



**Njenga v Republic (Criminal Appeal 189 of 2016)
[2023] KEHC 3362 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 189 OF 2016
HK CHEMITEI, J
APRIL 26, 2023**

BETWEEN

DANSON GITAU NJENGA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged with the offence of rape and the particulars of the charge were that on the 12th day of June 2011 in Nakuru district unlawfully and wilfully committed an act by inserting his male genital organ namely penis into the female genital organ namely vagina of WK aged 89 years which caused penetration without her consent.
2. The applicant was convicted and sentenced to serve under presidential pleasure under the provisions of Section 166(2) of the *Criminal Procedure code* as he was found to be guilty but insane.
3. The appellant thereafter went through various treatment and at the same time pursued his appeal herein. On January 25, 2021, the applicant told the court that he was abandoning his appeal on conviction and pursue the issue of sentencing.
4. The court thereafter directed that probation report be prepared in respect to the applicant. The same was filed in court on October 2, 2021. It was indicated therein that the victim had since passed on due to old age and those interviewed were her children and relatives.
5. They were, as can be deduced from the report unanimous that they did not trust the applicant and they were not sure whether the issue of his mental status was indeed true or pretence after committing the heinous act upon their mother and grandmother.
6. This court again ordered that a private doctor be engaged to treat the applicant's deviant sexual behaviour and one Rachel Anyona from Amani Psycho-Social Wellbeing Consultants filed a report



dated July 11, 2022 which indicated that the applicant was coherent and generally able to settle well with the community.

7. She went on to stress that the applicant understood the effect of substance abuse and he was glad that he survived the withdrawal symptoms.
8. There is also in court evidence that the applicant while in custody has undergone training in carpentry and joinery as per the certificates from the State Department of Labour as well as some spiritual training.
9. The learned state counsel submitted that the applicant abused drugs and alcohol and whatever he did was heinous. He submitted that in considering the sentence, the court ought to be guided by the sentiments of the victim.
10. Having read the proceedings before the trial court, it is not in doubt that what the applicant did to the octogenarian victim was to say the least animalistic in nature. She took advantage of an old lady who was helpless. Sadly, she passed on and i suppose with full knowledge that the applicant will serve and suffer for his offence.
11. The applicant unfortunately as was later found by the psychiatrist was suffering from the decease of the mind. He has undergone treatment at Mathari mental hospital and other medical facilities. The latest report nonetheless showed that he had healed.
12. It is noted that he has been in custody since June 14, 2011 although he spent some few months outside when he was granted bail. The same was however withdrawn when he missed court and the surety, who was his father withdrew. So essentially he has been in custody all through.
13. The offence as provided carried a minimum sentence of ten years and a maximum sentence of life imprisonment. Although the court rightfully sentenced him to serve under presidential pleasure, it appears that there was no follow up as directed by the trial court. The only follow up was when he filed this appeal.
14. Be it as it may, it is his constitutional right to know how long he will stay in prison. It is not fair to have him indefinitely held there without an appropriate definite period. All that the respondent was supposed to have done is prepare a periodical report to the court as a follow up so that it be legally known the status of the prisoner. This is clearly outlined under Section 166 of the [Criminal Procedure code](#). It states;

“Defence of lunacy adduced at trial

- (1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.
- (2) When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.



- (3) The President may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.
 - (4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report.
 - (5) On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.
 - (6) Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.
 - (7) The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.”
15. This court is also alive to the decision by Majanja J in *Republic versus SOM* (2018) eKLR although as it is now there is no material evidence placed before this court that the directives therein were implemented after the court declaring the above Section 166 of the *Criminal Procedure code* unconstitutional. In the absence of the above reports, this court will therefore make its findings which it had already done by getting reports stated above.
 16. In the premises, and in view of the fact that the applicant has not disputed the conviction, this court is of the view that the term so far served by the applicant of close to 12 years is generally sufficient punishment against the applicant.
 17. Considering his mental and health status as per the evidence of the doctors and the professional counsellors, the applicant who is now aged around 46 years ought to be granted another chance in life outside the four walls of prison. Hopefully he shall take advantage of the time he healed while in custody to recover what he lost over the years.
 18. At the same time the applicant must be a crusader against drugs and alcohol abuse and needs to register with a reputable government agency or a private entity for that matter so as to assist others going through the same challenges.



19. Finally, he ought as a matter of good conscience to reconcile at some point with the members of the victim's family despite her not being alive.
20. In the premises, the applicant is hereby set free and so as to integrate well with the society, he shall serve a three (3) years' probation period at the relevant probation office as shall be directed by the County Probation office Nakuru.
21. The applicant is otherwise set free unless lawfully held.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 26TH DAY OF APRIL 2023.

H. K. CHEMITEL.

JUDGE

