REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO 7 0F 2018

LESIIT, J

REPUBLIC.....PROSECUTOR

VERSUS

IBRAHIM KAMAU IRUNGU.....ACCUSED

RULING ON SENTENCE

1. The accused was arraigned before this court on the 19th day of January, 2018 with one count of Murder contrary to **Section 203** as read with **section 204** of the **Penal Code**. Initially, the accused was found not fit to plead and was subsequently admitted at Mathare National Mental Teaching and Referral Hospital for in-patient treatment. Vide a certificate dated 5th September, 2018 Dr. Ngugi Gatere, a Consultant Psychiatrist at the hospital certified the accused fit to stand trial. Plea was then taken on 9th October, 2018. The accused denied the charges.

2. At the Pre-Trial Conference directions, the learned defence counsel Mr. Wakaba informed the court that the accused was going to rely on the statutory defence of insanity. The defence offer for Plea bargaining was declined by the prosecution.

3. The court heard the case fully after which it came to the conclusion that the accused person was guilty for the offence of murder charged. However, a special finding of '*guilty but insane*' was entered under **section 166(1)** of the **Criminal Procedure Code (hereinafter referred to as CPC),** having found that at the time the accused committed the offence, he was by reason of mental illness incapable of knowing what he was doing was wrong, or that he ought not to do the act constituting the offence.

4. The court asked the counsel for the defence, as he prepared submissions in mitigation to consider the decision of **Rep. Vs. SOM, Kisumu High Court Criminal Case No.6 of 2011**.

5. The Learned Prosecution Counsel, Ms. Onunga urged the court to treat the accused as a first offender as they had no previous records on him.

6. Mr. Wakaba Counsel for the accused filed written submissions in mitigation and highlighted them in court. Counsel urged that **Section 166** of the **CPC** which provides that the proceedings be forwarded to the Minister in charge of correctional services who would in turn forward them to the President was unconstitutional as it took away the courts authority and discretion to pass a sentence, and given it to the executive.

7. Counsel relied on two cases. The case of **Rep V SOM (2018) eKLR** and **AOO & 6 others V A.G & another (2017) eKLR** for the proposition that in the exercise of Judicial Authority the court should be independent based on principals of separation of powers. Counsel submitted that the court should be the one with the duty to exercise the power provided under **section 166** of the **CPC**.

8. Mr. Wakaba submitted that the principle of fair trial begins when the accused is charged with an offence and runs through to the stage where sentence is meted out. Counsel urged that the right to fair trial is among the inalienable rights provided for under **Article 25** of the **Constitution**. Counsel cited the Supreme Court case of **Francis Karioko Muruatetu & another V Republic (2017) eKLR** to buttress his point that sentencing is a principle component of a trial and the fact that the accused mitigation should be considered before sentence.

9. Mr. Wakaba further submitted that **section 166** of the **CPC** discriminates against the accused due to its mandatory nature, the fact that it prescribes for an indeterminate sentence. Counsel urged that passing an indeterminate sentence on an accused person on account of illness was discriminatory.

10. Mr. Wakaba urged finally that as the court retired to consider the sentence to impose, it should give a determinate sentence. Counsel

urged the court to take into account that the accused was not in a position to know what he was doing was wrong due to mental illness at the time. Counsel urged that the court should also consider that the accused and the deceased were living amicably until the day of the incident. Counsel urged the court to take into account the fact the accused was remorseful for having caused the death of the deceased. Mr. Wakaba urged the court to take into account that the accused has been in custody since 2018. He said that he was a father of two children and a husband, and that he needed to provide for his family.

11. In response, the Learned Prosecution Counsel Ms. Onunga urged that **section 166(1)** of the **CPC** stipulated how an accused who has been found '*guilty but insane*' should be treated. Counsel urged that since the law has not been amended, the court ought to follow the provisions of **section 166(1)** of the **CPC**.

12. I have taken into consideration all the relevant factors, the accused mitigation and submissions, the sentiments of the prosecution and the cited cases. The issues in this case are quite similar to those in a case I did recently of **Rep. Vs Edwin Njihia Waweru, Milimani HCCR case No. 78 of 2015**. I will immensely quote from it.

13. Mr. Wakaba has urged that **Section 166** of the **CPC** which provides that the proceedings be forwarded to the Minister in charge of correctional services, who would in turn is required to forward them to the President, was unconstitutional as it takes away the courts authority and discretion to pass a sentence, and gives it to the executive. For that proposition counsel was relying on the two cases of **Rep. Vs. SOM**, supra and **AOO Vs. & 6 others V A.G**, supra.

14. **Section 166** of the **CPC** titled '**Defence of lunacy adduced at trial'** is the impugned provision**.** Under **sub-sections (1)**, **(2), (3), (4)** and **(5)** state as follows:

> **"(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.**
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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.**
>
> **(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."**

15. In **Republic vs. SOM.,** supra, Majanja J., after making a special finding in the cited case under **section 166 (1)** of the **Criminal Procedure Code** 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 No. 15 and 16 of the 2015 (UR)* 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…**

16. The learned judge proceeded to examine various decisions of judges touching on the same or similar issue. Some of the cases and his 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** *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, 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 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 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 (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*.

17. Majanja J. proceeded to apply the provisions of section **7(1)** of the **Sixth Schedule** to the **Constitution**, in order to align the provisions of **section 166** of the **CPC** to the **Constitution**. The learned judge correctly observed that the Court is entitled to construe existing laws, such as the **CPC** as one of the 'existing laws' that continue to be in force, with such *modifications, adaptations, qualifications and exceptions necessary to bring its provisions into conformity with the Constitution,* as provided under **section 7** of the **Sixth Schedule** of the **Constitution**.

18. Judge was of the view that **section 166** of the **CPC** which provides for the review of a sentence of one found "guilty but insane" to be carried out by the President rather than the court, was what created a problem. He proceeded to align the section to the Constitution by holding that henceforth the reference to "President" shall be read to mean, "the Court", finding that the effect of this was to ensure that the accused is brought before the court periodically so that the court may review the matter and if necessary call for and take necessary expert and other evidence before making an appropriate order within the framework of a definite period of detention imposed by the Court.

19. In my case which I have cited herein, **Rep. Vs. Edwin Waweru**, supra, I observed, which I stand by even in this case, that I would hesitate to substitute the word 'President' with 'court' in **section 166** of the **CPC,** as the provision is pegged to the **Power of Mercy** donated to the President under **Article 133** of the **Constitution.** I have already quoted **section 166, of** the **CPC**. I need not repeat it here.

20. In **Rep Vs. Waweru**, supra, I stated, and I still hold that position, that it was clear under **sub-section (5)** of that **Act** that the President is empowered, not to pass a sentence over the person against whom the court has entered a special finding under **sub-section (1),** but to exercise a power of mercy. 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."

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."

22. The Advisory Committee mentioned in that section is established under **Article 133(2)** of the **Constitution** and its membership includes the Attorney General as Chair and the Cabinet Secretary responsible for correctional purposes.

23. Furthermore, Parliament was mandated to enact Legislation to provide for-

"(a)…

(b)…

(c) criteria that shall be applied by the Advisory Committee in formulating its advice."

24. In compliance to **Article 133** of the **Constitution**, Parliament 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.**"

25. That committee is the one referred to 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.

27. Mr. Wakaba, Counsel for the accused cited the Supreme Court case of **Francis Karioko Muruatetu & another V Republic (2017) eKLR** and urged that sentencing is a principle component of a trial and that the accused mitigation should be considered before sentence is passed. Counsel urged that **section 166** of the **CPC** is discriminatory against the accused due to its mandatory nature and due to the fact, it prescribes for an indeterminate sentence.

28. I agree that the court should give a determinate sentence after reaching a verdict of guilty in a case. That actualizes the accused right to a fair trial which I agree begins at plea and ends once sentence is passed. A determinate sentence will also give force to the binding decision of the Supreme Court in the **Muruatetu case**, supra where the court held that the accused has a right, not only to give mitigation before sentence, but to have his mitigation considered.

29. After passing sentence, the court becomes functus officio. That is when the provisions of **section 166 (3)** to **(7)** of the **CPC** should take effect. They provide thus:

> "**(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.**
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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.**
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> **(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."**

30. I am well persuaded by the findings of the learned Judges in **AOO Vs AG**, supra, and **Rep Vs SOM**, supra, that awarding indeterminate sentences and leaving it upon the Executive to determine the nature of sentence to be served by a convict is interfering with a judicial function and is wholly undesirable. **Section 166(2)** of the **CPC** requires the Court the power to award an indeterminate sentence to an accused person found 'guilty but insane'. The fact that the court is only allowed to give terms of where the accused is to be held pending a determination by the President as to the sentence to be served by the convicted person, only serves to usurp the powers of the Court in exercising its Judicial functions by concluding the case.

31. The right to a fair trial starts from the moment the accused is arrested and ends upon the determination of the case and when the sentence is delivered. The court finalizes the matter when it issues a determinate sentence. To do otherwise is to leave the case hanging which is an absurdity.

32. This provision does require to be aligned to the **Constitution** (2010), as prescribed under **section 7** of the **Sixth Schedule**. I would agree with the alignment that allows the court to give a determinate sentence, without substituting the word 'President' with the word 'court', as I have explained in this ruling.

33. Having come to the conclusions I have in this case, I will now consider the factors necessary to enable the court in exercise of its discretion, determine the appropriate sentence to pass in this case.

34. I have considered that the accused caused his mother's death in this case, a matter he says he regrets. His own brother and wife all testified to the earlier good and amicable relationship between the accused and the deceased. I have considered that the accused was suffering from mental illness, which the doctor said was as a result of prolonged use of substance and drug abuse. I considered that these are effects of having ran away from home as a child, living in the streets and abusing all manner of substances. He is a young man in his early 30's. He has a family of two children and a wife who depended on him before his arrest.

35. Having considered all the circumstances of this case, I find that the correct orders to make in this case are as follows:

a) Accused will serve 10 years imprisonment from date he was arraigned in court in January 2018.

b) The proceedings herein be typed and a certified copy of the record and the notes from this court be transmitted to the ministry concerned for consideration by the President.

c) Right of appeal explained to the accused.

DATED AT NAIROBI THIS 25th DAY OF JULY, 2019.

LESIIT, J

JUDGE