IN THE COURT OF APPEAL

AT KISUMU

(CORAM: P. KIHARA KARIUKI (PCA), GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 10 OF 2013

BETWEEN

JUSTUS OYARO MACHUKI.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kisii (Sitati, J.) dated 4th November 2011,

in

H.C.CR.A No. 36 of 2005)

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JUDGMENT OF THE COURT

Justis Onyaro Machuki, the appellant, was charged with three counts of murder, count one being the murder of his brother ***Ombui Machuki (first deceased)***, count two being the murder of his mother, ***Bathseba Ombui Machuki, (second deceased)*** and count three for the murder of his wife, ***Joyce Kerubo Oyaro (third deceased)*** before the High Court at Kisii contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The particulars of the offence were that on 20th February 2005 at Kanyimba Sub Location Gucha District within the then Nyanza Province, in count (I) he murdered ***Ombui Machuki*** and in count II, he murdered ***Bathseba Ombui Machuki.*** A plea of not guilty was entered on behalf of the appellant and the prosecution called 5 witnesses.

Briefly, the facts of the case are that on the 20th February, 2005 at about 9.00pm, while asleep in her grandmother 's kitchen, the appellant's daughter ***Lydia Oyaro, PW 5 (Lydia)*** heard her mother screaming for help. When she went to the main house, the door had been locked from the inside, but she could hear her mother telling her that the appellant was strangling her. Lydia ran to her grandmother, who ordered Lydia to call her uncle, the first deceased. When the appellant refused to open the door, the first deceased kicked the door open, and upon enquiring from the appellant why he was beating his wife, the appellant hit the first deceased on the head with a hoe and he fell down. Lydia ran away screaming, and when she returned she also found her grandmother lying on the floor unconscious, having also sustained head injuries. The first and second deceased were rushed to hospital but died on the same

day. The third deceased died at the Tabaka Hospital where she was admitted a few days later.

The evidence of ***Lydia*** and ***Pamela Nyanchoka Ombui (PW 3)*** showed that the appellant would behave erratically when he consumed alcohol and would behave abnormally. According to ***Titus Mutai Kwambai, (PW 4),*** a medical superintendent, based at Gucha District Hospital who had worked with the appellant for one year, the appellant had two previous episodes of psychosis, and exhibited signs of madness.

As a consequence of this, on 9th February, 2010, the High Court of its own motion ordered that a psychiatrist mentally assess the appellant. Subsequent to this, on 8th March, 2010 from a psychiatrist report dated 12th February, 2010 and presented to the Court, the Court observed from the report that the appellant needed to be put on treatment then assessed again to ascertain his mental status. He continued to receive psychiatric treatment until a second report was issued on 20th September 2010 which found that the appellant was fit to stand trial.

Following a full trial before Sitati J. the Court found the appellant guilty on all three counts. Pursuant to ***section 167 (1) (b)*** of the ***Criminal Procedure Code***, a further order issued that the case be reported for the order of His Excellency the President, and in the meantime the appellant to be kept in appropriate custody.

Being dissatisfied with the conviction and sentence, the appellant filed an appeal to this Court, where in his memorandum of appeal, the appellant's complaints were that the prosecution had failed to prove their case beyond reasonable doubt; that the appellant had proved his defence of insanity; and that the appellant was convicted without the ingredient of *mens rea* having been established.

When the appeal came before us, ***Ms. Onyango,*** learned counsel for the appellant informed us that she would canvass all the grounds together. Counsel submitted that in his defence, the appellant had pleaded insanity, and that all the prosecution witnesses had testified that he was insane. Counsel's complaint was that, despite this, the trial court had found him guilty of the charges and ordered that he be detained in custody under ***section 167*** of the ***Criminal Procedure Code***. It was counsel's case that, under ***section 167***, the appellant would not have been required to serve a prison sentence, but would have been confined in a mental institution, and had the possibility of subsequent release, once found to be well.

Mr. Ketoo, learned Principal Prosecution Counsel, though in agreement with counsel for the appellant, submitted that the appellant had been found to be medically fit and to stand trial. The issue was whether the appellant was found to be unfit at the time of committing the offence; that in the end, he had been found to be insane; that ***section 167 (1) (b)*** of the Act provides for an acquittal, or if the appellant was convicted, he would be detained at the President's pleasure. Counsel concluded by submitting that based on the evidence this Court should uphold the conviction and sentence in accordance with ***section 167 (1) (b)*** of the Act, as he was a danger to both himself and the community.

We have carefully considered the record of appeal and counsels' submissions.

The issue before us is, whether in convicting and sentencing the appellant, the learned judge correctly applied the relevant provisions of the Criminal Procedure Code, given that the appellant had pleaded insanity in his defence.

In determining the issue of whether the appellant was insane to the extent that he could not be held liable for the death of the deceaseds, the trial court stated thus;

"…I am satisfied that the accused was likely to have been legally insane at the time he killed the deceased persons. It seems to me that psychosis is a disease that needs treatment as was the case here. I am therefore persuaded that from the nature of the crime and the deceased's proved conduct both before and at the time of the commission of the crime and all the surrounding circumstances, including the fact that even during the hearing of his case, the accused had to undergo psychiatric treatment and the fact that he was found to be a changaa addict, that it has been proved on a balance of probabilities that the accused was legally insane when he committed the murderous acts…"

Section 166 (1) and ***(2)*** of the ***Criminal Procedure Code*** provide;

"(1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omission at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.

(2) When the special finding is made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct."

From this provision, it is evident that, ***section 166*** is concerned with the situation where the defence of lunacy or insanity is adduced at the trial. ***Section 167*** which differs from ***section 166***, addresses the procedure to be adopted when the accused does not understand the proceedings, and provides for an order of acquittal of the appellant, or an order for the appellant to be detained at the President's pleasure, under such conditions the President may from time to time order, and that whilst so detained, the appellant would be deemed to be in lawful custody.

From the submissions before us, it is evident the appellant's complaint is that, since the trial court sentenced him under ***section 167*** of the ***Criminal Procedure Code***, it ought to have made an order of acquittal of the appellant or made an order that he be detained in a mental institution which would be deemed to be lawful custody.

The trial court having found the appellant to be insane, specified that ***section 167 (1) (b)*** would apply***,*** but instead applied the requirements of ***section 166*** of the Act. In view of the circumstances of the case, we are satisfied that the learned judge correctly applied the requirements of ***section 166*** of the Act, but it is apparent that, ***section 167 (1) (b)*** was pronounced in error.

In the circumstances, we see no reason to interfere with the conviction and sentence of the trial court, save to specify that the applicable provision was ***section 166 (1) and (2)*** of the ***Criminal Procedure Code***, and not ***section 167 (1) (b)***. Accordingly the appeal is hereby dismissed.

We so order.

Dated and delivered at Kisumu this 17th day December, 2015.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR