REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Case 9 of 2007

REPUBLIC……..……APPLICANT

VERSUS

JACOB NJUE DANIEL ALIAS KIMWITHA……..RESPONDENT

RULING

These proceedings arises because of the State pointed out to court that during the investigation of this murder case there was received a medical report by Dr. Thuo J.N. a consultant psychiatrist that the accused Jacob Njue Daniel was not mentally fit to plead his case in a court of law. The State Counsel was surprised by this report and before the taking of the plea then these proceedings were commenced. The counsel for the accused Mrs Kibe wondered how the state could doubt its witness but nevertheless she participated in the proceedings which the court ordered in order to test the evidence of the doctor. A court cannot try a person who is mentally sick.

The reason why the State was casting doubt upon the opinion of the doctor was based on the fact that the Accused is a person who has been holding responsible position in Government service for a long time and he was at the time a principal teacher of a public school, is a University Graduate and no one had at any time found him suffering from insanity or any mental illness to incapacitate him. Section 12 of the said Penal Code provides that " A person is not criminally responsible for an act or omission if at the 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; but a person may be crimininally responsible for an act or omission although his mind is affected by disease, if such a disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission" This provision relates to insanity at the time of committing the offence. When the accused was brought to court it was to plead. However he did not open his mouth to plead because the State Counsel Mr. Omwega insisted that the issue of mental status be cleared first. Therefore it cannot be said that the accused refused to plead or that the provision of Section 280 applied in this case. The present situation is as that obtained in the case of ***Nyinge s/o Suwatu vs Republic Court of Appeal No. 141/1959***. The facts in that case are that the prosecution called first witness a specialize psychiatrist in Charge of Mathari Mental Hospital to testify as accused sanity. He was not called to testify for Defence. At page 980 of the judgment the court said "much of the difficulty raised in this case, both below and an appeal was caused by the fact that the medical witness called to testify regarding the appellant's sanity was called by the crown (prosecution) as their first witnesses instead of being put into the box by the Defence. For the crown to call such a witness, in order that he may give evidence relevant to a defence of insanity which it lies on accused to establish would no doubt be justified in accused own interest if the latter were unrepresented at the trial. But where he is represented by counsel then the proper procedure in all ordinary cases is for the defence to call him. The proper course is for crown to offer him to the defence where sanity of the accused is at least questionable.

In my view this statement is in accordance with the provisions of Section 11 of Penal Code that every person is preserved same until proved otherwise. It is for the accused to raise the defence of insanity. However the issue of ability to plead and to understand this case against him and to defend himself. In the case of ***Kaplotura s/o Tarino 1957 Ea 553 vs Republic.*** The appellant was charged with murder and when arraigned the question of the appellant fitness to plead was considered and medical evidence was called showing that due to sanity and hardening of the arteries of the brain the appellant at time appeared to be …….. but would b e capable of understanding the nature of the charge in his more laud moments. The court held that whether the appellant was of "unsound mind and consequently incapable of making his defence" should have him investigated and also his ability to make his defence. The court ordered a retrial to investigate and consider if the appellant was capable of making a plea. There is also the case of ***Republic vs Madaha EA [1973] 515*** where the court in Tanzania held that where there was a report of unsoundness of mind at the time of offence that it was to be proved first if he was fit to plead and thereafter decide whether on evidence the accused was insane at the time of committing the offence. The burden of proof of insanity is on a balance of probabilities to be proved by accused and question may be raised by the court.

In that case where it was not proved that the accused was not able to plead the case was resulted for the prosecution to produce evidence that condition to be proved. In the present case the evidence produce by the prosecution was that the accused was unfit to plead to defend himself. The evidence was of a psychiatrist who was called for cross examination. He confirmed his opinion was based on the 30 minutes interview of the accused who told him that when he was in college in the 1980's he had destructive behaviour but he has not taken medicine since that time. He had not talked to accused relatives to find what was family history. He then said that accused intellect is intact and his mental is also intact. He said the accused is not insane. The doctor agreed openly that the accused is not insane although he said he was having hallucinations a psychotic disorder. He further said that his report was not complete he had recommended that accused person be admitted to maximum security psychiatric Unit at Mathare for further evaluation and management. This is strange recommendation as the accused was not showing any signs of violence to warrant. In fact the other witnesses called who had been working with accused and interacting with him in cause of his duties did not say that they have ever noticed any signs of insanity on the accused.

I find evidence of the psychiatrist having no basis he did not talk even to the officer who had brought the accused to find out his behaviour while in cells.

Upon considering the evidence offered by the prosecution I do not find that the accused is unfit to plead and to stand trial. It is for accused to raise defence of insanity to his trial. It is my finding that the accused is able to plead and defend himself of the charge made against him.

That is the order of the court.

Dated this 23rd November, 2007.

J. N. KHAMINWA

JUDGE

Read in open court.

23/11/2007

Khaminwa – Judge

Njue – Clerk

Mr. Kimathi for State.

M/s Kibe for Defence.

Accused present for plea.

The charge is read to accused in English language which he understands and all particulars there of are read to the accused who replies:-

It is not true. I did not murder the deceased.

Court: Plea of Not Guilty entered against the accused.

Trial fixed for hearing to commence on 19th and 20th February, 2008.

J. N. KHAMINWA

JUDGE

Mention on 29/11/2007. Production order to issue for 29th November, 2007.

Remanded in custody.

J. N. KHAMINWA

JUDGE

29/11/2007

Coram

Khaminwa- Judge

Njue – CC

Mr. Omwega

N/A for Ms Kibe

Accused present

Matter taken out for hearing. Hearing on 19th and 20th February, 2008.

Production order to issue.

Remanded in custody.

J. N. KHAMINWA

JUDGE