



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 20 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FAO.....ACCUSED**

**RULING ON SENTENCE**

1. FAO was initially charged with murder contrary to section 203 as read with section 204 of the Penal Code where it was alleged that she killed ZMN on 14<sup>th</sup> March 2019 at 8.00am at Gitathuru in Korogocho slums Nairobi. She denied this offence. Before the case could be heard, the accused and the prosecution entered into a plea bargain agreement leading to the reduction of the charge to manslaughter contrary to section 202 as read with section 205 of the Penal Code. On 30<sup>th</sup> May 2019, the accused pleaded guilty to manslaughter.

2. The prosecution presented the following facts to the court:

*The accused and the deceased lived as man and wife in Gitathuru Korogocho Slums. On 14<sup>th</sup> March 2019 the deceased who had been drinking came home at about 8.00pm and knocked on the door. The accused refused to open the door for him. The deceased hit the door open using a stone while insulting the accused. They quarreled over time. The accused picked a knife and stabbed the deceased on the thigh leading to profuse bleeding. The accused sought help from Peter Ndegwa brother to the deceased who lived a kilometer away. On returning to the scene they found the deceased dead. The matter was reported at Korogocho Police Post. A blood stained knife was recovered hidden under a mattress. The accused was arrested and detained pending charges. The body of the deceased was taken to City Mortuary where it was examined by Dr. Ndegwa. The doctor concluded that the deceased died as a result of exsanguination due to severed blood vessels due to penetrating sharp force trauma. After the accused was taken for mental assessment it was found that she had a mental condition for which she had been treated on several occasions at Mathare Hospital.*

3. The accused admitted that the facts as presented in court were correct.

4. This court found the accused guilty of manslaughter on her admission and convicted her.

5. In mitigation Mr. Swaka for the accused submitted that the accused is remorseful; that the deceased was her husband and the father of their child; that the accused was provoked by the deceased and that she did not intend to kill the deceased; that the deceased was drunk and extremely abusive and entered the house by force using a stone to break open the door; that the stab was on the thigh and this must have been on self defence; that the actions of the accused after the stabbing the deceased showed that she had not intended to kill the deceased. She looked for help from the brother of the deceased. It was submitted that the accused is a mental patient and has had a mental condition for some time. She is a first offender and has had time to recollect herself. Mr. Swaka asked this court to give the accused a second chance in life by imposing on her a non-custodial sentence.

6. This court called for report from the probation officers to acquaint itself with the social circumstances of the accused. The report was filed on 17<sup>th</sup> June 2019. I have read the report. It does not reflect positively on the character of the accused according to the family members who were interviewed. She has not been able to take care of her two children necessitated her parents to take care of the two children from a very early age. She has been suffering from mental ailments for some time and has been admitted at Mathari Hospital because of her mental condition. The report is not favourable for non-custodial sentence because the family members do not support her living with them but prefer that she be kept away from the community.

7. There are two reports from Mathari Hospital. One report is dated 25<sup>th</sup> March 2019. It is signed by Dr. Ngugi Gatere. It shows that the accused has had three admissions in the same hospital for schizophrenia. The opinion of the doctor is that the accused has been suffering from schizophrenia since 2008 and that as at the time of review on 25<sup>th</sup> March 2019 she had no symptoms because she was compliant with her medications. She was found fit to plead. To prevent a relapse the doctor recommended that she needs to continue on her medications.

8. Another report was made on 18<sup>th</sup> June 2019. In this report the accused was found fit to plead but she was found to be suffering from schizophrenia and her medication was continued. It is clear to me that the accused has been suffering from schizophrenia for a long time and has been admitted at Mathari Hospital on several occasions. To my mind, even at the time of committing this offence the accused was suffering from schizophrenia. Her mental status is kept under check by the medication she is taking. According to doctor Gatere, a relapse would occur if she were to fail to take the medication.

9. In view of the information availed to this court and the facts presented in court I hereby make a special finding in line with Section 166 of the Criminal Procedure Code that the accused is guilty of the act of killing Zacharia Mwangi Nyanja but was insane when she committed that offence.

10. In ***High Court Criminal Case No. 69 of 2013 Republic v. Joseph Waiganjo Karumbo***, this court was faced with a similar situation where the accused was found to have committed the offence when not mentally sound. In that case I considered the law under Section 166 of the Criminal Procedure Code. This section provides as follows:

***166 (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.***

11. Section 166 was declared unconstitutional in ***Kisumu High Court Criminal Case No. 6 of 2011 Republic v S O M [2018] eKLR*** where the court (Majanja J) had this to say:

***“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 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.”***

12. The court in the ***S O M*** case above case went further to declare that in order to remedy the constitutional defect the reference to “the President” under section 166 of the Criminal Procedure Code and the review carried out under that section shall be by the Court. The court sentenced the accused in that case to Mathari Mental Hospital for a term of fifteen (15) years subject to periodic review by the court in accordance with section 166 of the Criminal Procedure Code and in any case before the expiry of every two (2) years.

13. Having considered the circumstances under which the deceased was killed and given the mental status of the accused and the report from the probation officer, it is my considered view that the accused is not fit to be released back to society. She has mental health issues which

require supervised attention and medication. She has not been in a position to take care of her children and her presence with the family is not welcome by the family members. It would be difficult to supervise her given her medical conditions and the danger of a relapse if she does not take medication as prescribed. I will place the accused in a mental institution.

14. FAO is hereby committed to Mathari National Teaching & Referral Hospital for ten (6) years. During that time the accused shall be under the care of that hospital and shall be subject to periodic reviews by the court in every two (2) years in accordance with the requirements of Section 166 of the Criminal Procedure Code.

15. Orders shall issue accordingly.

**Dated, signed and delivered this 20<sup>th</sup> day of June 2019.**

**S. N. Mutuku**

**Judge**