



REPUBLIC OF KENYA



KENYA LAW
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**NMG v Republic (Criminal Appeal E003 of 2022)
[2023] KEHC 355 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E003 OF 2022
FN MUCHEMI, J
JANUARY 26, 2023**

BETWEEN

NMG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the sentence in the Principal Magistrate Court in Mukurwe-ini by Honourable D. N. Bosibori (RM), in Criminal Case No. E991 of 2021 on 20th January 2022)

Detaining a convict in prison at the President’s pleasure after a finding of guilty but insane under sections 166 and 167 of the Criminal Procedure Code is unconstitutional.

Reported by John Ribia

***Statutes** – constitutionality of statutory provisions – constitutionality of sections 166 and 167 of the Criminal Procedure Code – special verdict of guilty but insane – detention “at the pleasure of the President” – whether statutory provisions authorizing the detention of persons found guilty but insane at the pleasure of the President were unconstitutional for usurping the judicial function to determine the nature and duration of a sentence— Constitution of Kenya, articles 1, 159, and 160; Criminal Procedure Code (cap 75), sections 166 and 167.*

Brief facts

The appellant was charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. The trial court found him guilty of the offence but, upon evidence, determined that he was insane at the time of commission. Under section 166(2) of the Criminal Procedure Code, the court ordered his detention “at the pleasure of the President.” Aggrieved by the sentence, the appellant appealed, contending that it was harsh and excessive. The respondent conceded the appeal, submitting that sections 166 and 167 of the Criminal Procedure Code, which mandated detention at the President’s pleasure following a special finding of guilty but insane, were unconstitutional, as they vested a judicial sentencing function in the executive and thereby undermined the independence of the judiciary.



Issues

Whether sections 166 and 167 of the *Criminal Procedure Code*, in so far as they provided for the detention of persons found guilty but insane “at the pleasure of the President,” were unconstitutional for divesting the judiciary of its function to determine the nature and duration of the sentence.

Held

1. Under section 166 of the Criminal Procedure Code (CPC), the court’s role concluded once it entered a special verdict against an accused person and directed their detention pending the President’s decision. The Constitution firmly separated the powers of the Legislature, Executive, and Judiciary, with judicial power vested exclusively in the Judiciary. Sentencing in criminal matters, including the determination of the nature, severity, and duration of punishment, was an inherent judicial function and not an exercise of executive authority.
2. Vesting discretion in the President to determine how a convict was to be treated following a special verdict undermined the Judiciary’s fundamental duty to determine guilt and impose sentence. The statutory scheme for periodic review by the President, based on the advice of executive officers, further entrenched the impermissible transfer of judicial authority to the Executive.
3. Section 166 of the CPC was unconstitutional to the extent that it removed from the Judiciary the power to determine the nature and consequence of a special finding, contrary to article 160 of the Constitution, by vesting such discretionary power in the Executive. It also infringed the right to a fair trial, which was non-derogable under article 25 of the Constitution.
4. The sentence of detention at the President’s pleasure following a special finding of guilty but insane under sections 166 and 167 of the CPC was unconstitutional. In the instant case, the appellant underwent mental assessment to determine fitness to stand trial. The medical report diagnosed psychosis but confirmed trial fitness, with a recommendation for continued treatment as prescribed.
5. When sentencing the appellant, the trial court did not specify any mental hospital or facility for his continued treatment. The appellant was denied an opportunity to mitigate, contrary to the constitutional guarantee of a fair trial under article 25. There was also no prosecutorial input on whether the appellant had any prior convictions. Given that the offence was a misdemeanour carrying a maximum sentence of five years, the indefinite sentence imposed was grossly disproportionate, unconstitutional, and ought to be set aside.

Appeal allowed.

Orders

- i. *The sentence imposed under sections 166 and 167 of the Criminal Procedure Code was set aside.*
- ii. *The appellant was referred for a fresh mental assessment report by a doctor at the facility where he was currently held to be filed within 14 days. A probation report was to be prepared and filed within fourteen (14) days.*
- iii. *The sentence was reserved pending filing of the two reports.*

Citations

Cases

Kenya

1. *AOO & 6 others v Attorney General & another* Petition 570 of 2015; [2017] KEHC 6022 (KLR) - (Explained)
2. *BKJ v Republic* Criminal Appeal 16 of 2015; [2016] eKLR - (Explained)
3. *Hassan, Hussein Yusuf v Republic* Criminal Appeal 59 of 2014; [2016] KEHC 2860 (KLR) - (Explained)
4. *Katuta, Joseph Melikino v Republic* Criminal Appeal 12 of 2016; [2017] KEHC 6900 (KLR) - (Explained)
5. *Muerithi Kanyita v Republic* Criminal Appeal 35 of 2017; [2017] KECA 387 (KLR) - (Explained)



6. *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* Petition 15 & 16 of 2015; [2021] KESC 31 (KLR) - (Explained)
7. *Republic v SOM* Criminal Case 6 of 2011; [2018] eKLR - (Explained)
8. *Republic v Thomas Gilbert Cholmondeley* Criminal Case 55 of 2006; [2009] KEHC 3921 (KLR) - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 25, 29, 160- (Interpreted)
2. Criminal Procedure Code (cap 75) sections 166, 167 - (Unconstitutional)
3. Criminal Procedure Code (cap 75) sections 166(2); 167(1)(b) - (Interpreted)
4. Penal Code (cap 63) sections 216, 251, 329 - (Interpreted)

Advocates

None mentioned

JUDGMENT

Brief Facts

1. The appellant was charged with the offence of assault causing actual bodily harm contrary to section 251 of the [Penal Code](#) in Mukurweini Criminal case No E991 of 2021.
2. The particulars of the offence are that on the September 9, 2021, at around 3.30 pm in Mukurweini sub county within Nyeri county, the appellant assaulted Peter Kariuki Gakahu thereby occasioning him actual bodily harm. He was found guilty of the offence but the trial court found that he was insane when he committed the offence. The court thus detained him at the pleasure of the President pursuant to section 166(2) of the [Criminal Procedure Code](#).
3. Being aggrieved by the decision of the trial court, the appellant has lodged this appeal on the sentence on the grounds that it is harsh and excessive.
4. Parties agreed to dispose of the appeal by way of written submissions.

The Appellant's Submissions.

5. The appellant submitted that the sentence pursuant to section 167(1)(b) of the Criminal Procedure Code is harsh and excessive. He contends that he is not challenging the conviction and only the sentence and urges the court to grant him a less severe sentence of not more than five (5) years as provided in section 251 of the [Penal Code](#).

The Respondent's Submissions

6. The respondent concedes to the appeal and submits that sections 166 and 167 of the [Criminal Procedure Code](#) which provides for detention of an accused person at the president's pleasure after a special finding of guilty but insane are unconstitutional and thereby harsh and extensive. The respondent refers to the case of [Republic v SOM](#) [2018] eKLR to support her argument.
7. The respondent further relies on section 251 of the [Penal Code](#) and submits that the offence committed by the appellant is considered a misdemeanour and attracts a possible maximum sentence of up to five years. Further, the respondent argues that the appellant was not in his right frame of mind when he committed the offence and thus he is a suitable candidate for review of sentence by the court.



8. Moreover, the respondent submitted that the trial court in making the final orders on sentencing, failed to mention the mental hospital where the appellant was expected to be held as he was receiving his treatment. Furthermore, before sentencing, the appellant was not given a chance to mitigate thus violating his right to a fair trial under article 25 of the *Constitution*. The respondent relies on section 216 and 329 of the *Penal Code* and the cases of *Republic vs Thomas Gilbert Cholmondeley* [2009] eKLR and *Joseph Mureithi Kanyita v Republic* [2017] eKLR and submits that the severity of a sentence depends on the circumstances of each case. In the instant case and upon perusal of the record, there is no evidence of input or submission by the prosecution and there are no previous records of conviction in relation to the appellant. Consequently, the respondent submits that the trial court erred by failing to sentence the appellant and failing to consider other available sentences for a first offender charged with a minor offence.
9. The respondent argues that although the appellant was suffering from a mental illness during the trial, the Mental Assessment Report dated December 9, 2021 indicated that the appellant suffered from psychosis but the same was in remission and the doctor recommended he continues with the prescribed treatment. The respondent further states that the appellant was found fit to stand trial at the time the report was filed in court.
10. The respondent submits that there is no indication that the appellant has been receiving treatment while in prison as ordered by the trial court during sentencing. The respondent further argues that since the appellant's mental status is not certain, the court ought to order a fresh mental assessment to be conducted at Nyeri County Referral Hospital and the report filed to ascertain the appellant's mental status presently. This will assist the court to determine whether the appellant ought to be re-integrated back to the society under the care of a relative or if he needs to be committed to a mental institution. The respondent further urges the court to obtain a social inquiry/resentencing report to guide it on the appropriate sentence since the appellant has been in custody since January 20, 2022.

The Law

11. The constitutionality of the sentence of being held at the president's pleasure was discussed in the case of *Republic v SOM* [2018] eKLR whereby Majanja J observed that:-

However, this is not the end of the matter as I have doubt as to the constitutionality of these provisions particularly in light of the recent Supreme Court decision in *Francis Karioko Muruatetu and another v Republic* SCK Petition Nos 15 & 16 of 2015 where the court held that it is the judicial duty to impose a sentence that meets the facts and circumstances of the case. This suggests that a law that leaves the length of the sentence to another authority violates the fundamental rights and freedoms of the accused.

12. The learned judge proceeded to examine various decisions of judges touching on the similar issue. Some of the cases and observations are as follows:-

Several cases have cast doubt on constitutional validity of provisions that impose an indeterminate sentence on an accused at the instance of an authority other than the courts. For example in *AOO and 6 others v Attorney General and another* NRB Petition No 570 of 2015 [2017] eKLR Mativo J held that the provisions of the Penal Code where a child found guilty of murder is held at the pleasure of the President is unconstitutional as it violates the right to a fair trial under the *Constitution*.

Our courts have also been concerned about the treatment of persons with mental disability under the provisions of the CPC. In *Hussan Hussein Yusuf v Republic* Meru High Court Criminal Appeal No 59 of 2014 [2016] eKLR, Kiarie J held that Section 167(1) of the CPC which directs that a person suffering from mental disability and is unable to understand the proceedings is to be detained at the



pleasure of the President is unconstitutional as it violates articles 25 and 29 of the Constitution that prohibit cruel, inhuman and degrading treatment. The learned judge reiterated this position in *BKJ v Republic* Meru HC Criminal Appeal No 16 of 2015 [2016] eKLR. In *Joseph Melikino Katuta v Republic* Voi HC Criminal Appeal No 12 of 2016 [2016] eKLR Kamau J emphasized the point that keeping a mentally ill person in prison for an indeterminate period of time is cruel, inhuman and degrading treatment contrary to articles 25 and 29 of the Constitution.

Turning back to the provisions of section 166 of the CPC, it is clear that the court's duty comes to an end when it enters that special verdict against the accused and directs the accused's detention pending the President's decision. As Mativo J noted in *AOO & 6 others v Attorney General* (*supra*). The Constitution being the supreme law of the land separates the powers of the legislature, the executive and the judiciary. Judicial power is reserved to the judiciary. The imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and is therefore the exercise of judicial, not executive power. This holding is, in my view, consistent with what the Supreme Court held in the *Muruatetu* case. The vesting of discretion on the President on how the accused is to be treated after conviction is inimical to the fundamental duty of the Judiciary to determine the guilt of the accused and determine the terms upon which he or she serves the sentence. The fact that the statute provides for a periodic review by the President upon advice of executive functionaries goes further to buttress this key point.

I therefore find and hold that the provisions of section 166 of the CPC are unconstitutional to the extent that they take away the judicial function to determine the nature of the sentence or consequence of the special finding contrary to article 160 of the Constitution by vesting the discretionary power in the executive. It also violates the right to a fair trial protected under article 25 of the Constitution.

13. As much as I am not bound by the decisions of my rather judges, I am persuaded that the sentence of detaining a convict in prison at the president's pleasure after a special finding of guilty but insane under sections 166 and 167 of the Criminal Procedure Code is unconstitutional. The court record shows that the appellant underwent mental assessment on December 9, 2021 in order to determine if he was fit to stand trial. The doctor diagnosed him with psychosis thereby finding him fit to stand trial. It was recommended that he continues to undertake treatment as prescribed. On January 20, 2022, while the court was sentencing the appellant, the court did not mention the mental hospital or facility where the appellant was expected to be held as he was receiving his treatment. As submitted by the respondent, the appellant was never offered a chance to mitigate before sentencing which is in violation of his constitutional right to a fair trial pursuant to article 25 of the Constitution of Kenya. Additionally, there is no record of any input by the prosecution at the trial court, whether there were any previous records of conviction in relation to the appellant. Therefore keeping in mind that the offence is a misdemeanour and attracts a sentence of up to five (5) years, the sentence meted out against the appellant was harsh and excessive
14. In conclusion, I find that the indefinite sentence imposed on the appellant is unconstitutional and ought to be set aside.
15. It is my finding that this appeal has merit and it is hereby allowed.
16. The sentence imposed under sections 166 and 167 of the Criminal Procedure Code is hereby set aside.
17. The appellant is hereby referred for a fresh mental assessment report by a doctor at the facility where he is currently held to be filed within 14 days. A probation report shall be prepared and filed within fourteen (14) days.
18. The sentence is hereby reserved pending filing of the two reports.



19. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF JANUARY, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through videolink this 26th day of January, 2023.

