



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL 75 OF 2013

ERIC MUMO MUTHEU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. T. A.

Odera (PM) delivered on 18th February, 2013 in Mavoko Principal

Magistrates Court Criminal Case No. 288 of 2012)

JUDGMENT

The Appeal

The Appellant was convicted of, and sentenced to life imprisonment for the offence of defilement of a child, contrary to section 8(1) (3) of the Sexual Offences Act, after pleading not guilty to the offence and undergoing trial. The particulars were that the Appellant on 14th October 2010, at [Particulars withheld] in Athi River District within Eastern Province, intentionally caused his penis to penetrate the vagina of I.R. a child of 9 years. He had also been charged with the alternative offence of committing an indecent Act with a child contrary to section 11(1) of the Sexual Offences Act .

The Appellant filed an appeal against his conviction and sentence in a Petition and Grounds of Appeal that he lodged in this Court on 18th February 2013. Parties were then directed to proceed to hearing of the appeal by way of written submissions and the Appellant duly filed written submissions dated 13th March 2017, while Ms. Rita Rono, the Prosecution Counsel filed submissions dated 17th July 2017.

In the course of hearing the appeal, the Court noted that the Appellant was not coherent in his submissions, and the Prosecution counsel also informed the Court that the Appellant has been having psychological problems while in prison and was seeing a psychiatrist.

On 20th November 2017 this Court directed that the Appellant be examined by a psychiatrist. He was so examined on 21st December 2017 at *Mathari National Teaching and Referral Hospital* in Nairobi, and a medical report of that date was filed in court on 22nd January 2018. *Dr. Oyancha P.K, a Consultant Psychiatrist*, noted upon his examination of the Appellant, that he had an abnormal mental status and is unfit to stand trial.

As this is a first appeal, I was required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32). However, as the Appellant is not in a mental state to proceed with the hearing of the appeal, I am constrained to apply the procedure as regards set out in the Criminal Procedure Code in such circumstances.

In *Leonard Mwangemi Munyasia v Republic* [2015] eKLR, the Court of Appeal sitting at Malindi considered at length the different procedures that apply when the question of insanity arises during a trial. The said Court held that that where the trial court finds that the accused person was legally insane when he committed the crime, section 166 of the Criminal Procedure Code provides for the applicable procedure, whereby the trial Court has to report the case for the direction of the President, who may then order that the accused person be detained in a mental hospital, prison or other suitable place of safe custody.

The second procedure applies where the accused person, though sane when he committed the offence, is insane at the time of his trial and unable to follow the proceedings. This procedure is provided for under sections 162 to 164 of the Criminal Procedure Code,

which states that if in the course of a trial it becomes apparent, after the trial court has inquired into the issue, that the accused person is of unsound mind, and is therefore not able to understand the proceedings or make his defence, the court is required to adjourn the proceedings. Depending on whether the offence in question is bailable, the accused person may be released 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 of course, for his next and subsequent appearances before the court.

But if the case involved is one which bail may not be taken, or if sufficient security has not been given, the court will order for the detention of the accused person in safe custody in such a place as it may think fit and thereafter transmit the court record or certified copy thereof to the Minister (today Cabinet Secretary) for the time being responsible for prisons, who shall, in turn transmit it for the President's consideration.

The Court of Appeal was emphatic that it is only after the President directs that the accused person be detained in a mental hospital or such other place that the court will issue an order to effect the directive and the accused person shall be so detained until the President makes a further order after being satisfied from the report of the medical officer of the mental hospital or such other place, that the accused person is capable of participating in the trial. The Attorney General (today the Director of Public Prosecution) is required to indicate whether or not the State wishes to press on with the case against the accused person.

In *D M M v Republic* [2016] eKLR the Court of Appeal sitting at Malindi added that there is also the procedure prescribed by section 167 of the Criminal Procedure Code which applies where the accused person is not legally insane at the time of the commission of the offence or at the time of his trial, but cannot otherwise be made to understand the proceedings. Where such an accused person is tried by the subordinate court, the court is required by section 167(1)(a) to proceed to hear the evidence for the prosecution, and, any evidence for the defence if the accused is put on his defence, and depending on the court's evaluation of the evidence, it shall either acquit and discharge the accused if the evidence does not justify a conviction, or order the accused to be detained during the President's pleasure if the evidence justifies a conviction.

However, every such order shall be subject to confirmation by the High Court. The High Court is required by section 167(4) to forward to the Cabinet Secretary a copy of the notes of evidence at trial and a report containing any recommendation or observations on the case as it may think fit to make. Lastly under section 167(3) the President is empowered at any time, of his own motion or after receiving a relevant report, to order the detained person to be discharged subject to appropriate conditions on his welfare and supervision.

I find that sections 162 to 164 of the Criminal Procedure Code are the applicable provisions in this appeal, as there is no indication from the trial Court's proceedings that the Appellant was mentally unfit during trial, as he participated in the trial, including by cross-examining the prosecution witnesses as well as giving mitigation in his defence. There was however no medical examination and/or report on the Appellant's mental status in the trial proceedings. The Appellant has also not raised his mental status as a ground of appeal, and it has only become apparent during the hearing of the appeal that he is unable to follow the proceedings and to conduct the appeal.

Section 162 in this respect provides as follows:

“(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.

(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.

(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.

(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.

Although, these provisions do not expressly apply to an appeal, I hold that for purposes of this appeal, the Appellant is a person who is unable to make his defence and accordingly, I will be guided by section 162 of the Criminal Procedure Code and postpone the appeal to facilitate the Appellant's treatment.

I therefore commit the Appellant to the safe custody of *Mathari National Teaching and Referral Hospital* in Nairobi for treatment until he can understand these proceedings. In the event that the Appellant is found by the medical officer in charge of Mathari National Teaching and Referral Hospital to be capable of prosecuting his appeal while so detained in safe custody, the medical officer shall forthwith forward a certificate to that effect to the Director of Public Prosecutions, who shall thereupon follow the procedure set out in sections 163 and 164 of the Criminal Procedure Code .

It is so ordered.

DATED AT MACHAKOS THIS 21st DAY OF MARCH 2018.

P. NYAMWEYA

JUDGE