Case Number:	Criminal Appeal 150 of 1983
Date Delivered:	06 Nov 1984
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	James Onyiego Nyarangi, Alan Robin Winston Hancox, Alister Arthur Kneller
Citation:	Richard Kaitany Chemagong v Republic [1984] eKLR
Advocates:	-
Case Summary:	**Chemagong *v* Republic** Court of Appeal, Nairobi November 6, 1984 Kneller, Hancox JJA & Nyarangi Ag JA Criminal Appeal No 150 of 1983 (Appeal from the High Court at Eldoret, Mbaya J) ***Criminal law*** *- insanity - defence of - nature of defence - proof of insanity - whether epileptic fit a disease of the mind constituting such defence.* ***Evidence*** *- burden of proof - insanity - defence of - proof of insanity - burden of proof - standard of proof.* ***Appeal*** *- powers of appellate court - findings of fact by trial court - circumstances in which appellate court may interfere with such findings.* The appellant was charged with and convicted of murder by the High Court and sentenced to death. The facts of the case were that the appellant and the deceased were employees of a corporation

and the appellant, who had admittedly hidden a *panga* on the deceased's office, attacked him with it and inflicted multiple cut wounds on his body and the deceased died shortly afterwards. The appellant was arrested and he made a charge and caution statement, which the trial judge admitted in evidence after a trial within a trial. In the statement, the appellant admitted that he had cut the deceased with a *panga* but also stated that his mind was confused and he "could not see properly". Upon a medical examination carried out on the day following the killing of the deceased, the examining doctor found the appellant to be normal and with no history of mental disorder.

When the appellant was arraigned, the defence was granted a request for a second examination of the appellant. The doctor's report of this examination, which was done over a year after the killing of the deceased, stated that the appellant was normal at the time of the examination and was fit to plead, but referred to a claim by the appellant that he had been admitted at a mental institution some nine years before and that he drank alcohol and smoked cannabis. The report concluded that the appellant had a previous history of mental sickness. The appellant and members of his family claimed in evidence that he suffered attacks of epilepsy.

The trial judge found that the defence had not sufficiently established that the appellant was suffering from epilepsy and that even if he had been, he had not suffered an epileptic fit or stroke on the material day so as to affect his mind and render him incapable of knowing what he was doing.

The appellant appealed against his conviction.

Held:

1. A court on appeal will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal case, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.

	2. The burden of proving an averment of insanity once it is raised lies upon the accused person, who has to show on a balance of probabilities that at the time of killing the deceased, he was: a) suffering from a disease affecting his mind; b) that through such disease he was incapable i) of understanding what he was doing; or ii) of knowing that he ought not to kill the deceased. 3. An epileptic fit, provided that a suitable evidential foundation for it is laid and it is established on a balance of probabilities, may be a 'disease of the mind' within the *McNaghten* Rules where it has the effect of so impairing the mental faculties of reason, memory and understanding that the sufferer did not know the nature and quality of his act or if he did, he did not know he was doing what was wrong. 4. The preponderance of evidence in the case showed that the appellant suffered from epilepsy and was prone to fits at frequent intervals and it had been established on the balance of probabilities that the appellant was legally insane when he did the act charged. *Appeal allowed.* **Cases** 1. *Philip Muswi s/o Musele v Reginam* (1956) 23 EACA 622 2. *M'Arimi v R* (1982-8) 1 KAR 161 3. *R v Sullivan* [1983] 2 All ER 673 4. *M'Naghten's Case* [1843] 10 Ch & FIN 200 **Statutes** Criminal Procedure Code (cap 75) section 166(1)
Court Division:	Criminal
History Magistrates:	-

County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal Allowed.
History County:	Uasin Gishu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox JJA & Nyarangi Ag JA)

CRIMINAL APPEAL NO. 150 OF 1983

BETWEEN

RICHARD KAITANY CHEMAGONG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Eldoret, Mbaya J)

JUDGMENT

The appellant in this case appeals from his conviction of murder and sentence of death passed by the High Court at Eldoret (Mbaya J) on November 16, 1983.

Both the appellant and the deceased were at the material time employed at the Iten Branch of the Agricultural Finance Corporation, the appellant as a messenger and the deceased as a Branch Manager. There was very little dispute that on February 9, 1982, the appellant, who had admittedly hidden a *panga* on top of the safe in the branch manager's office the preceding Saturday, suddenly attacked him with it and inflicted multiple cut wounds on the deceased. There were several witnesses to the events which occurred. The savagery of the attack is indicated by the fact that one of the cuts, apart from fracturing the deceased's skull, also cut the neck muscle and right artery, and that both the deceased's hands had almost been severed, with only the skin holding them in position.

The deceased died within the hour and the appellant was arrested immediately. The same day he made a lengthy charge and caution statement to I/P Kipsang, which was admitted in evidence by the judge after a trial within a trial. In it, he admitted slashing the deceased with the *panga* and twice stated that he was confused in his mind and "could not see properly". In court, he said he was mentally disturbed and dizzy in his mind. On his first medical examination the following day, Dr Litunya said that the appellant was normal, had co-ordinated ideas and had no history of mental disorder. He complained of having been assaulted by a mob.

When the appellant was arraigned, he made no mention of mental illness, merely stating that he had no intention of killing the deceased, and a defence request for him to be mentally examined was granted. Presumably as a result of this request, the appellant was examined by Dr Okonji, the Provincial Psychiatrist at Nakuru, on February 14, 1983, over a year after the crime. While stating that the appellant was, to all intents and purposes, normal at the time of the examination, that he knew the offence for which he was arrested and that he and the deceased had been drinking when they fought, he nevertheless referred to the appellant's claim that he had been admitted at the Mathare Mental Hospital in 1974. He also said that the appellant drank alcohol heavily, and smoked cannabis, or *bhang*, (both relevant matters to the onset of an attack of epilepsy), from which the appellant and his family claimed in

evidence that he was suffering, but, as the judge rightly said, was not mentioned specifically in the report. The report did, however, conclude by saying that the appellant did have a previous history of mental illness, but that he was then normal and fit to plead, a matter which has not been in issue in this case. There was no record or card showing the appellant's admission into Mathare Mental Hospital, but it would appear from the doctor's evidence that some, at least, of the records are missing.

As the learned judge correctly stated, the burden of proving an averment of insanity, once raised, lies upon the accused person to show on the balance of probabilities:

" that at the time of the killing the deceased was=

(a) suffering from disease affecting his mind;

(b) through such disease incapable –

(i) of understanding what he was doing, or

(ii) of knowing that he ought not to kill the deceased."

Philip Muswi s/o Musela v R (1956) 23 EACA 622 at p 624." Per Madan JA, delivering the judgment of this court in *Marandu M'Arimi v Republic*, Criminal Appeal 88 of 1982. He went on to hold, however, that the defence had not established to the required standard that the appellant was suffering from epilepsy, but that even if he had been, the appellant had not on the material date suffered an epileptic fit or stroke so as to affect his mind and render him incapable of knowing what he was doing. He said:

"The evidence available shows that he meticulously arranged and executed his plan to kill the deceased"

and

"The conduct of the accused was throughout that of a person getting rid of the deceased."

The basis for these conclusions were that the appellant had placed a jerrican of paraffin and matches in the vicinity so as to blow up the deceased; the note, Ex 24, said to have been written by the appellant admitting the killing due to provocation; that according to Chirchir, the branch cashier, the appellant had locked the doors to the deceased's office before commencing the attack; and the contents of the appellant's repudiated statement, Ex 19, which, *inter alia*, showed the resentment which the appellant felt at being investigated for certain irregularities relating to receipts issued to borrowers from the corporation, and alleged that the deceased had refused to refund Kshs 1,500 he had borrowed from the appellant.

Most of the twenty grounds in the unnecessarily lengthy memorandum of appeal state that the judge erred in not reaching a special finding that the appellant did the act charged but was insane at the time he did it under section 166(1) of the Criminal Procedure Code. This was conceded in court by state counsel at the hearing of this appeal. Complaint was made in particular of the judge's finding that Mathare Mental Hospital is not an institution for treating epilepsy.

It is, we think, clear from Dr Okonji's evidence, and we understand the judge so to have held, that he can be legally insane and exhibit violent and bizarre behaviour during an attack. This would accord with the recent decision in *R v Sullivan*, Law Gazette 20th July 1983, p 1854 in which the appellant injured an

80 year old man while recovering from a psychomotor epileptic seizure. The Court of Appeal had sought to distinguish a malfunctioning of the mind from non-functioning of the mind due to epilepsy, the former only being aptly referred to in the *M'Naghten Rules* (*M'Naghten*'s case [1843] 4 St Tr (NS) 847), but in the House of Lords Diplock said:

"There was ample evidence that the defendant was acting unconsciously and involuntarily when he inflicted the injury, but cause of his condition was psychomotor epilepsy. Where the effect of a disease was so to impair the mental faculties of reason, memory and understanding that the sufferer did not know the nature and quality of his act or, if he did, did not know he was doing what was wrong, it was a 'disease of the mind' within the meaning of the Mc'Naghten Rules in *Mc'Naghten's* Case (1843) 10 C1 & Fin 200, even if the effect was transient or intermittent. On the evidence the defendant was therefore 'insane' at the time of his act, and the only possible verdict was that provided for by the Act of 1883 as amended."

This statement of the law is, in our opinion, applicable to a case where at the time of the offence, an accused person is in the throes of an epileptic fit, provided that a suitable evidential foundation for it has been laid, and provided, of course, that it is established on the balance of probabilities. In the instant case, several witnesses other than the appellant said he suffered from epilepsy, including his mother, DW 4 and his wife, DW 3. The latter, for instance, said that while in a fit the appellant "urinates and gets foam in his mouth". Moreover his uncle, Sawe Chemagong, was also said to have suffered from fits and to have killed somebody in 1976. Dr Okonji concluded his second report by saying:

"PAST MEDICAL HISTORY

He has suffered from typical grand-mal epilepsy (fits, seizures, convulsions) since childhood and has at various times been admitted at Tambach and Eldoret District Hospital and once at Mathare Mental Hospital in 1974. His drug compliance is extremely poor and the wife observed that he was getting convulsions (fits) twice a week.

OPINION

Mr Chemagong suffers from Epilepsy (fits seizures convulsions) and also heavily indulges in alcohol and *bhang* (*cannabis sativa*)

I would like to recommend that he should be committed to Mathare Mental Hospital, Nairobi and treated until his fits are controlled and stabilized."

In his evidence, he emphasized that when he had examined the appellant on February 14, 1983, he was at that stage normal. This then, would seem to be the explanation for Dr Okonji's earlier report which was regarded with such disfavour by the judge.

A court on appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. In the present case we think the preponderance of the evidence clearly showed that the appellant suffered from epilepsy and was prone to fits at frequent intervals. We think that the judge misapprehended the effect of the evidence on this issue and should have held that the appellant suffered from epilepsy as a disease.

Was the appellant, due to an epileptic fit, likely to have been legally insane at the time he killed the deceased" We appreciate that the remaining two assessors (one having been wrongly allowed to be

absent during a small part of the trial) took the view that the appellant was guilty of the full offence, but we are satisfied from the nature of the crime and the appellant's proved actions, and all the surrounding circumstances, including the frequency of his attacks of epilepsy, the appellant's addiction to alcohol and other aggravating factors which would be likely to precipitate an attack, that it was established on the balance of probabilities that the appellant was legally insane when he did the act charged.

We therefore allow the appeal to the extent of quashing the conviction and setting aside the sentence of death and substituting therefor, a special finding that appellant did the act charged but that he was insane at the time he did it. We accordingly, order that the case be reported for the order of His Excellency, the President, and that meanwhile the appellant shall be kept in appropriate custody.

Dated and Delivered at Nairobi this 6th day of November 1984.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

.....

JUDGE OF APPEAL

AG. J.O.NYARANGI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR