REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL REVISION 311 OF 2018

BN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Accused: Person with mental illness

1. The accused herein BN was arraigned in court on 5th January 2018 on a charge of Defilement contrary to section 8 (1) (3) of the Sexual Offence Act. The particulars of the offence were; that between the diverse dates of 17th December 2017 to 3rd January 2018 at [particulars withheld] village of Gaitu East Location, Imenti central district within Meru County the accused intentionally caused his penis to penetrate the vagina of JK a child aged 15 years.

2. He was assessed to ascertain his mental status on 3rd May 2018 by the psychiatrist, Dr. Mwikamba Andrea who upon examination of him concluded that the accused suffered from a mental disorder of mild intellectual disability due to the severe illness he had at the age of nine years. Hence, he found him to be of unsound mind and not fit to plead. However, the court ordered that the appellant be taken for a second mental assessment because the earlier report was inconclusive for it did not indicate whether his mental condition is curable.

3. Later the Psychiatrist indicated that his condition is not curable but his social adaptability can be improved through training in special school. Consequently the trial court ruled that the proceedings be stayed, bond be suspended and the appellant be committed to Mathari Mental and Teaching Hospital.

4. Counsel for the applicant has requested for revision of the order delivered on 9th July committing the accused to Mathare Hospital. The prosecution has asked this court to invoke its powers under section 162 of the Criminal Procedure Code.

5. The report, produced on behalf of Mathare Hospital by Dr Mucheru Wang'ombe found the appellant unfit to stand trial. Section 162 to 164 of the Criminal Procedure Code deals with cases where the court has reason to believe, or the accused person appears to be or is of unsound mind and incapable of making his defence. The part provides thus;

> **"PROCEDURE IN CASE OF THE LUNACY OR OTHER INCAPACITY OF AN ACCUSED PERSON**
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> **162. (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.**
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> **(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.**
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> **(3) If the case is one in which bail may be taken, the court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.**
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> **(4) If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall order that the accused be detained in safe custody in such place and manner as it may think fit, and shall transmit the court record or a certified copy thereof to the Minister for consideration by the President.**

(5) Upon consideration of the record the President may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody, and the court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in the manner provided by sections 163 and 164.

163 (1) If a person detained in a mental hospital or other place of custody under section 162 or section 280 is found by the medical officer in charge of the mental hospital or place to be capable of making his defence, the medical officer shall forthwith forward a certificate to that effect to the Director of Public Prosecutions.

(2) The Director of Public Prosecutions shall thereupon inform the court which recorded the finding concerning that person under section 162 whether it is the intention of the Republic that proceedings against that person shall continue or otherwise.

(3) In the former case, the court shall thereupon order the removal of the person from the place where he is detained and shall cause him to be brought in custody before it, and shall deal with him in the manner provided by section 164; otherwise the court shall forthwith issue an order that the person be discharged in respect of the proceedings brought against him and released from custody and thereupon he shall be released, but the discharge and release shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

164. Wherever a trial is postponed under section 162 or section 280, the court may at any time, subject to the provisions of section 163, resume trial and require the accused to appear or be brought before the court, whereupon, if the court considers the accused to be still incapable of making his defence, it shall act as if the accused were brought before if for the first time.

6. I have seen a new thinking stemming from the Constitution. The thinking is based on the right to fair trial and seems to suggest that sections 162-164 of the CPC should be subjected to the ultimate yardstick: the Constitution. The major concern of this school of thought is whether indefinite suspension of criminal proceedings against the accused is in accord with the right to fair hearing especially noting that fair trial demands that trial should be concluded within reasonable time. In some cases, there may never be resumption, let alone conclusion of the trial because the condition of the accused may never improve Even more substantial concern is whether indefinite committal of a sick accused person in a mental facility, at the mercy of the President without proper evaluation as to whether the committal affords the constitutionally demanded facilitation and comfort of persons with disability. Needless to state that arbitrary committal of an accused person to a mental hospital derogates from the realization of rights enshrined in the Constitution. Notably, transmission of record to the Minister by the court or by the minister to the president, the making of a decision by the President and transmission of such decision to court may take unreasonably long period. All these are valid concerns and show points raised show some elements of the said sections detract from right to fair trial as well as rights of persons living with disability. It bears repeating that suspension of trial as provided in law may be life-long; this may be likened to hanging a scourge for life upon the head of a sick individual who needs care and attention. More trouble and prejudice comes where a person is not released on bond but is committed to a mental institution at the president's pleasure in circumstances which portend that the committal will be or almost for life. Take for instance a case where there are no prospects of the accused getting better or trial resuming; yet, there are no special amenities or accommodations provided for the full enjoyment of life and realization of full potential by the accused as a human being. This is one such case.

7. In stating the above, I am aware that trial courts have been castigated by appellate courts for not strictly applying section 162-164 of the CPC. But, I see re-awakening in the questions posed above and also in the brutal constitutional vitality and command in section 7(1) of the Sixth Schedule to the Constitution entitled ***''Transitional and Consequential Provisions''*** that demands:

1. All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

8. Sections 162 – 164 of the CPC are existing law and must be subjected to the constitutional test in accordance with section 7(1) of the Sixth Schedule. It is no longer prudent argument that a court of law should plainly or mechanically apply a provision of statutory law as was formulated until it is declared unconstitutional. In my considered view, section 7 of the Sixth Schedule commands with authority the way to deal with existing law: construe it with such adaptations, modifications, alterations, qualifications necessary to bring the existing law into conformity with the Constitution. This mandate squarely falls in the laps of the court when interpreting such existing law. I also take the view that section 7(1) of the Sixth Schedule avoids the absurdity that comes with an outright declaration of the entire section to be unconstitutional especially where, for instance a read-in would ameliorate the gap in the section and bring it into conformity with the Constitution. I could be wrong on this but read-in practice is now accepted in our jurisdiction and legal system.

9. Be that as it may, the questions being asked of section 162-164 of the CPC spawn development of the law commanded in article 22 and 259 of the Constitution. I also have another thought. The Office of Director of Public Prosecutions as a state organ is bound by the Constitution and the Bill of Rights enshrined therein. The prosecution should be encouraged to exercise the power of termination of criminal proceedings in appropriate cases rather than subject the accused persons in need of care to the an indefinite suspension of proceedings, and or committal to some institution where it is clear that such person needs care and appropriate treatment. Here it bears repeating for the sake of emphasis. That some situations are hopeless as the accused person will never get well and therefore the trial may never resume. But, there is hope of some therapeutic orientation and adaptation that may alleviate the situation of the sick accused person. Very soon- if it is not already happening- I will not be surprised if courts and prosecution start to sign a petition such as I am suggesting! Of course, I am not oblivion of the fact that termination of criminal proceedings after the close of the prosecution case, leads to acquittal. See article 157(7) of the Constitution. That notwithstanding, termination where the case may be re-instituted should be considered first or as the case may demand. In fact, section 163 of the CPC envisions termination of proceedings by the DPP as one of the way forward. See also article 157(7) of the Constitution.

10. In this case, the prosecution applied to withdraw the case under section 87(a) of the CPC. The trial magistrate considered the request and declined the request by the prosecution under section 87(a) of the CPC. The trial court was of the view that the reasons given were not sufficient and so opted to go by section 162-164 of the CPC. The trial court stayed the proceedings, suspended the bond issued to the accused

and committed him to Mathari Hospital. From the ruling, the trial court had stated that it is best to have the accused placed in a safe place where he can get appropriate medical care. The inquiry in section 162-164 of the CPC is a serious process within the larger tenet of fair trial. Therefore, the trial court ought to interrogate the entire circumstances of the case and make an informed decision thereto. I admit that this case presents quite difficult scenario; on one hand there is an accused person who is a person with disability, and on the other hand, a child who is the victim of sexual assault. This scenario calls for careful balancing of rights and legitimate interests. Courts are commanded to place at the fore the best interest of a child in cases involving a child. In the circumstances, I agree that sufficient reasons ought to have been provided by the prosecution to terminate the case especially in light of the fact that the case is one of defilement of a child. In the circumstances, I would not sanction termination of the case. I will therefore examine the other possibilities in law.

Bond or bail a necessity

11. My reading of sections 162-164 in light of the Constitution reveals that the court should first consider release of the accused on bail or bond. The test is article 49(1) (h) of the Constitution, that only where there are compelling reasons that bond shall be denied. Except, however, I need to make it clear that the fact that the accused is suffering from a mental illness does not per se constitute compelling reason not to release a person on bond or to cancel or suspend his bond. Such is a person in need of care and must be accorded all accommodations under the law and the Constitution to make him realize his rights. In fact, section 162(3) takes cognizance of the need to ensure that accused person found to be of unsound mind is properly taken care of and prevented from doing injury to himself. See section 163(3) below:

> **2. If the case is one in which bail may be taken, the court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.**

12. In light of the reports filed, this court finds that the accused person is of unsound mind and incapable of making his defence. The Psychiatrist indicated that his condition is not curable but his social adaptability can be improved through training in special school. In such circumstances, the court ought to take a path that most favours enjoyment of a right and freedom of the individual rather than condemn such person to indefinite committal without considering whether the committal will offer special training which shall improve his social adaptation. The accused is a person with disability and has the right to be treated with dignity and respect. He also has a right to the realization of his full potential as a human being. In addition, he has a right to all reasonable accommodation necessary to realize his rights and potential thereof. See Article 19 and 54 of the Constitution. Courts are therefore obligated by law and Constitution to give full effect to the Bill of rights and to develop the law to the extent that it does not give effect to a right or fundamental freedom of an individual. It bears repeating that the condition of the accused is not curable except his social adaptation would be improved through training in a special school. There is absolute need to follow through on this accommodation or facilitation which would most favour realization of his rights. By suspending his bond and committing him to Mathari Hospital without careful consideration of his condition and needs was arbitrary and does not aid realization of his rights and full potential as a human being. I think not. I therefore direct the trial court to proceed under section 164 of the CPC and carry out a thorough inquiry to establish the most appropriate order; set terms and conditions to attach to bond or take such security or make such other order that will ensure the accused is taken care of properly and prevented from harming himself or others. Should committal to an appropriate institution be in his best interest, the trial court to fully evaluate the potency of such committal after receiving such expert opinions or reports as the trial court may decide. I should think that the legally mandated institutions which deal with persons with disabilities are necessary parties and should be served with this judgment so that they may participate in the inquiry I have ordered in the trial court. The original file shall be remitted back to the trial court immediately. It is so ordered.

Dated, signed and delivered at Meru this 30th day of September, 2019.

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F. GIKONYO

JUDGE

IN PRESENCE OF

Mungania for appellant

Namiti for DPP

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F. GIKONYO

JUDGE.