
KENYA / JUDGMENT

DKM v Republic [2010] KECA 511 (KLR)

[2010] KECA 511 (KLR)

COURT

Court of Appeal

BEFORE

PK Tunoi, EO O'Kubasu, EM Githinji

CASE / FILE NUMBER

Criminal Appeal 26 of 2006

Source: new.kenyalaw.org · Research copy typeset by Esheria. Not court-issued or certified.

DKM v Republic (Criminal Appeal 26 of 2006) [2010] KECA 511 (KLR) (30 April 2010) (Judgment)

Neutral citation:

[2010] KECA 511 (KLR)

Republic of Kenya

In the Court of Appeal at Nairobi

Criminal Appeal 26 of 2006

PK Tunoi, EO O'Kubasu & EM Githinji, JJA

April 30, 2010

Between

DKM

Appellant

and

Republic

Respondent

(Appeal from conviction and sentence of the High Court of Kenya at Machakos (Wendoh, J.) dated 13th December, 2005 in H.C.CR.C. NO. 7 OF 2001)

Judgment

1.The appellant was tried by the superior court with the aid of assessors on an Information charging him with murder contrary to Section 203 as read with Section 204 of the Penal Code. He was however convicted for the lesser offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and sentenced to life imprisonment. He now appeals against both the conviction and sentence.

2.The appellant is the elder brother of MMM (deceased). They used to sleep in the same house which is in his father's homestead. Their father Pastor DMN (PW1) (Pastor D) was living in a different house in the same homestead. Also living in a different house in the same homestead was PMM (PW2) (P) the eldest son of Pastor D. The house in which the appellant and the deceased were living was also used as a kitchen. It was a single roomed house. There were no beds in the house and apparently both the appellant and the deceased were sleeping on the floor.

3.On 18th January, 2000, the deceased arrived at home at about 7.30 p.m. He was served super by his mother after which he went to his house to sleep. The appellant arrived home later and his father Pastor D asked him why he had come home late. The appellant explained that he had been playing football at a nearby school. He also went to sleep.

4.At about 2.00 a.m. Pastor D heard commotion outside. He blew a whistle and P went to his father's house. The two searched the compound for thieves using a hurricane lamp. They did not see any. In the course of the search, they noticed that the door to the house of the appellant and deceased was ajar. They entered into the house and found the deceased lying on the floor with head injuries. He was dead. The appellant was not there and the window was closed. The door was not broken. The incident was immediately reported to the police.

5.At about 7.30 a.m. TKN (PW3) (T) was at the verandah of his house about half a kilometre from the home of Pastor D. The appellant who was passing by saw him and he (appellant) went to him and asked for tea. T who had already received a report that the appellant had killed his brother left the appellant at home ostensibly to buy sugar at the shops. He found one Daniel Kioli at the shops who agreed to assist in arresting the appellant whereupon the two went to the home of T and tied the appellant with ropes. The appellant was later handed over to the police. The police recovered a sharpening stone in the compound which was blood stained with pieces of hair stuck to it.

6.The postmortem on the body of the deceased was performed by Dr. Kibore. He observed that the skull was crushed with multiple fractures of the skull bone and that there was bleeding of blood vessels on the surface of the brain with formation of subdural haematoma. He formed the opinion that the cause of death was due to severe head and brain injury from severe head trauma from a heavy object. The postmortem report was produced by Dr. Edmond Wazome (PW4) under Section 77 (1) of the Evidence Act as Dr. Kibore was reported to have died.

7. Thereafter, the police prepared committal documents and submitted them to Senior Resident Magistrate, Machakos, who on 21st March, 2001 committed the appellant to trial in the superior court in accordance with the law as it then stipulated. The committal proceedings procedure was subsequently repealed by Act No. 5 of 2003. On 7th February, 2000 the appellant made a statement under inquiry to IP. Francis Wambua which is contained in the committal bundle. He stated in the relevant part: "I was educated upto Std. 8 and I work as a casual labourer and I smoke bhang. I do remember on 18/1/2000, I went home at around 8.00 p.m. and I went to sleep in the room which I normally share with my elder brother MM. When I was asleep, something told me to take a big stone and kill M with it. Something else told me not to and I slept. At around 2.00 a.m. the same thing told me to take the stone and kill M with it. It is then, that I went out to make a short call and I took a big stone, went back to the room, and crushed M's head with it and then ran away and hide (sic) myself in a nearby bush. In the morning I went to Kyalo's home and while there villagers came and arrested me".

8. On 8th February, 2000 the appellant was examined by Dr. Lumumba who formed the opinion that the appellant was of sound mind and had no mental disability.

9. The appellant was ultimately produced before the superior court for plea on 1st June, 2001. The appellant was represented by one Mr. Makau, advocate, who stated that the appellant was not fit to plead. The trial Judge thereupon postponed the plea until 10th July, 2001 and ordered that the appellant be placed at Mathari Mental Hospital and that his mental fitness to plead be ascertained. The appellant was examined by Dr. Wazome who prepared a report dated 10th July, 2001 but which was filed in court on 27th July, 2001. Dr. Wazome reported that the appellant was mentally sick and required psychiatric treatment and that he was insane at the time of the commission of the offence. The superior court, accordingly, on 21st October, 2001 committed the appellant to Mathari Mental Hospital for treatment. It took sometime before any further information regarding the appellant's fitness to plead was given to court. On 6th May, 2002 the appellant was produced in court and stated that he was taken to Mathari Mental Hospital but he was not admitted. By a letter dated 13th September, 2002 and produced in court on 10th February, 2003. Dr. A. O. Onyango, a consultant psychiatrist reported that the appellant was still admitted in hospital and was under going treatment. The appellant was ultimately produced for plea on 1st July, 2004 when he denied the charge.

10. At the trial, the appellant raised a defence of alibi stating that he slept at his employer's home and did not go home on the material night.

11. The two assessors who remained throughout the trial formed the opinion that the appellant was guilty but insane.

12. However, the superior court made a finding of fact, that there was no evidence that the appellant was of unsound mind as of 18th – 19th January, 2000 when the offence was committed. The superior court stated in part: "Accused was arrested on 19.1.00 soon after the murder. It seems that he was never taken for medical examination till Doctor Wazome (PW4) saw accused on 14.8.00. This was over 6 months after arrest. Accused was found to be suffering from

Schizophrenia – a mental illness. In my considered view I do find that there is no evidence to show that accused suffered from this illness 6 months earlier on 19.11.00 when the murder occurred. A lapse of over six months was too long a period for one to determine whether or not accused was mentally sick 6 months earlier. PW2 merely said in passing that he believed accused was not mentally sound but he did not expound or support that statement with reasons why he believed so. There is no evidence to show that accused was of unsound mind as of 18th – 19th /1/00”.

13. Although the appeal is against the sentence, the appellant states that he is dissatisfied with the sentence on grounds, among other things, that he pleaded guilty and that he was not in his normal state when he committed the crime since he was mentally disturbed. Although he filed a supplementary memorandum of appeal raising breach of his constitutional right to be taken to court within 14 days and three other procedural issues, he stated that he admits that he killed his brother and that his appeal is against the sentence. But since he is raising the issue of insanity, he is implicitly appealing against the conviction as well.

14. Mrs. Ouya, learned Assistant Deputy Public Prosecutor contended that the appellant should have been found guilty but insane and committed to Mathari Mental Hospital.

15. In *Republic vs. Madaha* [1973] EA 515 the High Court of Tanzania discussed exhaustively the distinction between unfitness to make a defence due to insanity and insanity as a defence to a charge and the applicable procedure in either case in accordance with provisions of the Criminal Procedure Code of Tanzania which provisions are in pari materia to Section 162 and Section 166 of the Kenya Criminal Procedure Code (Code). The court then stated at page 515 paragraph I: “A person may be insane at the time he did an act but sane or at least enjoying a lucid interval at the time of trial to be able to take his trial. Conversely, a person may be sane at the time he did an act but may be of unsound mind at the time of his trial”.

16. The problem in this case is that the appellant did not raise a defence of insanity. He instead raised an alibi defence which was not available to him because he did not raise it during committal proceedings, after he was given an alibi warning in accordance with Section 235 of the Criminal Procedure Code (now repealed). Nevertheless, the Court has a duty to consider alternative defences which emerge from the evidence and which could have been raised by an accused but which were not in fact raised.

17. In this case, the circumstances under which the appellant killed the deceased were bizarre. He crushed the deceased's head with a stone when the deceased was asleep. There was no evidence of provocation. Although the appellant left the house after the incident he remained in the neighbourhood and went to the home of Thomas, a neighbour a few hours later where he was arrested. This was also a strange behaviour. When the appellant was taken to IP. Francis Wambua, three weeks later, he made a statement under inquiry which we have already reproduced. Dr. Wazome, a psychiatrist who examined the appellant first on 14th August, 2000 made the following observation: “His speech was coherent but his thought process was disordered and had a poor grasp of the questions I put to him. By his mannerisms and shallow mood. I made

an inference that he was experiencing auditory hallucinations. He agreed to be hearing voices from outside which he had no power to stop, he looked confused and absent minded he lacked insight and judgment as to his illness and further interview became impossible due to thought disorder. He was not fit to plead.....After examining him and perusal of his committal documents, I formed the opinion that at the time of the commission of the offence he was under the influence of “voices” which commanded him to take a big stone and hit his brother, killing him instantly”.

18. Dr. Wazome also reported that the appellant was treated for 2 months in Mathari in 2002 and for six months in 2003.

19. The finding by Dr. Wazome is consistent with the appellant’s statement under inquiry. The two assessors advised that the appellant was guilty but insane.

20. Mr. Omirera, learned State Counsel submitted at the trial that the appellant was guilty but insane but Mr. Makau, learned counsel who represented the appellant at the trial objected to the making of a special finding and submitted that the appellant had no mental disability. Mrs. Ouya, again submitted, before us that the superior court should have made a special finding. The appellant still maintains before us that he committed the crime but was not in his normal state of mind.

21. It is apparent from the circumstances of this case that Mr. Makau did not appreciate the evidence and the nature of special finding leading the appellant to make a futile alibi defence.

22. Similarly, the superior court, with respect, did not appreciate the standard of proof where the defence of insanity is raised or arises from the evidence. The standard of proof is on a balance of probabilities and not beyond reasonable doubt.

23. The defence of insanity in the case arose from the prosecution evidence. We are satisfied that the circumstances of this case and the evidence of the psychiatrist established on balance of probabilities that at the time the appellant crushed his brother to death he was suffering from Schizophrenia and was incapable of understanding what he was doing or of knowing that he ought not to have done the act.

24. Accordingly, we allow the appeal against both conviction and sentence, quash the conviction and set aside the sentence. We substitute therefor a special finding under Section 166 of the Criminal Procedure Code that the appellant is guilty of causing the death of his deceased brother but was insane when he caused the death. The case is reported for the order of the President under Section 166 (2) of the Code. Since the appellant is still seeing visions as he told us at the hearing of the appeal, he is committed to the custody of Mathari Mental Hospital in the meantime.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2010.P. K.

TUNOI.....JUDGE OF APPEALE. O. O’KUBASU.....JUDGE OF

APPEALE. M. GITHINJI.....JUDGE OF APPEALI certify that this is a true copy of the original. DEPUTY REGISTRAR

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF’s page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://new.kenyalaw.org/akn/ke/judgment/keca/2010/511/eng@2010-04-30>

CASE PAGE <https://chat.esheria.ai/case-law/kenya/dkm-v-republic-2010>

Prepared on 26 October 2026 · Esheria