REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM; R. MWONGO, J.

CRIMINAL CASE NO. 6 OF 2017

REPUBLIC.....COMPLAINANT

VERSUS

JKN.....ACCUSED

RULING

1. The accused was convicted with murder in a judgment by Meoli, J. dated 27th February, 2019, but delivered by me on 14th March, 2019. He was found "guilty, but insane" and has been awaiting further directions and sentencing.

2. I ordered that the accused be transferred to Mathari Hospital for treatment, which was done. The accused underwent mental testing at Mathari Hospital. The Psychiatric Report dated 28th March, 2019, showed that he had no prior record of being treated for mental illness before the time he was taken to Mathari whilst he was at Naivasha Maximum Prison. The psychiatrist found that he had no thought disturbance, his abstract thinking and memory were intact, but his judgment poor. The report concluded that he had no major psychopathology.

3. In this matter, I am required to determine how to move this matter forward, the accused having been convicted as guilty, but insane, and in light of the indeterminate nature of proceedings under section 166 of the CPC.

4. Section 166(2) CPC requires that when a special finding of guilty but insane has been made, the accused be held in custody in such place and manner as the court deems fit, and report the case to the President for an order of commitment. This was done by letter dated 4 th July, 2019. I directed the accused to be held at Naivasha Maximum Security Prison pending the President's order of committal.

5. **Section 166** of the **CPC** titled '**Defence of lunacy adduced at trial'** which I am required to apply in this case, states as follows under **sub-sections (1)**, **(2), (3), (4)** and **(5)** :

> ***"(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.***
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> ***(3) The President may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.***
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> ***(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.***
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> ***(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. Where a special finding is made that the accused is guilty but insane, there is a lacuna in the law regarding what is to be done with regard

to sentencing. In addition, there is unclarity about what happens where there is delay, as is often the case, between the time the President is notified and actual committal being effected. On this, the accused's counsel sought monthly mentions whilst she did research.

7. In the meantime, the court noted that during his appearances in court the offender, had appeared to be extremely clear and coherent in his utterances, although he appeared not to be aware that he had been convicted.

8. When Counsel made her submissions, she set out the procedure required to be followed under section 166 of the CPC. She pointed out that the procedure is mandatory and leaves the court no discretion; that the officer in charge of the detention facility where the offender is held is required to make a report to the Minister for consideration in respect of the detainee after expiry of three years from the date of the President's order; thereafter, after every two years the officer in charge of the detention institution shall make a report to the President for consideration. Ultimately, counsel submitted, the sentence is imposed upon the accused on direction of the President

9. Counsel availed two authorities to the court. In **HM v Republic [2017] eKLR**, a two-judge bench of the High Court in Meru upheld the determination of the lower court that the appellant was guilty of raping a mentally unstable girl, but was incapable of understanding what he was doing at the time. There, the court stated that detention at the President's pleasure is unconstitutional. The court stated:

> ***"The lengthy incarceration of such convicts erodes their human dignity provided under Article 28 of the Constitution. The appellant did not know that he ought not to have committed the act. He was mentally sick and the law acknowledges that mental status….***
>
> ***The sentence is now indefinite and all what the appellant has to do is to entertain the faint hope that the President's pleasure will be exercised before the expiry of 10 years. One serving such a sentence cannot be held to be serving a proper sentence. The sentence is indefinite it can be more or less than 10 years prescribed period. That situation erodes the appellant's dignity…..***
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> ***I do find that his detention at the President's pleasure from an unknown period is an excessive sentence"***

In that case, the convict's sentence was reduced to the period already served.

10. In the present case no sentence has, of course, been meted, and Section 167 of the CPC is not in play. The sentence prescribed for murder is death under section 204 Penal Code. However, under the **Muruatetu principles** (see **Francis Karioko Muruatetu & Another v Republic, [2017] eKLR)** such sentence is, subject to mitigation, a period that is at the discretion of the court.

11. The second case availed by counsel was **Republic v SOM [2018] eKLR,** where Majanja, J dealt with the sentencing of the accused whom he convicted of murder as guilty but insane. He found that the **Muruatetu** principles were applicable to the case stating:

> ***"5. Although, the Francis Muruatetu Case dealt with the mandatory death sentence, the principles it espouses are nonetheless applicable to this case. I would like to point out that the provisions of section 166 of the CPC dealing with conviction and sentence of an accused found guilty but insane are mandatory from the point of view of the accused and the court. They do not give the court any discretion irrespective of the nature of the mental illness or condition of the accused. The ultimate sentence imposed on an accused found guilty but insane is at the discretion of the President who determines under what conditions the accused serves either in a mental institution or a prison or is ultimately discharged….***
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> **……**
>
> ***7. Several decisions 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. 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 as unconstitutional they violate the right to a fair trial under the Constitution. After examining various provisions of the Bill of Rights including the right to dignity, the right to a fair trial and the rights of the child, the learned Judge held the indeterminacy of the sentence exacerbates the cruel, inhuman or degrading nature of the punishment on the grounds that the maximum period of incarceration remains at all times unknown to the accused and the period of incarceration is dependent on the executive. The learned Judge further held that since the imposition of a sentence was judicial function, the provision leaving the length of the sentence to the President violates Article 160 of the Constitution which provides and affirms the independence of the Judiciary on the following terms:***
>
> ***160. (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.***
>
> **…….**
>
> ***11. 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 the special verdict against the accused and directs the accused's detention pending the President's decision. As Mativo J., noted in AOO and 6 Others v Attorney General (Supra), "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 that the Supreme Court held in the Muruatetu Case (Supra). The vesting of discretion on the President on how the accused it 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 advise of executive functionaries goes further to buttress this key point."***

12. Majanja J, analysed a number of cases that expressed concern about the treatment of persons with mental disability under the provisions of the ***CPC***. These include ***Hussan Hussein Yusuf v Republic*** **Meru High Court Criminal Appeal No. 59 of 2014 [2016] eKLR**, where Kiarie J., held that **section 167(1)** of the ***CPC*** which provides 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 for promoting cruel, inhuman and degrading treatment in violation of **Articles 25** and **29** of the Constitution. There, the learned judge reiterated the position in ***B K J 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, in which Kamau J., emphasised 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.**

13. Majanja, J. finally held that the provisions of section 166 of the CPC were unconstitutional as they seek to take away judicial discretion in sentencing as well as violating the right to fair trial. The court directed the accused be committed to Mathari Mental Hospital for a term of fifteen years subject to review every two years.

14. I have also perused the case of **Republic v Ibrahim Kamau Irungu [2019] eKLR** where Lesiit, J referred to her decision in **Rep. v Edwin Njihia Waweru, Milimani HCCR Case No. 78 of 2015**. In that case, the learned Judge held that it was clear that under Section 166(5) the President is empowered, not to pass a sentence over the person against whom the court has entered a special finding under section 166(1)**,** but to exercise a power of discharge, or properly put, the **Power of Mercy.** She held that the power of mercy is donated to the President under **Article 133** of the **Constitution, which is distinct from the power of sentencing, saying:**

> ***"The former is a judicial function and the latter is an executive responsibility. Kenya adopted that system, of use of an Advisory Committee to advice the Executive on the exercise of power of mercy over certain cases after the accused are convicted and sentenced by courts of law, from Britain. Kenya is not alone. Many commonwealth countries also adopted that system, including Belize. As can be understood in the Privy Council decision in REYES Vs. R. (BELIZE) (2002) UKC 11:***
>
> ***"…The board is mindful of the constitutional provisions governing the exercise of the Power of Mercy by the Governor-General. It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter is an executive responsibility."***

15. The learned Judge (Lesiit, J) went on to state:

> ***"21. I find that the judicial function is to pass sentence, and that function is reserved to the judicial process and cannot be taken away from it. I find that the law gives the executive a responsibility to make a determination whether a person need not suffer the punishment imposed against him by the court, and may remit such punishment for some reason, in certain cases. Under the law, the executive, if at all it determines to exercise the power of mercy in a case, can do so only by reducing and not enhancing or making it more severe. Otherwise it would make meaningless the aspect of 'mercy'. That executive power to exercise a power of mercy has constitutional underpinning under Article 133 of the Constitution which stipulates thus:***
>
> ***"133(1) On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by-***
>
> ***(a) granting a free or conditional pardon to a person convicted of an offence;***
>
> ***(b) Postponing the carrying out of a punishment, either for a specified or indefinite period;***
>
> ***(c) Substituting a less severe form of punishment; or***
>
> ***(d) Remitting all or part of a punishment.***
>
> **……..**
>
> ***23. Parliament, under its legislative mandate, enacted the Power of Mercy Act No. 21 of 2011. The application of the Act is provided under section 3 as follows:***
>
> ***"The provisions of this Act shall govern all matters relating to a petition under the Constitution for the exercise of the power of mercy by the President pursuant to Article 133 of the Constitution."***
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> ***25. The Advisory Committee referred to in Article 133 of the Constitution is the one which may make a special report for transmission to the President under section 166(6) of the CPC which provides:***
>
> ***"(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."

26. These provisions of the law demonstrate that the Power of Mercy has both constitutional and statutory underpinning. Therefore, to replace the word 'President' with 'court', will not only interfere with powers donated by the Constitution and actualized through statute, but also result in an absurdity. That is undesirable."

16. I agree with Lesiit, J's position that the court should give a determinate sentence after reaching a verdict of guilty in a case, and that such sentence in fact actualizes the accused right to a fair trial. The right to a fair trial commences with a plea and ends once sentence is passed (see Article 50(2)(b) to Article 50(p) Constitution). After the passing of sentence, the court becomes *functus officio.* I also agree that a determinate sentence gives force to the binding principles espoused in the **Muruatetu case**, where the court held that the accused has a right, not only to give mitigation before sentence, but to have his mitigation considered in determining the severity of sentence.

17. If I was inclined to apply section 166 CPC as it is, this will leave the accused in an indeterminate situation whereby the Executive will be asked to determine the nature of detention to be served by a convict. This, I believe, will amount to interfering with a judicial function and is a wholly untenable situation, because **Section 166(2)** of the **CPC** requires the Court to award an indeterminate sentence to an accused person found 'guilty but insane'.

18. In my view, it is unconscionable that, under section 166 CPC, the court is only allowed to give terms concerning where the accused is to be held pending a determination by the President ultimately as to where the accused will be detained (section 166(3)) and, upon a report, to determine whether the accused is to be discharged or otherwise dealt with (section 166(5)). This tends to usurp the powers of the Court in exercising the distinct Judicial function entrusted to it to conclude the case by meting sentence in the case; and also interferes with the right to fair trial.

19. In the end, the learned Judge Lessiit sentenced the accused to ten (10) **years imprisonment from the date he was arraigned in court in January 2018, and ordered that the proceedings be typed and a certified copy of the record and the notes from the court be transmitted to the ministry concerned for consideration by the President.**

20. I note that in the present case, the accused was found to have inflicted blunt force trauma on his son, the deceased. They had been sharing the accused's one-roomed house together. The cause of the death was skull fracture with internal bleeding due to trauma; the main feature of which was dehiscence: that the two skull portions which hold the head together had parted at the coronal suture. The court found that the deceased died a violent death due to fatal head injuries inflicted on the deceased while he lay on a cushion on the floor.

Disposition

21. Having carefully considered all the foregoing matters, I am persuaded that the proper way to proceed after convicting an accused as 'guilty but insane', is to take such action as will ensure the full and fair trial rights of the accused are complied with. These include appreciating that such rights can only be properly complied with if the court finally concludes the case before it with the issuance of a sentence; the sentence must be determinate so as to give finality, should the convict wish to exercise his right to appeal; and that a report be forwarded to the executive branch to enable it to take such constitutional action under Article 133 of the Constitution as it may deem appropriate, to exercise the power of mercy.

22. Accordingly, and for the above reasons I direct that the accused shall be afforded an opportunity to tender his mitigation and thereafter, he shall be sentenced.

23. I also order that a probation officer's report be availed within the next thirty days to enable the court to have a proper perspective for sentencing purposes.

Administrative directions

24. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Ruling has been rendered through Zoom video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this Ruling shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

25. A printout of the parties' written consent to the delivery of this Ruling shall be retained as part of the record of the Court.

26. Orders accordingly.

Dated and Delivered at Nairobi this 30th Day of April, 2020

Signed

RICHARD MWONGO

JUDGE

Delivered via Zoom videoconference in the presence of:

1. Ms. Kithinji for the accused

2. Ms Langat for Prosecution

3. Accused present in person

4. Court Clerk - Quinter Ogutu