Kiprop v Kiptanui; Director of Public Prosecution (Interested Party) (Miscellaneous Criminal Application E094 of 2023) [2024] KEHC 10380 (KLR) (23 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10380 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION E094 OF 2023

RN NYAKUNDI, J

AUGUST 23, 2024

BETWEEN

LOICE JEPKOECH KIPROP ..... APPLICANT

AND

SEBASTIAN KIPTOO KIPTANUI ..... RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... INTERESTED PARTY

RULING

1. The Respondent herein, Sebastian Kiptoo Kiptanui was charged in Eldoret Criminal Case No. E080 of 2022 and E082 with the offences of breaking into a building and committing a felony contrary to section 322(1) of the *Penal Code*.

2. The Respondent admitted to all the counts and was admitted on his own plea of guilty and sentenced to 14 years.

3. Vide a Notice of Motion Application dated November 6th 2023, the Applicant is seeking for the following orders:

    a. Spent

    b. That Sebastian Kiptoo Kiptanui be produced in court for the purposes of an inquiry by the Honourable Court to establish whether by reason of mental illness health he is capable of protecting his interests.

    c. That the Honourable Court be pleased to appoint the Applicant, Loice Jepkoech Kiprop, as the Respondent's guardian ad litem.

d. That the Honourable Court be pleased to order for mental assessment of the Respondent and the report thereto ascertaining the Respondent's mental status be presented before the Honourable Court'

e. Costs be borne by the Interested party.

4. The Application is premised upon section 2 as read together with section 10 of the *Mental Health Act*.

5. The Application is based on the grounds on face of it among others: that the Respondent herein, Sebastian Kiptoo Kiptanui was charged in Eldoret Criminal Case No. E080 of 2022 and E082 with the offences of breaking into a building and committing a felony contrary to section 306 of the *Penal Code* with alternative charge of handling stolen goods contrary to section 322(1) of the Penal Code; that the Respondent admitted to all the counts and was admitted on his own plea of guilty and sentenced to 14 years; that the Respondent is however incapable of protecting his mental ill-health; that despite the glaring mental ill health of the Respondent, the subordinate court did not order for mental assessment prior to taking of the plea or sentencing in the aforesaid matters; that the Respondent was unrepresented in the lower court proceedings and that it took the Applicant sometime to procure the services of an advocate due to financial challenges.

6. The application is supported by the annexed affidavit dated 6th November 2023, sworn by the said Loice Jepkoech Kiprop.

7. The application is opposed by the Interested Party vide his Replying Affidavit dated 16th December 2023 in which he avers as follows:

a. That the Respondent was arrested and charged in Eldoret CMCR E080/2022 with two counts of Breaking into a building and committing a felony contrary to section 306(a) of the Penal Code

b. That the Respondent initially took a plea on 13/01/2022 and plead guilty to the charges but later changed his plea to not guilty after which the prosecution's case proceeded with three witnesses testifying for the state.

c. That after the Respondent was placed on his defence on 12/05/2023, he opted to change his plea and a plea of guilty was subsequently recorded and the facts of the case were read to him and he confirmed the same to be true.

d. That looking at the record of the trial court, the law regarding recording of a plea of guilty were strictly and dutifully adhered to and looking at the record of trial, the Respondent was accorded a fair trial which included a right to cross-examine witnesses and make submissions on mitigating circumstances. The Respondent took advantage of this by asking PW1 questions and mitigating including admitting that he had a prior record of committing the very same offence.

e. That the period between plea, conviction and sentencing lasted over 15 months within which the time, the Applicant could have brought it to the attention of the court that the Respondent suffers from a mental infirmity.

f. That in over 15 months that the matter was awaiting determination, the trial court would have noted that the Respondent suffered from a mental infirmity that rendered it impossible to defend himself against the charges he was facing.

g. That in any event, by virtue of section 11 of the Penal Code, every person is presumed to be sane unless the contrary is proven. The Applicant and the Respondent bore the responsibility of rebutting that presumption by availing proof that the Respondent suffers from a mental infirmity.

h. That despite the fact that trial lasted over 15 months, the Applicant and the Respondent failed to rebut the presumption of sanity including at the time of filing and arguing this Application.

i. Insanity cannot be pleaded over a conviction and especially in the revision application without any documentation in support.

j. That going by the fact that the Respondent actively participated in the trial including confirming the history of recidivism and, on his own motion, requesting that the charges be read to him afresh, it is so obvious that he was of sound mind throughout his trial.

8. The Application was canvassed by way of written submissions.

I have carefully considered the application, the averments in the Affidavit sworn in support and in rebuttal of the same. I have too considered the parties' written submissions. The main issue for determination is;

Whether the application is merited

9. In that regard, I find that, the issue herein, basically revolves around, the determination as to whether, it is a mandatory legal requirement that, an accused person should be subjected to the subject mental assessment. In considering the same, I find that, indeed, first and foremost, both parties appear to be in agreement that, the requirement to subject a suspect to mental assessment before plea, is a matter of practice than law.

10. Be that as it may, the question to answer is; what is the rationale of that practice? In my considered opinion, the rationale is founded on statutory law and therefore the argument that, the requirement is purely based on practice per se, may not be fully correct. It is noteworthy that, indeed the provisions of; section 11 of the Penal Code, states that, there is presumption of sanity as regards all persons. It provides as follows:

> " Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved"' (emphasis added).

11. The question that arises is: how is the contrary to be proved? Can it be legally and conclusively proved in the absence of the mental assessment examination of the subject? Furthermore, who is to prove the contrary of presumed sanity; the prosecution or the accused? Finally, who is to benefit from such proof?

12. In the same vein, section 12 of the *Penal Code* states 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 criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission".

13. Similar questions arise; how then, can it be established that, a person was or was not of sound mind, at the time he or she is alleged to have committed the criminal offence? Again, who has the burden of proving the same, and who is to benefit from the proof thereof?

14. It therefore follows that, the mental assessment of the accused person is important pursuant to the provisions of; section 11 and 12 of the *Penal Code,* save for the fact that, it is required in evidence, where need arises.

15. The further, question that arises is, whether the requirement for mental assessment report should (if at all, it is required) be given before, at or after plea? To appreciate the answer to that question, regard should be held on; the purpose of requiring a mental assessment report. In my considered opinion, it serves the purpose of; inter alia, determining whether, the accused is mentally fit to understand, or appreciate the charges and/or information and then stand trial.

16. Indeed, the insistence that an accused be fit to stand trial arose out of a concern in the common law that, criminal trials be fairly conducted. (See Blackstone,*Commentaries on the Laws of England*, Clarendon Press, Oxford, 1769, Vol IV, P 250. The justifications for the requirement that, the accused be fit to stand trial may be divided into four:

    a) A recognition that it is fundamentally unfair to try an unfit accused;

    b) A recognition that it is inhumane to subject an unfit accused to trial and punishment;

    c) A perception that, a trial of an unfit accused is comparable to trial of an accused in absentia, (*Allen, Kesevarajah & Moses* (1993) 66 A Crim R 376,397. 10 See Vernia),

    d) A procedure the legal system repudiates; and a concern to avoid diminution of the public's respect for the dignity of the criminal justice process if unfit accused are subjected to trial and punishment.

17. It follows that, there is need to establish the mental status of an accused person before plea is taken and therefore as much as it may be a matter of practice, it is morally right and in the interest of justice and the accused to do so.

18. In the that regard, the Court of Appeal in the case of; *Leonard Mwangemi Munyasia -Vs- Republic* (2015) eKLR, stated that

> considering, both section 12 aforesaid and the McNaughten Rules, in the given circumstances, the accused person will not be acquitted but under section 167 (1) (b) of the *Criminal Procedure Code*, he will be convicted and ordered to be detained during the President's pleasure, because of the insanity, where he requires treatment rather than punishment, hence detained as patients and not prisoners.

19. The Court of Appeal further pronounced itself as follows:

> " We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus, it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the

immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop. What must be avoided and what this court has warned against in the two decisions relied on by the appellant's advocate in this appeal, is the likelihood of sentencing to death a person with a mental disorder. Therefore, it is the duty of trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person's history or antecedent, to inquire specifically into the question. Indeed, it would serve as a good practice, like it is in England, to call evidence based on the opinion of an expert in such cases in terms of; Section 48 of *Evidence Act* to explain the state of mind. It is the duty of both the investigating officer and the defence, to have the accused person subjected to a medical examination to establish whether he suffered from the disease of the mind that affected his mind and made him incapable of understanding his action. In addition, and in order to ascertain the accused person's state of mind at the time of the offence, the expert opinion of a forensic psychologist, may also be sought. The field of forensic psychology has become a popular field of psychology in Kenya, yet their expertise is hardly sought in criminal trials." (Emphasis mine).

20. Indeed, the mental status of the accused at the time of commission of the offence is gathered by the psychiatrist at the time of mental assessment, as it is based on the history given by the accused including any previous treatment records and it only makes legal sense that, the same be availed before plea is taken.

21. The Court of Appeal in the aforesaid case, cited a medieval English Judge, Brian CJ in a 1468 case of; *Greene vs Queen*, and who in turn reiterated Cicero who famously remarked that: -"The thought of man is not triable, for the devil himself knoweth not the intendment of man",

22. As aforesaid, it is the duty of the Prosecution to establish the mental state of the accused as it is of the defence. In that regard, it suffices to note that, in order, to prove that, a suspect is guilty of a criminal offence, a prosecutor must often also prove that, the suspect had a particular mens rea when committing the offence: (for example, intention, or recklessness, as to a consequence of the suspect's action or omission; or knowledge, or belief, or suspicion, of circumstances in which those actions or omissions take place).

23. There are a number of ways in which a suspect's particular and individual mental state may be relevant to whether a prosecutor can prove that they had the mens rea for the offence alleged. This can range from a diagnosed mental health condition or disorder, to evidence that a suspect (without proof of a condition) did not, for instance, appreciate or turn their mind to a risk which was present in a case.

24. Be that as it were, is not easy to gather tangible evidence and quite often, however, proof of mens rea will rest solely or heavily on inference, which is proof nonetheless.

25. To revert back to the issues herein, I find that, the applicant prays that the Honourable Court be pleased to order for mental assessment of the Respondent and the report thereto ascertaining the Respondent's mental status be presented before the Honourable Court'

26. That, in my opinion, clearly indicates that, first and foremost, he does not wish to rely on the provisions of; section 9, 11 and 12 of the *Penal Code*, that, he is not criminally liable due to his state of mind at the time of the alleged offence. Secondly, that he is fit to stand trial and therefore, if he declines to be subjected to the mental assessment, he will not at any time, raise a defence or averment to the effect, that he was not mental capable of participating in the trial.

27. As indicated by the authorities cited by the parties herein, a case trial will not be deemed to be improper and/or a conviction quashed, due to want of a mental assessment report, where the accused does not allege that he was of unstable mind, at any time and was not subjected to the mental examination.

28. In summation I find that, there is no constitutional and/or express provision in the statutes that stipulates that, a person accused of committing any other offence be subjected to mental assessment before plea. However, as already stated the subject requirement is a matter of universal practice in the interest of the accused.

29. It is vital to note the cognizant fact that the period between plea, conviction and sentencing lasted over 15 months within which the time, the Applicant could have brought it to the attention of the court that the Respondent suffers from a mental infirmity. In over 15 months that the matter was awaiting determination, the trial court would have noted that the Respondent suffered from a mental infirmity that rendered it impossible to defend himself against the charges he was facing. Moreover, the Applicant had the opportunity as the mother to the Convict to address the issue of mental infirmity during the pendency of the proceedings before the trial court.

30. Be that, as it were, I find that, in the absence of express provisions of the law, the choice as to whether an accused person will be subjected to a compulsory mental assessment before plea lies with the convict. For purposes of this Application, the expectation of the court will be for the Applicant to provide something including documents and tangible objects or reports that tends to prove or disapprove the existence of an alleged factor. This piece of evidence in the Affidavit falls short of that legal requirement as is stipulated in the law.

31. This superior court considering this matter is of the view that there is no new and compelling evidence given by the Applicant to ascertain that prima facie the convict was at the time of plea taking suffering from some mental illness to warrant this court to waive his right to privacy and confidentiality so as to subject him to a psychiatric mental evaluation. To that end, the prior proceedings before the trial court could have been the right forum to invoke the defence of insanity associated with the highlights of the trial surrounding the commission of the offences in which the convict was being prosecuted by the prosecution.

32. Thus, in rejecting this Application, I take it that the Applicant is pend to introduce new information while this court is not even sitting in appeal flowing from the proceedings of the trial court. In suggesting to this Court by the Applicant that an order be made for the convict to undergo psychiatric evaluation without an evidential basis being laid that the convict had an history of insanity will be difficult in the stricter sense of the record to grant this Application. The principle limiting the scope of this court exercising jurisdiction, there is very little evidence to the degree that this convict had an history of mental illness. Yes, I agree the Applicant wants to be appointed guardian ad litem, but in this context, the application fails for want of merit.

DATED AND SIGNED VIA EMAIL AT ELDORET THIS 23RD DAY OF AUGUST, 2024

.....

R. NYAKUNDI

JUDGE

Limo R.K. & Co. Advocates for the Applicant

Mr. Mark Mugun for the Interested Party