against her; and
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> 2.And in the alternative that if the appellant committed the act of killing N then she was, to put it straight, insane at the time she committed the act.

We can dispose of the first proposition fairly quickly.

We agree with Mr Tobiko that the duty of a first appellate court, of which we are in this appeal, is:-

> "... to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."

See, for example, *Okeno v Republic* [1972] EA 32. We are mindful of that duty, but we nevertheless have no doubt that on the recorded material, the conclusion that the appellant killed N was inevitable. There was no controversy on the recorded evidence that PW 2 did bring N to the appellant and that the appellant received N in her house. Again PW 2 went to the appellant's house on the 16th April, 1991; N was not there and the evidence of PW 2 that the appellant told her that N had gone to visit an aunt was not really challenged. That allegation by the appellant was clearly false because on 15th April, 1991, at 5 pm PW 1 discovered the body of N in a bush. Again PW 4, the other brother of the appellant, narrated to the judge and the assessors how he went with the appellant to their parents' home in Murang'a to report there that N had been run over by a vehicle. That evidence was also not seriously challenged and we repeat that PW 2 and PW 4 are brothers of the appellant. They would have no reason to invent such stories about their sister. We now know from the evidence that N had not been run over by any vehicle and that she had not gone to visit any aunt either at Huruma or at Langata. PW 5 saw her with the appellant on the 15th April, 1991; the appellant was going out with her. It does not seem to us to be terribly important whether the time was 12 noon or 2 pm or even 4 pm PW 5 was not asked if she was wearing a watch or had a clock nearby and there is nothing on record to show how literate PW 5 was. But it was never suggested to her

that she (PW 5) never saw the appellant going out with N. She swore throughout her evidence that she saw the appellant going out with N and that the appellant carried a *panga*.

We have already set out the verdict of assessor Rose and in that verdict, she refers to some watchmen. One of those watchmen Mulevu Ndungo (PW 21) who was guarding a construction site in Dandora. On 15th April, 1991, when he was in his house preparing lunch, he heard screams coming from a City Council dumping site. He ran in the direction of the screams; he was with a colleague Reuben Ngunga. On the way they met a woman wearing a white blouse and carrying a *panga*. The blouse had blood stains and when they asked the woman what had happened, she told them that she was being chased by three people and that she had cut one of those people with her *panga* and hence the blood stains on her house. She told PW 21 and his colleague that the attackers had run in the opposite direction to that from which she had come. PW 21 and his colleagues followed the alleged attackers but none was seen. PW 21 identified the appellant as the woman he met under these circumstances. We now know that the body of N was found within the vicinity from which the woman PW 21 met was running. We agree that the identification of the appellant by PW 21 was not very satisfactory, but was it just a coincidence that PW 5 said she saw the appellant carrying a *panga* leave with N, and that sometime thereafter PW 21 should meet a woman with a blood-stained blouse carrying a *panga* and running from the direction in which the body of N was to be found? We ask again, were these all a coincidence? The learned trial judge and the assessors did not think so. We equally do not think so.

So that even if we were to ignore the cautioned inquiry statement of the appellant in which she admitted killing her daughter there was strong circumstantial evidence from which a reasonable tribunal properly directing itself on the law with regard to evidence of circumstances, could safely conclude that the circumstances pointed exclusively to the appellant and to no one else as the killer of N. The appellant both retracted and repudiated her statement under inquiry but that statement was fully corroborated by the circumstantial evidence on record and like the judge and assessors we are fully satisfied that it was the appellant who hacked her daughter N to death during the afternoon of 15th April, 1991.

We will now deal with the alternative argument Mr Tobiko advanced on behalf of the appellant: Was the appellant sane when she killed her own daughter?

On the very face of it, there is something strange in a mother killing her own child in the manner we have already narrated, but there cannot be a presumption of insanity; on the contrary the law assumes that every person is sane and intends the natural and probable consequences of his or her actions until the contrary is proved. Since the burden of such proof is on the accused person, it is to be discharged upon a balance of probabilities.

Her first explanation as to why she killed her daughter was in her statement under inquiry to which we have alluded. There she blamed it all on the devil, the powers of darkness and her frustrations. But in her unsworn statement made during her trial she told the judge and the assessors:-

> "I loved my daughter although I got her when I was very young. I would not have done anything harmful to her in my right mind. I was not in control of my actions. I do not know what really happened. I realised much later. For some of the things I have heard in this Court I am surprised. I had that child only and I would not have liked to stay without a child. That is all I have to say."

Then follows the evidence of Dr Okonji to which we referred earlier in this judgment. Dr Okonji told the Court that he held a Bachelor of Medicine and Bachelor of Surgery degrees from the University of Nairobi, that he was a member of the Royal College of Psychiatrists of the United Kingdom and that he held a Diploma in Psychiatry (DPM) from the University of London. He had been in medical practice for twelve years. There could not have been any doubt on the evidence that Dr Okonji is an expert in his field. In the case of *Parvin Singh Dhalay v Republic* Criminal Appeal No 10 of 1997 (unreported) this Court had this to say regarding the evidence of experts:-

> "We think we should at this stage say something about the opinions of experts when they appear to assist the Courts. It is now trite law that while the Courts must give proper respect to the

opinions of experts such opinions are not, as it were, binding on the Courts and the Courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a Court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo v George Matata Ndolo* Civil Appeal No 128 of 1995. There the Court said with regard to the evidence of experts:-

> "The evidence of PWl and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A Court cannot simply say:-
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> "Because this is the evidence of an expert, I believe it."..."

"That, we think, is the proper direction which a Court dealing with the opinion of an expert or experts must give itself and the assessors when it is necessary to direct the assessors on such evidence. Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a Court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert is not soundly based, then a Court is not only entitled but would be under a duty, to reject it."

Dhalay's case was decided in 1997, and we think it correctly states the law on this point. We would see no reason for departing from it or doubting its correctness on this point.We have said Dr Okonji was a properly qualified medical practitioner in the field of Psychiatry. He examined the appellant on the 24th August, 1994, and during that examination, he learned that there was a history of mental illness in the family. There was a younger brother of the appellant who had been admitted to Mathare Mental Hospital for a psychiatric illness. In 1997 the appellant had a short episode of psychiatric illness for which she was treated at the Nairobi Hospital. Because the learned trial judge and two of the assessors who sat with him rejected the evidence of Dr Okonji we must go into some detail about that evidence and the reasons why it was rejected. Dr Okonji told the judge that at the time he examined the appellant she was in remission of her illness, but that the probability was very high that when she committed the offence she was mentally ill. According to Dr Okonji, the illness called "a mood disorder" has two phases. There is the phase when one becomes elated, over-active and very restless. Then there is the "depressed phase", when the mood is depressed, the victim is tearful, looks at the world through dark glasses, feels hopeless, helpless and worthless. In between the two phases, the victim of the disease looks very normal until either of the phases sets in. In the normal phase, the victim will handle problems normally, while in the depressed phase, homicide and suicide are common and the victim does it in the hope that he is doing the best thing. During the two phases, the victim loses insight and may not know there is something wrong with them and is unwilling to go for medical care unless compelled to do so. Dr Okonji ended his evidence in chief by saying that such a person may be well to-day but may be unwell the following day. The remission may come at any time and the illness has no effect on the patient. Such a person can tell lies. Dr Okonji was thoroughly crossexamined by the prosecuting counsel, Mrs Oduor, but he stuck to his evidence and reading the record of evidence it cannot be said that the medical evidence called by the appellant was in any way discredit by the prosecution. For their part, the prosecution chose not to call any medical evidence.

Sgt Christopher Magut (PW23) said in his evidence that he was the investigating officer in the case. On the 21st May, 1991, he and another officer called Magere, took the appellant to the police surgeon, Nairobi Area, for medical examination. The surgeon examined the appellant and completed a P3 Form. But the prosecution did not even produce the P3 Form during the trial. What did that form contain? We cannot tell.

The truth of the matter is that the appellant raised a reasonable probability that she might well have been mentally ill at the time she hacked her own daughter to death. The burden then shifted to the prosecution

to dislodge, and do so beyond any reasonable doubt, that the appellant was infact sane when she killed Nancy.

And why did the learned judge and two of the assessors reject the medical evidence called by the appellant?

In his summing-up notes to the assessors, and having summarised to them the evidence of Dr Okonji which we have set out elsewhere in the judgment, the learned judge directed the assessors as follows:

> "Evidence before this Court is that the accused completely concealed the offence right from the very second the offence was committed on the 15th April, 1991, upto the day she was taken to the police on 15th May, 1991. Consider whether that can be the behaviour of a person who was suffering from a depressed phase of mood disorder or an affective illness."

The 1st assessor, Leonard Gitau then gave his verdict as follows:-

> "In my opinion the accused killed the deceased. When doing so she was not suffering from a mental illness. She was normal knowing very well what she was doing. I do not agree with the medical evidence. On the verdict generally I find that the accused is guilty of manslaughter considering her young age she got the child while in school and she had not been staying with the child. Those are my reasons."

The second assessor Peter Maina Njoroge's verdict was:-

> "In my opinion, the accused killed the deceased. At that time she was not mentally sick - mood-disorder stays for a week. At the time she killed the deceased the accused was knowing what she was doing and knew it was bad. That could not have been mood disorder.
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> On the charge generally, the accused is guilty of manslaughter. This is because she was still young and got the child when in school."

We have already set out the verdict of the third assessor, Mrs Rose Karuga and we need not repeat it. She herself had no doubt that the prosecution had failed to dislodge the medical evidence called by the appellant and she consequently found that the appellant was mentally sick when she killed N. It is, however, to be noted that not even the 1st and 2nd assessors were prepared to convict the appellant of murder. Having found that she was not mentally ill when she killed Nancy and she being approximately 27 years old at the time, the only verdict open to the two assessors was one of murder. But they shied away from that verdict.

In his judgment, the learned judge, in rejecting the evidence of Dr Okonji had this to say, among other things:-

> "Evidence before this Court is that the accused completely concealed the offence right from the very second the offence was committed on the 15th April, 1991 upto the time she was being taken to the police station on the 15th May, 1991. She was able to work on the 14th and worked on the 16th April, 1991 and subsequent days until arrested. With all due respect to Dr Okonji, that cannot be the behaviour of a person who was suffering from a depressed phase or mood disorder or affective illness, if the doctor's evidence that the depressed phase or mood disorder takes at least one week from the time of the attack to the time of remission is to be believed. Since the accused was able to work on 14th April, 1991, and there is no evidence from the accused or the relatives or the co-workers or her neighbours that the accused was under attack by mood disorder before or on 14th April, 1991, let it be assumed that she could have been attacked by mood disorder late on the 14th April, 1991. In my opinion it is inconceivable in those circumstances that remission could have set in a minute or minutes or hours or even a day after the accused had committed such a horrible act of killing the deceased on the 15th April, 1991 to enable her conceal the killing as she did. In terms of section 12 of the Penal Code, I do not think that can be the behaviour of a person

> who through a disease affecting her mind is incapable of understanding what she is doing or of knowing that she ought not to do the act or make the omission. I therefore, rule out the assumption that the accused may have been attacked by mood disorder late on the 14th April, 1991. Dr Okonji did not tell the Court the date of the attack by the mental illness he claims to have seen in August 1992."

So the learned judge rejected the evidence of Dr Okonji principally on the grounds that the appellant was able to conceal the disappearance and death of N, and that she was, immediately before and immediately after the time of the offence, able to go on with her normal duties, such as going to work and so on and that her relatives, neighbours and colleagues at work did not notice any abnormal behaviour on her part.

With the greatest respect to the learned judge, whom we must say otherwise did an excellent job, the conclusion he reached on the issue of the mental state of the appellant at the time of the offence was not justified by the evidence of Dr Okonji or any other evidence. Dr Okonji never said and he was never cross-examined on that point, that a person suffering from mood disorder would not be able to pursue the daily chores of life. On the contrary, he specifically stated that the illness has no effect on the patient and the patient can tell lies, which we understand to mean that during the illness the patient can tell lies. The appellant was clearly telling lies when she told people that N had been run over by a vehicle or that she had gone to visit various relatives. We must not forget that the evidence of Dr Okonji was that of an expert. We repeat that the judge was entitled to reject such evidence but only for sound and cogent reasons. The learned judge himself recognized that the prosecution themselves had not only failed to call any medical evidence, but had even failed to produce the P3 Form which they must have had in their possession. The opinions of the judge, we fear, were purely speculative for they were not based on sound and cogent evidence. Mrs Rose Karuga thought so and specifically told the judge that the prosecution had failed to place before the Court any evidence with respect to the mental condition of the appellant at the time she killed her daughter. We agree with Mrs Karuga on this point. However, we must disagree with Mrs Karuga on her general verdict that the appellant was not guilty of any offence because she was not in control of her mind, which would mean an acquittal of the appellant. We equally must disagree with the two male assessors that the appellant was guilty of manslaughter, just as much as we do not agree with the learned judge that the appellant was guilty of murder.

The conclusion to which we ourselves must arrive at must be based on section 166 (1) of the Criminal Procedure Code. We accordingly allow the appeal to the extent that we set aside the conviction for murder and the sentence of death and substitute the conviction with a special finding under the above stated section to the effect that the appellant committed the act of killing her daughter N but that at the time she killed N, the appellant was insane. Pursuant to section 166 (2), we order that the appellant shall be detained in prison custody pending the pleasure of His Excellency the President. These shall be our orders in this appeal.

Dated and Delivered at Nairobi this 8th day of August 2000.

R.S.C.OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

A.A.LAKHA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR