



IN THE COURT OF APPEAL

AT NAIROBI
(CORAM: OMOLO, SHAH & BOSIRE, JJ.A.)
CRIMINAL APPEAL NO. 35 OF 1991
BETWEEN

J W M APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nairobi (Mango J) dated 13th February, 1991

in

H.C.CR.C. NO. 71 OF 1988)

JUDGMENT OF THE COURT:

The late Mr Justice Mango, with the aid of assessors, tried *J W M*, the appellant, on an information charging the appellant with the offence of murder contrary to *section 203 as read with section 204 of the Penal Code*. The particulars contained in the charge were that on the 20th day of November, 1987, at Gatimu Village of Kiambu District, Central Province, the appellant murdered *S N N*, hereinafter referred to as "the deceased". At the conclusion of the trial, the learned Judge summed-up the case for the assessors and after considering the matter, two of the assessors told the Judge they were of the view that while the appellant was not guilty of the offence of murder, he was nevertheless guilty of the offence of manslaughter. The third assessor was of the view that the appellant was not guilty of any offence and ought to be acquitted. This was on 31st January, 1991. Mango, J. reserved his judgment to the 8th February, 1991 and on that day he delivered his judgment in which he differed with all the three assessors, found the appellant guilty of murder as charged and sentenced him to death. The appellant now appeals to this Court against both the conviction and sentence.

The appellant himself filed a memorandum of appeal containing in all six grounds, and those grounds were:

- "1.That the learned trial judge erred in both law and fact in convicting and sentencing me to death on a murder charge whilst the evidence adduced did not qualify to prove murder to the required standard;
- 2.That the trial judge erred in law and fact in finding the charge proved without giving due consideration or sufficiently considering the defence raised;
- 3.That the circumstantial evidence relied by (sic) as a basis of conviction was inconclusive;

4. That the learned trial judge erred in law and fact in failing to find that there was provocation whilst the comprehensive act indicated that I was labouring under insane dillution (sic) which deprived me power of control;

5. That the learned trial judge erred in law and fact in finding the charge proved whilst the evidence adduced did not establish malice aforethought or show that I was the actual offender;

6. That the trial judge's findings are against the weight of the evidence adduced."

Mr Kiage argued the appellant's appeal before us. Mr Kiage filed two more grounds in a supplementary memorandum of appeal and those grounds were that:

"1. The learned judge erred in law and misdirected himself in disagreeing with the assessors without assigning reasons for doing so;

2. The learned judge erred in failing to appreciate that all the facts of the case and the surrounding circumstances were suggestive of manslaughter and not murder."

There could not have been any doubt on the recorded evidence that on November 20th, 1987, someone attacked and inflicted serious injuries upon the deceased. Peter Mbiyu Githuka (P.W.4) was one of the people who found the deceased lying on a road and the deceased had been seriously injured. P.W.4 said he asked the deceased what had happened to him and in the words of P.W.4:-

"... and he said he had been cut by 'Brown' - the accused's nick name. He was talking with a feeble voice. I knew Ngugi before - he was older than me and I knew him all my life. We looked for a vehicle belonging to Kibachi and Ngugi was rushed to Hospital. Next day we got report that Ngugi had died. I knew the accused very well. We were in school together. He is called J W M but his nick name is 'Brown' and this is the name he is known by in the village."

The evidence of this witness (P.W.4) shows that the deceased was found lying on a path and the deceased had serious injuries on him. The deceased was rushed to the hospital and the next day P.W.4 was told the deceased had died. According to P.W.4 before the deceased was rushed to hospital, he (deceased) even named the appellant as his assailant.

Dr Francis Njoroge Kariuki (P.W.12) saw the body of the deceased on November, 26th, 1987 at the City Mortuary when he carried out a post-mortem examination on the body. Dr Kariuki saw a cut wound on the forehead, 4" long with 8 stitches, on the right side of the face with 1" long fracture on the skull below the wound and exposing the underlying brain. There were also cut wounds on the right anterior shoulder 1" long with two stitches, and on the lower chin with five stitches and two inches long. As a result of his examination, Dr Kariuki formed the opinion that the deceased had died because of the multiple cut wounds to the head and fractured skull, all of which must have caused a sharp trauma. It is clear to us that these wounds which caused the deceased his life are the ones P.W.4 saw on the deceased, when he found the latter lying helpless on a footpath during the evening of 20th November, 1987. Of course, no one saw the appellant attack the deceased though P.W.4 said the deceased told him it was the appellant who had attacked him. That must be why the appellant is complaining in ground three of his memorandum of appeal that the circumstantial evidence relied on by the trial Judge to convict him was not conclusive. Also in grounds one, two and six, the appellant complains that the evidence upon which he was convicted did not prove the charge to the standard required by law.

As, we have said, we are satisfied and the learned Judge and two of the assessors must have been, that someone attacked the deceased while he was walking on a footpath in the evening of 20th November, 1987, inflicted serious cut wounds upon the deceased and that the deceased subsequently succumbed to his injuries on 21st November, 1987. The first question we have to deal with, therefore, must be whether it was the appellant who attacked the deceased.

On this aspect of the matter, we really have little difficulty in coming to the conclusion that it was the

appellant who attacked the deceased. Three other persons were attacked that evening and within the area in which the deceased was attacked. Those persons were Chege Kariuki (P.W.5), Joseph Kabata (P.W.6) and Nyagah Mbochi (P.W.10). All of them swore that the appellant attacked each one of them with a panga that evening, though their injuries were, mercifully, not serious. In the case of P.W.6, that witness specifically stated that when attacking him, the appellant said:

"even you must, you must die".

In his unsworn statement, the appellant told the Judge how he went to look for his cow which had gone astray, found someone following his cow, followed that person into a bar, grabbed a sword from some watchman there and started to attack people there. Clearly it was the appellant who attacked P.W.5, P.W.6 and P.W.10 and when he told P.W.6 that even him (P.W.6) must die, the appellant was obviously referring to the attack on the deceased whom he had rendered helpless. The attack on the deceased was just immediately before the attacks on the three witnesses and it is unreasonable to think that somebody else other than the appellant could have been involved in them. Like the court below, we are satisfied on the recorded evidence that it was the appellant who inflicted on the deceased the injuries of which he died.

The injuries inflicted on the deceased were so severe that the person causing them must be taken to have known, or ought to have known that the injuries would, at the very least, occasion grievous bodily injury to the deceased. The appellant says in ground five of his grounds of appeal that the evidence adduced did not establish malice aforethought or show that he was the actual offender. The Judge found that the appellant was the *"actual offender"* and we have found so too. **Section 11 of the Penal Code** says:

"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

The appellant did not allege at any stage during his trial that he was not of a sound mind at the time he inflicted serious panga cuts upon the deceased. Even in his unsworn statement to which we have referred, he did not say that he was of unsound mind. Dr Samson Gitonga (P.W.8) examined the appellant on the 24th October, 1987; the typed record we have shows Dr Gitonga as saying in cross-examination that:

"J W M showed me signs of insanity"

while in the P3 Form which Dr Gitonga produced in evidence as Exh 8, the doctor remarked:

"No signs of insanity (+ve history of family mental illness. Rec: examination by a psychiatrist)."

We have checked the typed record with the learned Judge's hand-written notes of Dr Gitonga's evidence and it is clear from the hand-written notes that the word "no" in the hand-written notes is typed as "me". Otherwise the other portions of the typed notes agree with the hand-written notes and what Dr Gitonga told the trial court is that he saw no signs of insanity in the appellant but that he (Dr Gitonga) learnt that there was a history of mental illness in the family. Not being a psychiatrist himself, Dr Gitonga recommended that the appellant be examined by a qualified psychiatrist. It appears that the prosecution did not comply with Dr Gitonga's recommendation and it was the High Court (Osiemo, J.) who ordered on the 25th September, 1989, that a medical report on the appellant be made available to the court before the trial date. We have in the court record a report dated 26th February, 1990, from Mathari Mental Hospital and it is as follows, where material:

"High Court of Kenya

Law Courts

P.O. Box 30041

NAIROBI

RE: HIGH COURT NBI CRIMINAL CASE NO. 71 OF 1988: REPUBLIC V JWM:

I have to-day re-examined the above-named (see our report Ref. No. IP NO 22773 of 30th October, 1989).

The accused has no complaints related to mental illness and has no psychiatric history. on mental examination, I found nothing to suggest mental illness.

In summary, this is a man who has no previous psychiatric history and is mentally well. My view is that he was mentally well when he allegedly committed the offence he is charged with. He is Fit to Plead.

SIGNED

Dr. C.K. Munene,

DEPUTY DIRECTOR OF MENTAL HEALTH."

So that apart from the fact that the appellant never raised any issue relating to his sanity either before, during and even after his trial, there was no evidence from the prosecution which could raise any doubt as to the sanity of the appellant. Unless some other explanation can be found the court would inevitably find that the appellant, in cutting the deceased in the manner he did, must have intended either the death of the deceased or very grievous harm, to him.

The other explanation offered in this Court by the appellant and which Mr Kiage for him argued at length is to be found in ground four of the appellants memorandum of appeal and in ground two of the supplementary memorandum. In ground four, the appellant complains that:

"... the learned trial judge erred in law and fact in failing to find that there was provocation whilst the comprehensive acts indicated that I was labouring under insane dillution (sic) which deprived me of power of self control."

Mr Kiage put it differently in the supplementary memorandum of appeal, namely:

"THAT the learned judge erred in failing to appreciate that all the facts of the case and the surrounding circumstances were suggestive of manslaughter and not murder."

Expounding on this point, Mr Kiage referred us to the extra-judicial inquiry statement made by the appellant to Inspector Johnson Munene (P.W.8) during the investigations of the case. That statement was, however, repudiated by the appellant and was only admitted after a trial within the trial. In that statement the appellant had told P.W.8 that he had killed the deceased because he (appellant) had found the deceased having sexual intercourse with his wife by the road side. His wife fled and when he (appellant) asked the deceased about it, the deceased had retorted that:

"He [deceased] will be having sexual intercourse with her even if I am [appellant] present and I [appellant] will do nothing to him."

As we have said this was no part of the appellant's defence; indeed he insisted throughout the trial that he did not tell P.W.8 anything of that kind. He did not repeat that story in his defence and we do not see how we can force it upon him as his defence. Mr Kiage, however, told us that this statement was part of the evidence on record and that being so, the trial court ought to have considered it. Mr Kiage did not tell us expressly that the appellant in fact found the deceased sleeping with his wife by the road side. If that had been true and the appellant had raised it as a defence then of course it would constitute a grave provocation which might well have reduced the charge to manslaughter. But as we have repeatedly said, this was not the appellant's case. There was really no question of the appellant finding the deceased having illicit sexual relations with his wife. That allegation was clearly untrue. The appellant's wife was not even at home as she had run back to her parents' home. What we understood Mr Kiage to be saying

was that the appellant was every waking minute of his life tormented by the thought that members of his family were having a field-day with his wife. On the 25th July, 1987, Kamau Ngugi (P.W.15) had heard a conversation between the appellant and one Mbugua Ngaru. P.W.15 heard Mbugua Ngaru tell the appellant:

"I do not know what kind of person you are, your wife is seduced by people of your family."

Mr Kiage argued that the appellant's mind became consumed by that thought so that even if he did not actually find the deceased sleeping with his wife, the appellant must have had an insane delusion that he had in fact found them in *flagrante delicto*, and that being so, the appellant was to be treated as though the insane delusion in fact represented a true state of affairs, and that, by itself, must reduce the charge to one of manslaughter. Mr Kiage referred us to the case of **REX V KIBIEGON ARAP BARGUTWA (1939) 6 EACA 142**.

The head-note to that case reads:

"Appellant and his father were passing a night together in the latter's hut when about 6 a.m. a neighbour heard shouts from the hut and on going there found the appellant attacking his father with a native sword. Appellant had also wounded five goats which were in the hut and when seized by neighbours he was very violent. The father died from multiple injuries inflicted by the appellant. Appellant, when asked by the man who tied him up why he had attacked his father, immediately replied that his father had attempted to have unlawful connexion with him. Appellant consistently held to this allegation which he repeated to a doctor and at the preliminary enquiry and at his trial. The deceased denied the accusation before he died and the allegation was rejected as untrue in fact at the trial. According to the medical testimony the attack was so violent that it suggested that the appellant cannot have been in his right senses. Appellant appealed from a conviction for murder.

Held:

(1)That though such incomprehensible acts are not in themselves sufficient to establish insanity in law, nevertheless such acts coupled with the fact that at the moment when he was compelled to cease his attack he made the allegation against the deceased, there was good reason to think that the appellant may at least have been labouring under an insane delusion that the deceased had made an indecent assault upon him;

(2)That the appellant must be judged as though the facts with respect to which the delusion exists were real and such facts would constitute sufficient provocation to reduce the offence to manslaughter.

(3)The finding must be manslaughter followed by a sentence of imprisonment and not a special finding of guilty but insane."

Mr Kiage asked us to find that the appellant in our case was labouring under the insane delusion that he had found the deceased having sexual intercourse with his wife by the road side, that the wife fled and the appellant, under the insane delusion, set upon the deceased and killed him, under the supposition that he had been provoked by the supposed act of sexual intercourse. We were, therefore, asked to apply the case of **BARGUTWA**, ante, and find that the appellant was only guilty of manslaughter.

We repeat that it was not the appellant's case that he was acting under an insane delusion when he killed the deceased. Immediately **BARGUTWA** was asked why he had attacked his father, he straightaway said the father had sexually molested him. He gave the same story to the doctor who examined him, to the magistrate who conducted the preliminary inquiry and finally repeated the story during his trial. In the case of this appellant, the only time he mentioned the issue of the deceased having sexual intercourse with his wife, if he ever mentioned it, was in his extra-judicial statement to the police. In court, he repudiated that statement and never repeated the allegation in his unsworn statement. That is entirely inconsistent with the current contention that the appellant was labouring under an insane delusion.

Again, the circumstances from which the alleged delusion arises must be reasonable. In **BARGUTWA's** case, he had spent the night in the same hut with his father and it is even probable that they well might have shared the same bed or whatever it was that they had slept on. It was in those circumstances that **BARGUTWA** thought, wrongly, that his father had sexually assaulted him. One can understand a man making the kind of allegation **BARGUTWA** made against his father; the circumstances surrounding the allegation would make the allegation probable even if not truthful or realistic.

In the case of this appellant his wife was not even at the scene where the deceased was attacked and killed. We know from the evidence that the wife had run back to her parents' home. We think it would be extending too far and to dangerous proportions the principle in **BARGUTWA's** case to interpret it as covering a situation where without any good reason for it, a person imagines that he has found another man sleeping with his wife, proceeds to treat that imagination as the truth and then base a defence of provocation on the imagined position. There is really no good reason why we should think and hold that the appellant was labouring under an insane delusion. He was not because there was no such delusion and there was no good reason for being so deluded.

Lastly, Mr Kiage told us that the learned trial Judge did not give any reason(s) for disagreeing with the assessors. We are satisfied the learned Judge gave reasons for every conclusion he came to. We do not think he was, either at the end of his judgment, or at any other stage of his judgment, required to, as it were, list all the reasons which led him into differing with the assessors. While the law, as established by this Court requires that where a judge differs with the assessors he must given his reasons for so doing, this is not a statutory requirement and even cases such as **ZAKARIAH KABUI KINUTHIA V REPUBLIC (1982-88) 1 KAR 1172** on which Mr Kiage relied, do not set out how a judge is to give his reasons. In our view, it is sufficient if, on reading the judgment as a whole, one is able to understand the reason(s) given by a judge for the conclusion(s) arrived at. It is not mandatory, for example, for a judge to say:

"For the reasons given in the judgment I disagree with the assessors"

or that he should list each and every reason and say:

"These are the reasons why I disagree with the assessors."

We are satisfied that in this appeal, the learned Judge gave the reasons why he did not accept the opinions of the three assessors.

All the grounds of appeal listed by the appellant must accordingly fail. He inflicted grievous panga cuts on the deceased and the deceased died of those injuries. The appellant, as a reasonable man must have known that the cuts would either grievously injure the deceased or kill him. The appellant killed the deceased with malice aforethought and that being the decision we have arrived at this appeal must accordingly fail and we order that it be and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 13th day of October, 2000.

R. S. C. OMOLO

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR