REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 34 OF 2007

REPUBLIC

VERSUS

MIRIAM WACEKE MAINA…….1ST ACCUSED

ESTHER WATETU MAINA……2ND ACCUSED

JUDGMENT ON SENTENCE

Following my order of 26th June, 2015, the 1st accused person was examined at Mathari National Teaching and Referral Hospital inorder for this court to be informed of the appropriate sentence to be meted out against her.

On 22nd October, 2015, the Director of Public Prosecutions filed in this court a report on the outcome of the psychiatrist examination of the 1st accused. In his opinion, Dr Mucheru Wang'ombe, a consultant psychiatrist said:-

> ***The accused has been on treatment for depression and would benefit from long term medication and follow up.***
>
> ***As to whether she is fit to plead, she would benefit from an evaluation for her current mental status.***

The *"evaluation of the accused person's current mental status"* is exactly what the psychiatrist ought to have done and submitted his findings so as to enable this court to sentence the accused person appropriately; by suggesting that the "accused would benefit from such an evaluation" the psychiatrist is implying that he did not evaluate the accused person's mental status as expected.

That notwithstanding, the psychiatrist suggested, equivocally in my view, that the accused person suffers from depression. For purposes of sentencing, and if the psychiatrist's report is anything to go by, I would take it that the accused person suffers from some decease of the mind.

Mr Njuguna for the accused submitted on the report and noted, correctly in my view, that the report was of little assistance to the court. Counsel urged, however, that he was aware of an earlier report on the accused person's mental status which was amongst the documents he was supplied with by the prosecution at the commencement of the accused persons' trial. He urged the court to admit it under **section 329** of the Criminal Procedure Code.

The report that counsel referred to had been made by the late Dr Owino, the central provincial

psychiatrist, but which had hitherto not been produced in court. According to that report, Dr Owino established that the accused person suffered from depression and therefore she was unfit to take plea to the charges for which she was ultimately tried and convicted.

In view of the findings of this report counsel urged that the accused should be detained at the pleasure of the President and not be sentenced to death; he relied on the Court of Appeal decisions in **Criminal Appeal No. 261 of 2006, Julius Wariomba Githua versus Republic and in Criminal Appeal No. 239 of 2006, Harrison Mutisya & Another versus Republic.**

Mr Njue for the state acknowledged in response to the counsel for accused person's submissions that indeed there existed a psychiatrist report by the late Dr Owino in which the accused person was certified as unfit to stand trial but which could not however be produced in evidence because the prosecution was compelled by this court to close its case before that report could be produced. Counsel did not also object to the admission of that report for purposes of sentencing the accused person. He agreed with the counsel for the accused that since the accused person was not fit to stand trial and yet she had been convicted, she should be detained at the president's pleasure in lieu of the death sentence.

As noted there was a suggestion in the report of Dr Wang'ombe that the accused person suffers from depression; Dr Owino also referred to this mental illness in his report and perhaps it is on this basis that he found the accused person unfit to stand trial. I agree with both counsel for the state and the accused person that the court cannot close its eyes on these two reports and proceed to sentence the accused person as if she is a normal person. I have already noted elsewhere that the question whether she should have been tried in the first place can only be answered elsewhere.

The Court of Appeal was faced with a similar situation in **Julius Wariomba Githua versus Republic (supra)** in which the issue of the appellant's sanity was questioned at the appeal for the first time; the Court held that had this issue been interrogated at the appellant's trial, the trial judge could possibly have found the appellant guilty but insane. Going by the facts of the case, the Court of Appeal held that the trial court sentenced to death a man with a possible mental disorder. The court set aside the sentence of death and substituted it with that of detaining the appellant at the President's pleasure.

In **Harrison Mutisya & Another versus Republic (supra)** the Court of Appeal sustained the conviction of the appellants on a charge of murder but remitted the record back to the trial court for it to consider such mitigating factors and antecedents that would guide it in meting out the proper sentences against the appellants.

I agree and indeed I am bound by the foregoing decisions; it is in line with these decisions that I sought for evidence to assist me to mete out the appropriate sentence and also assist the President in the exercise of his prerogative of mercy. Accordingly, having considered further evidence and the mitigating circumstances, I would order that the accused person be detained at the President's pleasure in accordance with **section 167(1) (b)** of the **Criminal Procedure Code.** Orders accordingly.

Dated, signed and delivered in open court this 15th day of January, 2016

Ngaah Jairus

JUDGE