REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

CORAM: KWACH, BOSIRE & O'KUBASU, JJ.A.

CRIMINAL APPEAL NO. 122 OF 2000

GEORGE NGUGI MUNGAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at
Nyeri (Juma J) 6th July, 2000

in

H.C.CR.C. NO. 6 OF 1998)
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JUDGMENT OF THE COURT

The appellant, ***George Ngugi Mungai*** , a clerk at CID Headquarters Nairobi, was arraigned before the High Court at Nyeri (Juma, J.), on two counts of murder contrary to ***Section 203*** as read with ***Section 204 of the Penal Code*** , and after his trial with the aid of assessors, was found guilty as charged and was thereafter sentenced to suffer death. The trial Judge did not, however, indicate whether the sentence was on one or both counts. We would, however, wish to observe that where, as here, an accused person faces two or more capital charges and he is convicted on at least two of them, it is desirable and indeed essential that the trial court passes sentence on one and leaves the issue of sentence in the remaining count or counts in abeyance. We, however, hasten to add that the manner in which the learned trial Judge proceeded to sentence the appellant has not occasioned any discernible prejudice.

In the appeal before us, the appellant challenges his conviction in the two counts as aforestated, and also, the sentence which was meted out to him. The appellant's memorandum of appeal has two grounds, namely:

> (1)The learned Judge erred in law and in fact in concluding that the facts of the appellant's case did not fall under the definition of legal insanity in terms of the M'Naghten's case.
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> (2)The learned trial Judge further erred in law and in fact in failing to appreciate that the appellant was severely depressed and did not know what he was doing at the time he committed the offence.

Neither at his trial nor before us does the appellant challenge the facts upon which his conviction was based. Indeed in a charge and caution statement he made to the police after his arrest and which he self-recorded, he makes a clean breast of the killing of Alice Njeri Mungai, the deceased in the first count, and

James Kamanga Mungai, the deceased in the second count. His case all along has been that when he killed the two, he was legally insane. The defence of insanity is provided for under ***Section 12 of the Penal Code*** , which provides that:

> *"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act o r make the omission; but a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."*

The burden of establishing such defence is, by dint of the provisions of ***Section 11 of the Penal Code*** , on the accused. The standard of proof, is not, however, as high as that which lies on the prosecution to establish the commission of an offence. All an accused person is called upon to do, is to call such evidence as will show on a balance of probabilities that as at the time he committed the act or made the omission charged through a disease affecting the mind, he was incapable of understanding what he was doing or of knowing that he ought not to do the act or to make the omission. (See also, ***MARANDU M'ARIMI V R [1982 -88] 1 KAR 161 .***

The appellant was the step-son of the deceased in the first count and the step-brother of the deceased in the second count. The appellant's father, Henry Mungai (P.W.7), who was also the father of the deceased in the second count, had two wives, the appellant's mother and the deceased in the first count (hereunder referred to as Njeri). Each of the wives had several children. However, the two wives or houses as they are commonly referred to in our setting, did not live in harmony and mutually accused each other of being responsible for each house's problems. For instance, in 1995 the appellant's brother died in Nakuru. According to P.W.7, the appellant, his mother and brothers alleged that Njeri and her son, Kamanga, had bewitched him.

Events leading to the death of Njeri and Kamanga started at Fedha Estate in Nairobi on 16th November, 1998 at the house of one Dorothy. The appellant, at the request of CPL Patrick Leonard Kimeo (P.W.2), who was his friend and a workmate at CID Headquarters Nairobi, accompanied the latter to Dorothy's house for a birthday party for her son. P.W.2 who is a photographer, had been invited to take pictures at the said party. He carried with him his camera and a pistol, which was loaded with 6 rounds of ammunition. As the party was in progress P.W.2 gave the appellant the gun temporarily because he was going to the toilet for a call of nature as it was not convenient to go with it. While P.W.2 was in the toilet, the appellant escaped with the gun at about 7.30 p.m., travelled to his home in Muranga with the gun intending to use it against Njeri and Kamanga, and before he reached his destination he test fired the gun to confirm that it was serviceable. He then headed straight to Njeri's house. He found her already asleep. He knocked at her bedroom window, and as soon as she woke up she promptly inquired as to who was knocking. The appellant identified himself by giving his name and added that he had gone there to talk to her. The time then was about 10.20 p.m. Through an opening in the window, the appellant aimed and shot Njeri as she walked towards the door to open for him. She fell down and died. The postmortem report on her body shows that she died of cardio respiratory arrest and haemothorax due to a penetrating chest injury caused by a gun shot.

The appellant left immediately and straightaway went to Kamucii bar where Kamanga was believed to be. Through an opening in a window in that bar he saw Kamanga leave the bar counter to attend to a customer who wanted to be served with a drink. He immediately took out the gun and he aimed and shot him. The bullet penetrated Kamanga's chest and ruptured what the doctor who performed the post-mortem on his body described as "great vessels". Like his mother, Kamanga fell down and died immediately.

In the meantime P.W.2 returned from the toilet but did not find the appellant; nor was he able to find his gun. He looked for the appellant in places where he thought he would be found but in vain. He then decided to make a report of the matter at Buru Buru Police Station. The appellant did not return to his residence in Nairobi until the next day at about 8 a.m. According to P.W.2 the appellant looked scruffy,

had the same clothes on as on the previous night and his shoes were covered with mud. He was unkempt. He confessed having used P.W.2's gun. P.W.2 called the police who came and arrested the appellant.

No one saw the appellant shooting both deceased persons. However, because of the bad blood between P.W.7's two houses and remarks which the appellant was alleged to have made before the material day, that he would one day cut Kamanga, the police were told that he was the prime suspect. P.W.2's gun was taken possession of and the same along with three spent bullets were taken to the ballistics expert who, on microscopic examination, found that the gun had been used to kill Njeri and Kamanga.

In a self-recorded charge and cautionary statement, the appellant gave a detailed account how and why he shot the two deceased persons, and because of the nature of the defence he raised at his trial and before us, it is imperative to outline what he said in the statement.

In the confession statement the appellant says that he indeed stole P.W.2's gun, went with it to his home in Muranga, purposely to use it against Njeri and Kamanga; that he test fired it before reaching the house of his step-mother, Njeri; that he went and awoke Njeri and shot her, went to his father's bar known as Kamucii and under the cover of darkness shot Kamanga through an opening in a window, and thereafter he returned the gun to P.W.2 to whom he confessed to having killed his step-mother and step-brother using the gun; that his step-brother, Kamanga had confessed to him that he was a devil worshipper and that the said Kamanga had been accused of killing his (appellant's) brother in 1995 through witchcraft as a sacrifice to the devil; and that the death of his brother had pained him and made him not only resent Njeri and Kamanga but also caused bitterness and misunderstanding between Njeri's and his mother's respective houses; that Njeri's family was continually threatening his family as a result of which he has lived in fear, had moved out of his home fearing that he would be the next victim after his brother and that other members of his mother's house had, likewise, moved out of the home for the same reasons; and that on the material date he recalled the suffering of his mother and all members of her house and when he found himself in possession of P.W.2's gun he decided to steal it, and secretly escaped with it with a view to using it to injure Njeri and Kamanga.

The appellant was medically examined on 27th November, 1996 by Dr Muthee, who remarked, in a P3 form he filled, that the appellant appeared depressed with prolonged grief for his late brother and recommended that the appellant be examined by a psychiatrist, which was done on 5th December, 1996, by Dr Joyce Kitili Wambua (D.W.2). In her evidence she stated that after interviewing the appellant's relatives, and the appellant himself, she came to the conclusion that the appellant was suffering from depression which made him easily angered and, also affected him adversely in the way he saw things, and that the depression was present before the material killings. She also testified that family problems and the fact that his girlfriend had left him were the cause of his mental condition.

In his defence, the appellant stated on oath that problems between Njeri's family and that of his mother started in 1995 because of the manner in which his father divided his land between his two wives. Njeri may not have been satisfied with the way the division was done and allegedly threatened that somebody in the other house would die before the end of that year. Indeed the appellant's brother died in the course of that year. The appellant attributed his death to witchcraft on the part of Njeri and her son Kamanga. He stated further that Kamanga had confessed to him of being a devil worshipper and that his deceased brother must have been offered by the said Kamanga and his mother as a sacrifice to the devil. The appellant further testified that because of those events and the fact that his girlfriend left him some time before the killings complained of, his health had deteriorated and at one time he had to be admitted at Mathare Mental Hospital for 10 days for psychiatric treatment. He fears for his life and because of that fear, he moved out of his home to live in Nairobi. His mother, and brothers had done the same for the same reasons.

D.W.2 supported the appellant's assertion that he suffers from a mental illness and on her part testified that the factors which the appellant said affected him psychiatrically were indeed capable of causing a mental illness and did cause the appellant a depression which in her view accounted for his behaviour of killing his step-mother and step-brother. The foregoing is, in summary, the evidence which the learned trial Judge considered and summed up to the assessors. In their findings, the assessors were of the opinion

that the appellant was guilty of murder but was insane. The learned trial Judge was not of the same view. In a well considered judgment he held that although the appellant, on the basis of medical evidence before him, could have been clinically insane, by his conduct it was clear that the appellant clearly knew the nature and quality of the acts he was doing, that he knew what he was doing was legally wrong and that the appellant set out on a mission to avenge the death of his deceased brother. He therefore, rejected his defence and held that it did not fall within the defence of insanity as propounded in the ***M'Naghten*** case .

We wish to observe that the defence of insanity as contained in our Penal Code was not taken from the holding in the M'Naghten case , but from rules which were made in England following the decision in that case and which came to be known as the ***M'Naghten's*** Rules . The defence of insanity having been incorporated in our Penal Code there is clearly no necessity of falling back on the M'Naghten ***Rules. Section 12 of the Penal Code*** , which we quoted earlier, sets out the whole gamut of the defence of insanity. As this Court stated in the ***Marandu M'Arimi case*** (Supra), the onus is on the appellant to show on a balance of probabilities that at the time of the act or omission giving rise to the charge or charges against him he was suffering from a disease which affected his mind to the extent that, at the time of the act or omission complained of, he was incapable of either understanding what he was doing or of knowing that he ought not to do the act or make the omission in issue.

D.W.2 after examining the appellant and interviewing his relatives came to the conclusion that before the acts complained of the appellant was suffering from a disease of the mind. The learned trial Judge agreed with her and made a finding to that effect. In her submissions before us, Miss Mwai urged the view that the learned Judge having accepted the evidence of D.W.2, it meant that the appellant had discharged to the standard required the burden on him in law to establish the defence of insanity, and the further finding by the learned Judge that he knew the nature and quality of what he was doing was an error of both law and fact. We have no proper basis for faulting D.W.2 on her opinion that the appellant was or may have been mentally sick at the time he killed Njeri and Kamanga. However, whether or not the appellant understood what he was doing or whether he knew that he ought not to do it, is a question of fact and a court will be perfectly entitled to reject the evidence of a medical expert on the issue if there is other evidence it has accepted to the contrary. Indeed that is the conclusion this Court came to in the case of ***PARVIN SINGH DHALAY V REPUBLIC Criminal Appeal No. 10 of 1997 (Unreported) .*** Clearly it is because of this that the learned trial Judge after considering other evidence he had accepted came to the conclusion that notwithstanding the appellant's mental illness as found by D.W.2, the appellant understood what he was doing and knew that it was legally wrong. He cannot as Mr Oluoch, the Principal State Counsel, rightly submitted, be properly faulted on that. We also agree with Mr Oluoch that the appellant before, during and after the acts complained of, understood what he was doing and that it was against the law. Besides, counsel for the appellant does not seem to us to have addressed the second part of Section 12 of the Penal Code, which in pertinent part, provides that:

> "... but a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease *does not produce upon his mind one or other of the effects abovementioned in reference to that act or omissi on."*

The effects mentioned in the section relevant to the issue before us are either incapability of an accused understanding what he is doing or of knowing that what he is doing is wrong and, therefore, ought not to be done. Although the learned trial Judge did not specifically allude to that provision, the manner in which he handled the appellant's defence clearly shows that he had it in mind.

In view of what we have stated above, Miss Mwai's submission cannot possibly be accepted and we must, regretably, reject it. We have carefully read the case she cited to us of ***EUNICE NJOKI KAMAU V REPUBLIC Criminal Appeal No. 36 of 1994 (Unreported)*** and in our view it is not in point. Besides P.W.7 who is the appellant's father, clearly testified that prior to the acts complained of, the appellant had openly declared that he would one day cut Kamanga with a panga, and we venture to say he would have done it in that manner had he not, by sheer chance, come into possession of P.W.2's gun. The learned trial Judge in the circumstances, was clearly right when he held that the appellant set out to avenge the death of his deceased brother and therefore possessed the necessary malice aforethought.

For the foregoing reasons we have no hesitation in coming to the conclusion that the appellant's defence of insanity was properly rejected and he was therefore properly convicted. Accordingly, we dismiss his appeal in its entirety. It is so ordered.

Dated and delivered at Nyeri this 27th day of October, 2000.

R. O. KWACH

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR