REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

[CORAM: MRIMA, J.]

CRIMINAL APPEAL NO. 81 OF 2019

LM.....APPELLANT

-versus-

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. H. Ndungu Chief Magistrate in Meru Chief Magistrate's Criminal Case (S.O.) No. 37 of 2016 delivered on 4th day of December 2018)

JUDGMENT

1. The Appellant herein, **LM,** was charged in *Meru Chief Magistrates Court Criminal Case (S.O.) No. 37 of 2016* formerly Criminal Case No. 430 of 2013 (hereinafter referred to as '**the Case'**) with defilement of a 6-year-old girl. He denied the charge and a trial was ordered. The Appellant was represented by Counsel.

2. Five witnesses testified in the case. They were the complainant who testified as **PW1** one **DG**. **PW2** was the mother of the complainant. A neighbour to the complainant and PW2 testified as **PW3**. **PW4** was a Doctor from Meru Teaching and Referral Hospital. The investigating officer **No. 91227 PC Ambrose Korir** testified as **PW5.** For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. After the testimony of PW1 the prosecution informed the court that the Appellant appeared to be of unsound mind. It prayed for an order of mental assessment. The court made the order. The Appellant was examined and a report was prepared. The report was produced by a Consultant Psychiatrist from Meru Teaching and Referral Hospital on 27/02/2018. The Consultant took the court through the report. He confirmed that as at the date of examination the Appellant was unfit to plead. He however indicated that if the Appellant was put on drugs he was likely to recover.

4. The court then committed the Appellant to his brother for purposes of treatment. On 13/03/2018 the court on application by the prosecution ordered the trial to proceed as the Appellant continued with treatment. The trial proceeded thereafter. The Appellant was found to have a case to answer. He was placed on his defence. He gave a sworn defence and did not call any witness.

5. Judgment was rendered on 04/12/2018. The Appellant was found guilty as charged and he was convicted. The court considered the mental status of the Appellant and pursuant to **Section 167(1)(b)** of the **Criminal Procedure Code** committed him at the President's pleasure.

6. Being aggrieved by the conviction and sentence, the Appellant lodged the appeal subject of this judgment. He preferred 4 grounds of appeal as follows: -

> **1. The learned Magistrate erred in law and fact in conducting trial of the appellant contrary to the provisions of the law relating to persons of unsound mind.**
>
> **2. The learned magistrate erred in law and fact in finding that the appellant was not of unsound mind and that he was fit to plead contrary to medical evidence on record.**
>
> **3. The learned magistrate erred in law and fact in finding that the evidence on record proved that the appellant was guilty of defiling the complainant.**
>
> **4. The sentence passed against the appellant is illegal.**

7. Directions were taken and the appeal was heard by way of written submissions. The Appellant complied. The submissions were centered

on how the trial court handled the issue of the Appellant's insanity. He submitted that the trial was a nullity and prayed that the appeal be allowed, conviction quashed and sentence set-aside. The Court of Appeal decision in ***Mombasa Criminal Appeal No. 46 of 2015 Nyawa Mwajowa v Republic (2016) eKLR*** was cited in support of the submissions.

8. The appeal was partially opposed. The prosecution supported the conviction. It urged this Court to note that the charge was proved in law. It further implored this Court to be alive to the fact that the Appellant's mental condition was not that serious and that the Appellant was represented by Counsel and he fully participated in the trial. The prosecution however conceded to the appeal on sentence.

9. As this is the Appellant's first appeal, the role of this Court is well settled. It was held in **Okemo vs. Republic (1977) EALR 32** and further by the Court of Appeal in **Mark Oiruri Mose vs. Republic (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In discharging the above duty, this Court will first deal with the issue of the Appellant's mental status. The starting point is the law.

11. **Sections 162, 163** and **164** of the **Criminal Procedure Code** provides for the procedure in cases of lunacy or other incapacity of an accused person during the trial. **Section 166** of the **Criminal Procedure Code** provides for the defence of lunacy. **Section 167** of the **Criminal Procedure Code** provides for the procedure when one is committed into the President's pleasure.

12. The procedure to be followed once a Court is faced with an insane accused person has been repeatedly dealt with by the Court of Appeal. In ***Mombasa Karisa Masha v. Republic Criminal Appeal No. 76 of 2014*** as referred to in ***Nyawa Mwajowa v Republic*** (supra) the Court held as follows: -

> ***When the trial judge made the order of 20th September 2011 postponing the trial of the appellant and committing him to Port Reitz Hospital, it was pursuant to section 162 of the Criminal Procedure Code. By invoking that provision the court was proceeding on the basis that the appellant was of unsound mind and incapable of making his defence. Instead of the order which it made committing the appellant to Port Reitz Hospital, section 162 (4) obliged the court to order the appellant to be detained in such place and manner as it may think fit (including Port Reitz Hospital) and to transmit the court record or certified copy thereof to the Cabinet Secretary responsible for the Kenya Prison Service for consideration by the President. Upon considering the record the President would, by order, direct the appellant to be detained in a mental hospital or other suitable place of custody until such time as the President makes a further order or until the court, upon receiving a certificate from the relevant medical officer that the appellant was capable of making his defence and upon hearing the Director of Public Prosecutions on whether he wished to proceed against the appellant or not, orders the appellant to be brought before it for further proceedings……***
>
> ***We would add that courts of law should discourage emergence of a practice that is contrary to statutory provisions and procedure unless the provisions or procedures are first expressly invalidated by the court, amended or repealed. In this case, it must be borne in mind that under section 162(5), apart from making an order for the detention of the accused person in a mental hospital or any other suitable place, the President is empowered to make any further order in the matter. Such an order could be an order that is potentially for the benefit of the accused person, including possibly regarding his or her further trial or non-trial. By short-circuiting the prescribed procedure, the trial court could therefore unwittingly be denying an accused person an order that could be to his or her benefit. We are of the view that the provisions ought to be strictly followed and if they have outlived their purposes, they should be properly invalidated or repealed instead of encouraging a practice that is in direct conflict with statutory provisions. While we understand the basis of the practice of sidestepping the legal requirements involving the Cabinet Secretary and the President to be a desire to speed up the trial or conclusion of the issue of the accused person's mental status which is otherwise delayed by the bureaucracy of the two offices, we must emphasize that these are requirements of the law in respect of which no office can claim to be busy. The solution, in our opinion, lies not in short-circuiting the requirements of the law; but in insisting that the concerned offices discharge their legal duties with due dispatch as expected under the Constitution and the Criminal Procedure Code."***

13. From the record the issue of the Appellant's insanity was brought to the attention of the trial court on 18/09/2017. It was by the prosecution. The court enquired into the matter. It referred the Appellant for a mental assessment. A report was produced in Court by a Consultant Psychiatrist who confirmed that the Appellant was of unsound mind and was not fit to plead. That was on 27/02/2018.The court then committed the Appellant into the care of his brother for treatment.

14. On 13/03/2018 the court made the following order: -

> ***My direction are (sic) that the matter be set down for hearing even as the accused continues medical treatment and the court is continuously updated on his state.***

15. The above order was made without any medical update on the status of the Appellant. Clearly, the court did not follow the procedure in **Section 162** of the **Criminal Procedure Code.**

16. Apart from the foregone the Consultant made a further stunning revelation about the mental status of the Appellant as follows: -

> ***….I find a person with two conditions one which befall in childhood. It is intellectual disability. It was there since childhood.***

17. It is the foregone condition which rendered the Appellant unfit to plead at the time of the examination. It therefore means that the Appellant was in that condition even at the time he was alleged to have committed the offence. With that, I must first satisfy myself from the

record whether the offence was proved in law.

18. The proceedings and the judgment speak for themselves. The court properly analyzed the evidence and dealt with the three ingredients of the offence of defilement. It rightly found that PW1 was a minor. It also rightly found that there was a penile penetration into PW1's vagina. Lastly, it found that the Appellant was the assailant. The Appellant was indeed arrested in the course of the sexual act.

19. I have as well revisited the evidence. I wholly agree with the analysis by the trial court. I have nothing much to add other than that the offence of defilement was rightly proved against the Appellant.

20. Having so found, I remain alive to the Appellant's mental status. The defence of lunacy in **Section 166** of the **Criminal Procedure Code** perfectly falls in place. I hereby make a special finding that the Appellant was guilty, but insane. The appeal on conviction is dismissed.

21. I will now deal with the sentence. The court committed the Appellant into the President's pleasure under **Section 167(1)(b)** of the **Criminal Procedure Code.** That was on 04/12/2018.

22. **Sections 166** and **167** of the **Criminal Procedure Code** have undergone judicial scrutiny. The provisions were declared *'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.'* (See ***AOO & 6 others v Attorney General and Another Nairobi Petition No. 570 of 2015 (2017) eKLR, Hassan Hussein Yusuf v Republic Meru High Court Criminal Appeal No. 59 of 2014 (2016) eKLR*** among others.)

23. Given that the above declarations were made as early as 2016, the trial court therefore erred in committing the Appellant into the President's pleasure under **Section 167(1)(b)** of the **Criminal Procedure Code** in 2018**.** The appeal therefore succeeds on sentence. The sentence is hereby set-aside.

24. There are two rival positions on how to handle a convict upon the special finding. On one hand there is the proposition that the word 'President' in **Sections 166** and **167** of the **Criminal Procedure Code** be substituted with the word 'Court'. That was by *Majanja, J* in ***Kisumu High Court Criminal Case No. 6 of 2011 Republic v. SOM.*** On the other hand, there is the proposition that a Court ought to sentence the convict accordingly and transmit the proceedings to the concerned Ministry for consideration by the President under the provisions of the **Power of Mercy Act No. 21 of 2011.** The latter was by *Lesiit, J* in ***Nairobi High Court Criminal Case No. 78 of 2015 Republic v ENW (2015) eKLR***.

25. I have read the two decisions. I am persuaded by the approach taken in ***Nairobi High Court Criminal Case No. 78 of 2015 Republic v ENW*** (supra). I wish to add that by adopting that approach the sentence becomes definite and it reduces on each passing day. Remission also comes at hand. The power of mercy may be exercised accordingly. And, given the nature of mental illnesses it may take such a long period for the convict to recover; longer that a term of imprisonment. That means the convict will just be languishing in prison. That will highly prejudice the convict.

26. I have considered the circumstances under which the offence was committed. I have also revisited the mitigations. PW1 was a minor of tender age at the time the offence was visited on her. The Appellant was well over 50 years old. He took advantage of the minor. In further consideration of the sentencing guidelines I hereby sentence the Appellant as follows: -

> **(a) To serve 15 years' imprisonment. The sentence to run from the time the Appellant was charged before the trial court, that is on 06/05/2013.**
>
> **(b) The proceedings and judgments before the trial court and before this Court shall be typed, certified and transmitted to the concerned Ministry for consideration by the President.**

Orders accordingly.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at MERU this 30th day of October, 2019.

A. MABEYA

JUDGE