Mbugua v Republic

Court of Appeal, at Nakuru February 5, 1982

Law, Miller & Potter JJA

Criminal Appeal No 98 of 1981

February 5, 1982, Potter JA delivered the following Judgment.

The appellant was charged with the murder of his wife on May 8, 1980 at Kiptangwani Farm, Gilgil in the Nakuru District. He pleaded not guilty but was convicted by Mead J sitting at Nakuru on July 10, 1981 and was sentenced to death. The appellant now appeals to this court against conviction and sentence.

In the morning of May 9, 1980, Inspector Songoro (PW 2) acting on information went to the house of the appellant on the Kiptangwani Farm, which he found to be locked. He was admitted into the house by the appellant, where he saw the dead bodies of an adult female and of a male child. The bodies had severe cuts on the head and lay in a pool of blood. The appellant told the Inspector that the bodies were those of his wife and son and admitted that he had killed them with an axe. The inspector found a bloodstained axe in the house which the appellant admitted was the weapon he had used. Dr Amin (PW 4) found on post mortem examination of the body of the wife that there was a big cut 5 inches long on the right side of the scalp and a fracture on the right parietal bone. There were no other injuries and he considered that the cause of death was those head injuries. Two other witnesses, Mr Mwaniki (PW 3), a farmer, and PC Juma (PW 5) were with Inspector Sangoro and saw the appellant and the two dead bodies in the house and the injuries to the bodies and the axe. A government analyst's report showed that the blood on the blade of the axe and the blood of both the deceased was of group O. None of the above evidence was challenged at the trial.

When the appellant was arraigned on February 19, 1981, counsel for the prosecution, Mr Etyang, drew the attention of the court to the evidence of Dr Ngatiri at the preliminary inquiry, who suspected that the appellant may have suffered from schizophrenia at the time of committing the offence. The learned judge, upon the application of defence counsel and on being informed that the defence would be one of insanity, authorised the removal of the appellant to Mathari Mental Hospital for mental examination. The appellant was examined by Dr Fazal (DW 1), a consulting psychiatrist at the Hospital, on April 13, 1981. Dr Fazal wrote a report on that date and on July 6, 1981 gave evidence at the trial. Before the trial commenced on April 22, 1981, defence counsel asked for an adjournment as he had not received Dr Fazal's report. This application was refused on the grounds that defence counsel had been dilatory in obtaining an appointment for the examination of the appellant and that the appellant would not be prejudiced by the prosecution case proceeding at that stage. The prosecution case was closed on the first day of the trial. Dr Ngatiri, who gave evidence at the preliminary inquiry, was not called by the prosecution. The trial was adjourned by consent to May 20, 1981 and the court ordered that Dr Ngatiri be served with a witness summons to appear on that date. The trial was eventually resumed on July 6, 1981. The appellant made an unsworn statement in which he said:

"I did those things because at that time I was not normal – after that the court can do anything it wishes". Defence counsel then called Dr Fazal, who said that he examined the appellant on April 15, 198l in order to ascertain whether he suffered from mental illness on that date or on May 8, 1980 (the date of the alleged offence). The witness testified that he found no sign of mental illness in the appellant. When the appellant's father (PW 12) and brother (PW 13) gave evidence of identification of the deceased, they were cross-examined by defence counsel about the appellant's mental state. The www.kenyalawreports.or.ke father said that in July 1979, the appellant was mentally confused. He used to keep quiet the whole day when he came home. He would turn on the radio full volume. The brother said that when the appellant became mentally sick, he used to say that he heard records being played in his head. He claimed to have taken the appellant to hospital in April, 1980 because he was mentally sick. Dr Fazal, however, said that the appellant had no history of mental illness prior to the examination. The appellant told him that he had never suffered from hearing voices, or from any mental illness. In any event, in the opinion of the doctor, the behaviour described by the appellant's relatives did not amount to mental illness or insanity. Dr Fazal had no doubt that the appellant was normal at the time of the killing.

When the appellant made a charge-and-caution statement on May 12, 1980, he gave his first explanation of his motives. He said: "It is true I killed my wife and my son because I met her with another husband doing love. I was very annoyed and cut them with an axe together with the child. But I did this because sometimes my head becomes bad". Nearly one year later on April 15, 1981, the appellant told Dr Fazal that he killed his wife because she was having an affair with another man and the doctor added his opinion that if the appellant was suffering from mental illness, he would not have given that reason and remembered it a year later. The appellant's father (PW 12) and brother (PW 13) said nothing to further a partial defence of provocation. Indeed the father said: "The accused lives within fifty yards from my house - he has lived there for about five years. I have not witnessed any trouble between the accused and his dead wife Wangara".

Mr Onganyi for the appellant submitted that on the evidence, there was a possibility that the appellant was legally insane at the time of killing his wife and alternatively, that there was a possibility that the appellant acted under provocation, so as to reduce the offence to manslaughter. Of the three assessors, one considered the appellant guilty but insane, and the remaining two considered him guilty of murder. As the learned judge correctly pointed out in his judgment, an accused person has to raise the defence of insanity, as defined in Section 12 of the Penal Code and bears the onus of having to prove insanity on a balance of probabilities. Dr Fazal was the accused's own witness. The learned judge found his evidence convincing, and on the basis of his testimony found that there was no evidence that the appellant suffered from any disease of the mind at the time of the commission of the offence.

Having rejected the defence of insanity, the learned judge considered the evidence of provocation. Section 207 of the Penal Code provides that where an accused person "...does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only". Section 208 defines provocation. It is sufficient for the purposes of this case to say that provocation means: "... any wrongful act or insult of such a nature as to be likely, when done to an ordinary person ... to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

Having considered the evidence with care, the learned judge concluded: "In agreement with two of the assessors I find no evidence that the deceased had been unfaithful to the accused, certainly not the slightest evidence that the

accused had caught the deceased in the act of adultery. I do not find any evidence to support the

defence of provocation." We see no reason to differ from that finding.

At the hearing, Mr Odero appeared for the appellant, who had himself put in a detailed memorandum of appeal making it clear that his only defence was insanity. That aspect of the case has caused us much concern. The learned judge correctly directed himself and the assessors on the relevant law and on the onus of proof in cases in which insanity is relied on as a defence. He found, in agreement with a majority of the assessors, that at the time of the offence the appellant was not suffering from any disease of the mind and he convicted him of murder.

On the evidence and material before him, we have no doubt that the learned judge came to the correct conclusion. We accordingly order that this appeal be dismissed.

At the same time, we are concerned that the background to this case and in particular to the appellant's history of possible mental illness may not have been fully investigated. For instance, the remark made by Dr Ngatiri at the preliminary inquiry was that he had been informed that the appellant was suffering from paranoid schizophrenia. He did not disclose the source of this information but did express the opinion that if this was so, the appellant might have been suffering from that disease at the time of the offence.

Although the court issued a summons for this doctor to appear at the trial as a defence witness, he did not in fact appear, for reasons unknown to us. In these circumstances, we feel that this aspect of the case should receive further attention as to the appellant's mental condition and that our concern should be conveyed to those responsible for advising His Excellency the President upon the exercise of the prerogative of mercy.

As Law and Miller JJA agree, it is so ordered.