



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 64 OF 2008

REPUBLIC.....PROSECUTOR

-Versus-

J K M.....ACCUSED

RULING.

Postponing criminal proceeding

[1] The accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code CAP 63 of the Laws of Kenya. He first appeared in court on 12th November 2008. He did not take plea for there was no report on his mental condition. Again on 13th November 2008 he could not take plea for there was no record of his mental fitness to plead. On 13th February 2009 he was to be taken for mental treatment in Nairobi. On 15th May 2009 he was said to be under treatment at Mathari Hospital Nairobi. As at 14th June 2010 the accused had not taken plea due to mental instability. Plea was differed to 15th June 2010 when he finally pleaded not guilty before Kasango J. Soon thereafter, report was received from Meru Hospital that the accused was not mentally stable. The accused was committed to Mathari Hospital for treatment. See proceedings of 9th December, 2010. Subsequently, the accused was in and out of Mathari Hospital for treatment. The proceedings are replete with these incidents and recordings which I do not wish to multiply. However, on 17th October 2017, the accused was certified to be capable of making his defence under section 163(2) of the Criminal Procedure Code (CPC). See report filed on 21st March 2018. The accused appeared in court on 6th March 2018 but the court was still of the view that the accused was not fit to stand trial despite the fact that he had been certified to be capable of entering his defence. The accused's behavior and what he said was indecipherable and incoherent. Nonetheless, the case was fixed for hearing on 16th May 2018 but the accused was absent. The court directed the hearing to be undertaken on 30th July 2018 and the accused to appear. On the day of hearing, the accused was brought in handcuffs for he had been violent throughout his travel from the police remand to court. This information was relayed to court by the police. The accused was vicious and could not communicate. The court as well as the prosecution were convinced that the accused was still not able to make his defence. At that point, the court sought the prosecution to intimate to court whether they intend to proceed with these proceeding against the accused as provided for in section 163(2) of the CPC. But, Mr. Namiti did not provide any concrete response. He stated that he leaves it to the court. See section 163 of CPC on these issues:

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.

Accordingly, I am enjoined to dealing with the matter as provided under section 164 of the CPC which provides as follows:

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.

[5] I have formed the opinion that despite the fact that the accused has been certified to be capable of making his defence, and a certificate to that effect has been forwarded to the Director of Public Prosecutions, he still not capable of making a defence in this case. I do not wish to make a goof of the procedure in section 162 of the CPC. See the case of **GRACE NYAROKA vs. REPUBLIC, CR. APP. NO. 246 OF 2006 (NYERI)**. I will therefore employ the correct procedure as was set out in the case of **KARISA MASHA vs. REPUBLIC [2015] EKL**R by the Court of Appeal sitting in Mombasa 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.*”**

[7] To be properly grounded, the following is important. In this case, the accused was found by the medical officer in charge of Mathari hospital to be capable of making his defence and a Certificate to that effect was issued under section 163(1) of the CPC. In ordinary circumstances, the Director of Public Prosecution should 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.

[8] The prosecution did not act in accordance with section 163(2) of the CPC when it merely stated that; ‘I leave it to court’- something I find to be curious. I do not understand the dilemma on the part of the DPP as this case does not fall under article 157(7) of the Constitution which provides that:-

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.

[9] In the circumstances, and after the court required the accused to appear, the court considers the accused to be still incapable of making his defence. I shall, therefore, act as if the accused were brought before this court for the first time. I am guided by section 164 of the CPC. In light thereof, this court finds that the accused person is not capable of making his defence given the intermittent and almost frequent episodes of mental illness. Accordingly, pursuant to section 162 (4) of the Criminal Procedure Code, I postpone further proceedings in this case. The accused person shall be detained at Mathari mental hospital and a certified copy of this record be transmitted to the Cabinet Secretary for Ministry of Interior and National Coordination for consideration by His Excellency the President. It is so ordered.

Dated, signed and delivered in open court at Meru this 31st day of July 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Mutunga advocate for Mutunga for accused persons

Mr. Namiti for State

F. GIKONYO

JUDGE