

KENYA / JUDGMENT

Dena v Republic [1999] KECA 207 (KLR)

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COURT

Court of Appeal

BEFORE

ZR Chesoni, JE Gicheru, AB Shah

CASE / FILE NUMBER

Criminal Appeal 53 of 1998

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Dena v Republic (Criminal Appeal 53 of 1998) [1999] KECA 207 (KLR) (21 January 1999)
(Judgment)

Amani David Dena v Republic

Neutral citation:

[1999] KECA 207 (KLR)

Republic of Kenya

In the Court of Appeal at Malindi

Criminal Appeal 53 of 1998

ZR Chesoni, JE Gicheru & AB Shah, JJA

January 21, 1999

Between

Amani David Dena

Appellant

and

Republic

Respondent

(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Ang'awa, J)
dated 9th May, 1999 in HCCRC No 43 of 1995)

Judgment

- 1.The appellant, Amani David Dena faced a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The charge alleged that in the morning hours of the 2nd day of November, 1992, at Kinani Village of Kaloleni Location within Kilifi District of the Coast Province, he murdered his wife Salama Dena.
- 2.In his opening address the learned Principal State Counsel stated that the appellant and the deceased had a dispute the night of 1st November, 1992 over a pregnancy. The following day on 2nd November, 1992, at about 6.00 am the appellant cut his wife's neck using a knife and a panga and thereafter surrendered himself to the police at Kaloleni Police Post. He was arrested and charged.
- 3.The appellant was alleged to have confessed on 17th November, 1992 of killing his wife and on 18th November, 1992, a doctor Erick James Maina, a psychiatrist who examined the appellant formed the impression that he was mentally ill. In Dr Maina's opinion the appellant suffered from a form of illness known as schizophrenia whereof he had hallucinations and strong beliefs that he would be harmed by others. The doctor recommended then that the appellant was unfit to plead.
- 4.On 5th February 1996, when the appellant was arraigned in the Superior Court (Ang'awa, J) he pleaded not guilty to the charge. The case was kept under mention till 5th November, 1996 when Mr Gacivih produced a copy of a medical report of the examination of the appellant and state that the appellant was fit to plead. The case was fixed for hearing on 12th February, 1997.
- 5.When the trial commenced the learned state counsel informed the Court that the prosecution would proceed on the basis that the appellant was guilty, but insane. On 12th February, 1997 Mr Adbulla for the appellant informed the Court that while he conceded that at the time the offence was committed the accused was not in a state of sound mind and did not know what he was doing at the time rather than a prolonged hearing his client (appellant) had instructed him to offer a plea of manslaughter and get him a specific period. However, the plea of guilty but insane was offered by the prosecution and not the accused.
- 6.The trial proceeded and the police officer, No 27231 Inspector Michael Murithi Mwaniki who visited the scene of crime and to whom the crime was reported by the appellant told the Court:"I am the first officer who came in contact with the accused. His physical appearance was normal. He was a resident of my area. I had dealings with him before. These were domestic dealings. There was a man who was seducing his wife. There was a history of quarrel after charging the accused. He was not a quarrelsome person. I am not aware. I have had no fights."Mr Abdulla then said:"This is a special trial under section 166 of the Criminal Procedure Code. Condition of the accused I amat a loss. I seek directions."In his closing submission the state counsel said:"I submit this is a case of guilty but insane."Mr Abdulla said he would call no evidence for defence.

7.The learned Judge wrote a brief summing up to the assessors and told them that the trial was conducted under section 166 of the Criminal Procedure Code and that the evidence had been adduced that the accused at the time of the commission of the offence was mentally ill. The three assessors returned a decision of guilty but insane.

8.The learned Judge based her judgment on section 166 of the Criminal Procedure Code and made a special finding that the accused was guilty of murdering Salama (his wife) but that at the time of committing the act he was insane. She then reported the case for the President's order under section 166(2) of the said Code, and ordered for the appellant to be held in custody at Mombasa.

9.Under section 162 of the Criminal Procedure Code the Court can, in the course of a trial or committal proceedings if it has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, inquire into the fact of the soundness of the accused's mind. The reason may be from information by the prosecution, as the case was here. If the Court, after such inquiry forms the opinion that the accused is of unsound mind and in the result incapable of making his defence, the Court must then postpone further proceedings in that particular case. If the case is bailable the accused may be released on bail or upon sufficient security being given. If the offence is not bailable then the Court orders that the accused to be detained in such place and manner as it may think fit. The court record of the case or its certified copy is forwarded to the Minister for the time being responsible for prisons for consideration by the President. The President may direct under his hand addressed to the Court that the accused be detained in a mental hospital or other suitable place of custody till the President or Court orders that the accused be brought to Court again if a medical officer in charge of the mental hospital or place has found that the accused is capable of making his defence and the doctor has forwarded to the Attorney-General a certificate to that effect. The Attorney General then informs the Court whether he intends to proceed with the case or otherwise. If the Attorney General chooses to continue with the prosecution the committal proceedings or trial resumes from where it had stopped, but if the Republic decides otherwise the Court must discharge the accused. The discharge in such a case does not operate as a bar to any subsequent proceedings against the accused on account of the same facts. This procedure relates only to any inquiry into the unsoundness of the accused person's mind.

10.The general rule laid down in the English case of *Woolmington v Director of Public Prosecutions* [1935] AC 462 that in criminal law the prosecution bears the legal burden of proving all the elements of the offence necessary to establish the prisoner's guilt is still good law in Kenya. This rule is subject only to the defence of insanity and also to any statutory exception. Insanity is therefore a defence which is open only for the accused to raise and the prosecution cannot raise it for the defence as Mr Gacivih with respect, attempted to do for the appellant when he severally submitted that this was a case of guilty but insane. When the accused raises this defence of (insanity) he bears the burden of proving it on the balance of probabilities - see the English case of *M'Naghten* (1843) 10 CL & F 200; *Smith* (1910) 6 Cr App R 19; *Sodeman v The King* [1936] 2 ALL ER 1138.

11. Where the accused raises the defence of insanity the procedure is that laid down under section 166 of the Criminal Procedure Code. After he proves, on the balance of probabilities, that he was insane at the time he did the act or made the omission the trial Court must make a special finding which, it must record that the accused is guilty of the offence or omission charged but was insane at the time he committed the act or made the omission, and report the case to the Minister and to the Permanent Secretary of the Ministry for the time being responsible for prisons, for the order of the President. The Court shall in the meantime order the accused to be kept in custody in such place and in such manner as it shall direct.

12. Although the counsel and the learned Judge maintained that this was a proper case for section 166 of the Criminal Procedure Code the accused did not raise the defence of insanity and he withstood their pressure to do so. The prosecution took over the role of the defence and convinced the learned Judge to treat the appellant guilty but insane. It appears the appellant got so confused that he did not know what took place. Since he maintained that he was not guilty he seems to have assumed that he was tried, convicted and sentenced to death. That explains why in his own appeal he appealed against a death sentence which was never imposed.

13. In supplementary grounds of appeal Mr Ngombo who represented the appellant complained that the learned Judge erred in law by conducting a trial based on the plea of a person mentally unfit to plead or face trial. Whatever be the case the Court does not appear to have been sure of what it was to do ie whether to inquire into the unsoundness of the accused's mind under section 162 or deal with the case under the provisions of section 166 of the Criminal Procedure Code. Both counsel agreed that there was a mistrial. We do not think the appellant had a fair trial. We have taken into account the length of time which has elapsed since the alleged commission of the offence, but we think that the gravity of the offence concerned outweighs all other considerations and makes this case appropriate for ordering a retrial. Consequently we allow the appeal, set aside the Superior Court's special finding and the other orders thereon and submit the case back to the Superior Court for retrial by another Judge of that Court, on priority basis. The appellant shall continue to be held in custody till his retrial.

14. Those shall be this Court's orders.

DATED AND DELIVERED AT MOMBASAA THIS DAY 21ST OF JANUARY
1999 CHESONI.....CHIEF JUSTICE JE GICHERU JUDGE
APPEALA.SHAH.....JUDGE OF APPEAL

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