

UGANDA / JUDGMENT

Musele v Reginam (Criminal Appeal Nd. 266 of 1956) [1950] EACA 622 (1 January 1950)

[1950] EACA 622

COURT

East African Court of Appeal

BEFORE

Briggs, JA, Sinclair, VP, Worley, P

CASE / FILE NUMBER

Criminal Appeal Nd. 266 of 1956

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H. M. COURT OF APPEAL FOR EASTERN AFRICA

Before Sir Newnham Wörley (President), Sir Ronald Sinclair (Vice-President) and Briggs, Justice of Appeal

PHILIP MUSWI s/o MUSELE, Appellant (Original Accused)**REGINAM, Respondent****Criminal Appeal No. 266 of 1956**

(Appeal from the decision of H. M. Supreme Court of Kenya, Forbes, J.)

Insanity as defence to murder-M'Naghten Rules-Section 13 of the Penal Code Eastern Africa Order in Council, 1902, article 20.

The appellant had been convicted of the murder of his wife and the sole issue on appeal was whether the trial Judge was wrong in refusing to bring in a special verdict of guilty but insane. The appellant had given evidence that when he killed his wife he did not know what he was doing. A psychiatrist gave evidence that he thought the appellant was very depressed and thought he was justified in killing his wife, but that his belief as to what was right or wrong was coloured by the belief that his wife was practising witchcraft on him.

Held (18-12-56)—(1) On the proper construction of section 13 of the Penal Code the word "wrong" means "contrary to law" and it would not be a defence to prove that although the accused knew that what he was doing was legally wrong, he believed that it was morally right, and it must be proved that, if he was capable of understanding what he was doing, he was incapable of knowing that his act was contrary to law.

(2) The evidence fell far short of establishing even the probability that the appellant, through disease affecting his mind, was incapable of knowing that what he did was contrary to the law of Kenya.

Appeal dismissed.

Case referred to: R. v. Windle, 36 Cr. App. R. 85.

Ardwings-Khodek for appellant.

Brookes for respondent.

JUDGMENT (prepared by Sinclair, Vice-President).—The appellant was convicted by the Supreme Court of Kenya of the murder of his wife, Elizabeth Mali. We dismissed the appeal and now give our reasons for so doing.

The sole issue in the appeal was whether the learned trial Judge was wrong in refusing to bring in a special finding of guilty but insane. It appears from the evidence that the appellant went to the deceased's house at about 8 p.m. on 19th February, 1956, and shot her with an arrow while she was sitting in the kitchen with three of her children. The deceased died almost immediately. After he had shot the deceased the appellant hid by the side of a sisal hedge of the compound while some people came in response to the children's cries. He then frightened them away by throwing something—either a stick or a panga—at the house. After they had left he set fire to the kitchen with the body of the deceased still in it. Thereafter he disappeared until he was arrested nearly a month later at Mutito location, a place far from his home at Kavisuni.

There was evidence of bad feeling between the appellant and the deceased dating from 1952 when the appellant married a second wife. From that time

there were continual quarrels between them and the appellant appears to have believed that the deceased was practising witchcraft against him. On her part, the deceased appears to have been trying to alienate the children of the marriage from the appellant, with some success. Her last act in that respect was the cause which led to her death. A few days before her death she went to Kavisuni, where the appellant lived, and took away her small son, Maluki, who had been living with his father. The appellant was absent when the deceased took Maluki away but he returned on 17th February. He was very angry when he found that the deceased had taken the child.

At the trial the appellant gave evidence that when he killed the deceased he did not know what he was doing: that after finding the deceased had taken Maluki away he thought of all the trouble she had caused him in the past five years by taking his children away from him and bewitching him and then he thought it better to kill her: that he was very ill in his mind and wandered away

without knowing where he was until the next day when his head cleared and he remembered he had killed his wife: that since 1917 there had been occasions when his head was "not right" and that other members of his family were insane.

Dr. Margetts, the psychiatrist specialist in charge of Mathari Mental Hospital, examined the appellant between 15th August and 5th September, 1956, and again on 17th September. From his examination and his inquiries into the appellant's history he formed the opinion that the appellant was in a state of mild depression. He said that "depression" is a pathological state of physical and mental slowing. In that condition a man might not know the difference between right and wrong depending on the severity of the illness. The appellant told him that in 1917 he became mad, that the madness lasted for about four years and that he had fits at that time. One of his informants corroborated that the appellant had fits. The appellant also told him that there was a history of madness and epilepsy in his family. He thought it possible that the appellant was very depressed in February (when he killed the deceased) and might then have been insane, but said that he based that statement "on what he himself has told me, which, of course, is subject of question". His conclusions are summarized in the following passages from his evidence:-

"I believe he did know what he was doing when he killed his wife. I can't say whether he knew what he was doing was contrary to Kenya law, but it appears from what I can find that it was not contrary to tribal law. At time I would say he had the capacity to distinguish between right and wrong."

"I think accused knew what he was doing, but thought he was justified in doing it. I think he was capable of distinguishing between right and wrong but his belief as to what was right or wrong was coloured by his belief that his wife was practising witchcraft on him."

The learned trial Judge, after correctly directing himself as to the burden of proof which rested upon the appellant to establish the defence of insanity, namely that it was sufficient if the appellant established a probability that he was insane at the time when he killed the deceased, found that the appellant knew what he was doing when he killed the deceased and knew that what he was doing was wrong. Accordingly, he rejected the defence of insanity.

The main ground of appeal was that the learned Judge did not direct his mind sufficiently to the evidence of Dr. Margetts and in particular to his testimony that he could not say whether the appellant knew what he was doing was contrary to Kenya law and that the appellant might have been insane in February, 1956.

Section 13 of the Penal Code provides: —

"A person is not criminally responsible for an act or omission if at that 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 or make the omission."

To establish the defence of insanity it was, therefore, necessary for the appellant to prove that at the time when he killed the deceased he was-

- (a) suffering from a disease affecting his mind;
- (b) through such disease incapable— $\frac{1}{2}$
- (i) of understanding what he was doing, or
- (ii) of knowing that he ought not to kill the deceased.

In our view the evidence of Dr. Margetts that throughout the period during which the appellant was under his observation he was in a state of mild "depression", that the appellant was less depressed at the end of that period than at the beginning and that it was possible that he was very depressed in February, 1956, established the probability that he was in a state of depression which is a disease affecting the mind, when he killed the deceased. We are, however, unable to agree with the submission of counsel for the appellant that the learned Judge misdirected himself when he said in his judgment that there was no evidence to support the appellant's story of being subject to fits. In forming his opinion as to the appellant's state of mind, Dr. Margetts was, no doubt, entitled to take into consideration the statement of his informant that the appellant suffered from fits, but we do not think that that statement, conveyed to the Court through the mouth of Dr. Margetts, was evidence to prove that the appellant, in fact, suffered from fits. The appellant's story was not supported by the other witnesses who included the appellant's immediate relatives. There was also no evidence to support the appellant's allegation that members of his family were insane. On the contrary, the appellant told Dr. Bowry, who examined him on 13th March, 1956, that there was no one in his family who was mad.

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There could be little doubt on the evidence that the appellant knew what he was doing when he killed the deceased. He could hardly have given such a clear and detailed account of the killing if he had not been aware of what he was doing. Furthermore, in the opinion of Dr. Margetts, the appellant did know what he was doing.

The more difficult question was whether the appellant was incapable of knowing that he ought not to kill the deceased. Section 13 of the Penal Code is, no doubt, intended to be a codification of the M'Naghten Rules in which the test of responsibility was laid down as follows: --

" $\dots$ to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.'

It has recently been held by the Court of Criminal Appeal in *R. v. Windle*, 36 Cr. App. R. 85, that the word "wrong" in that definition means "contrary to law", and that it would not be a defence to prove that, although the accused knew what he was doing was legally wrong, he believed that it was morally right. We think that the same construction should be put on the corresponding words in section 13; that is to say, in order to establish the defence of insanity, it must be proved that the accused, if he was capable of understanding what he was

doing, was incapable of knowing that his act or omission was contrary to law. Ignorance of the law is no excuse unless it is shown that his ignorance was the result of disease affecting his mind.

In the instant case the evidence fell far short of establishing even the probability that the appellant, through disease affecting his mind, was incapable of knowing that it was contrary to the law of Kenya to kill the deceased. Dr. Margetts's evidence did not establish such a probability; he thought that the appellant was capable of distinguishing between right and wrong. Even if the appellant did not know that it was contrary to the law of Kenya to kill the deceased, there was nothing in the evidence of Dr. Margetts, or in any of the other evidence, to indicate that such ignorance was the result of disease affecting his mind. And even if he believed that he was justified in killing his wife because she was practising witchcraft, there was again no evidence that such belief arose from any mental defect; it is a belief sometimes held by entirely same Africans. The question whether the appellant's act was or was not contrary to tribal law is irrelevant. The responsibility of the appellant must be determined by whether his act was contrary to the law of Kenya which, so far as it relates to homicide, is contained in the Penal Code. The provisions of the Penal Code prevail over any tribal law or custom; see article 20 of the Eastern Africa Order in Council, 1902. We would add that we agree with the learned Judge that the fact of the appellant's disappearance from his home after the killing indicated that he knew he had done wrong.

There is one further matter on which we feel it necessary to comment. The first two witnesses for the prosecution, Dr. Bowry and Dr. Margetts, were called to testify as to the appellant's state of mind. We would emphasize again that as a general rule such evidence should be called by the defence and not by the prosecution. The procedure followed in England is set out in **Archbold** 33rd ed., p. 20. as follows: \$-\$

"Insanity being a matter of defence, the onus of establishing it lies upon the prisoner, *R. v. Oliver Smith*, 6 Cr. App. R. 19. The procedure that the defence should call any witness whose evidence is directed to that issue should be strictly followed, the duty of the prosecution being limited to supplying the defence with a copy of any report or statement of any prison medical officer who can give evidence on that issue and to making such person available as witness for the defence. *R. v. Casey*, 32 Cr. App. R. 91; *I. C. L. C. 2171*. Where evidence to establish insanity has been called for the defence, the prosecution may call rebutting evidence. *R. v. Smith*, 8 Cr. App. R. 72. And where it is clear from the cross-examination of witnesses for the prosecution that the defence of insanity will be raised, and it is ascertained that no evidence will be called to establish this defence, the Crown may, before closing its own case, call evidence to negative insanity. *R. v. Abramovitch*, 7 Cr. App. R. 145."

That procedure should be followed in Kenya unless there are special reasons to the contrary: where, for instance, the accused is not represented it might be in the interests of justice that evidence as to his state of mind should be called by the prosecution.

Although the appellant did not establish that he was legally insane at the time when he killed the deceased, the fact that he was in a state of depression will no doubt be fully considered in the proper quarter.

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