REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION NO. 32 OF 2015

DENIS MOGERA NYAKWARTA……APPLICANT

VERSUS

REPUBLIC……..……RESPONDENT

RULING ON REVISION

Denis Mogera Nyakwarta, the Applicant herein, was the accused person in Criminal Case No 178 of 2012 in the Principal Magistrate's Court at Makueni, wherein he was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. He pleaded not guilty to the offence on 22nd May 2012 and the trial commenced before Hon. J. Karanja PM on 9th August 2012 when three (3) prosecution witnesses testified, before the trial was adjourned. On 15th October 2012 the trial continued before the same trial magistrate and two more prosecution witnesses testified before it adjourned. The last two prosecution witnesses then testified on 10th January 2013 and the prosecution closed its case.

On that date, the court record shows that the said trial magistrate noted that the accused's behavior and utterances had led him to doubt the accused's sanity, and ordered that the accused person be subjected to a psychiatric examination. On 14th January 2013 the trial Court noted the contents of a report of that day's date by Dr. Munga Edgar of Machakos Level 5 Hospital, that indicated that the accused had an element of mental retardation, does not understand the charges and is not fit to plead.

On 7th February 2013, Hon. J. Karanja PM recorded that having been made aware that the accused is and has been of unsound mind, he was postponing further proceedings in accordance with the procedure in section 162(2) of the Criminal Procedure Code, and ordered that the accused be detained in safe custody at the Mathari Mental Hospital, and that a copy of the trial Court's record be transmitted to the relevant Minister pursuant to section 162(4) of the Criminal Procedure Code.

Several mentions of the case thereafter showed that the Accused person was still committed at Mathari Mental Hospital and was still unwell. On 8th October 2014, the matter came up before Hon. R. Koech PM, who noted that the accused person had been certified as capable of making his defence by a certificate issued by the Medical Superintendent of Mathari Mental Hospital dated 23rd September 2014, and sought production of the accused person. On 24th November 2014 the accused was brought before the said magistrate, and Mr. Mageria, the accused's lawyer, sought the accused's acquittal on the grounds that his right to fair trial was contravened as he did not understand the proceedings. The Prosecutor, IP Katumo submitted that he had not received instructions on the case from the Director of Public Prosecutions, and the matter was adjourned to await the said instructions.

On 22nd January 2015 the said prosecutor indicated to the trial Court that he had instructions from the

office of the Director of Public Prosecution directing that the case against the accused proceeds to its logical conclusion, whereupon the trial magistrate indicated that he would give directions when the accused's counsel was present. On 26th February 2015 and 25th March 2015, the accused's counsel applied for the case to start *de novo* pursuant to section 200 of the Criminal Procedure Code. The prosecution opposed the application on the ground that efforts to trace witnesses had been unsuccessful. On 27th April 2015 Hon. R. Koech directed that the matter be mentioned to get an indication from Hon. Karanja, who had by then been transferred to Meru, when he would be sitting or when he would deliver a ruling on whether the accused has a case to answer. Subsequently on 11th May 2015, Hon. R Koech informed the accused, his lawyer and prosecution that he had a discussion with Hon. Karanja who indicated he was ready to deliver his ruling and conclude the hearing.

The accused's counsel subsequently made an application to this Court by way of a letter dated 14th May 2015 for review of the orders issued by Hon. R. Koech on 11th May 2015, on the ground that the defence is opposed to the matter being transferred to Meru to be heard by Hon. Karanja, since at the time the prosecution witnesses testified the accused was unrepresented and was of unsound mind. He sought that the orders be quashed and the matter be heard *de novo.*

The prosecution opposed the application in a replying affidavit sworn by CPC Lincoln Wafula, who is attached to Kalawa Police Station, and is the investigation officer of Criminal Case No 178 of 2012 in the Principal Magistrate's Court at Makueni. He stated that he is not able to trace witnesses except for two witnesses, and that Hon Karanja is willing to hear and conclude the matter. Further, that the accused in that case had followed the proceedings and cross-examined witnesses before the trial magistrate noted that he was unwell, and the current report indicates he is fit to stand trial. He asked that the matter proceeds from where it had reached.

I have considered the Applicant's application and response by the prosecution. The applicable law in this application is Article 50(2)(q) of the Constitution which provides that every accused person has the right to a fair trial including the right if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. Section 362 of the Criminal Procedure Code in addition gives powers to this Court to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

Section 364 of the Criminal Procedure Code provides for the powers of the High Court on revision as follows in this regard:

> **"(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—**
>
> **(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;**
>
> **(b) in the case of any other order other than an order of acquittal, alter or reverse the order.**
>
> **(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:**
>
> **Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.**
>
> **(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of**

the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

With respect to the present application, I find that the issue before this Court is whether the correct procedure was followed by the trial court when it found the accused to be mentally unfit during the course of the trial. The accused's counsel, prosecutor and trial Court appeared to have proceeded on the basis of section 200 of the Criminal Procedure Code, which provides for the procedure to be followed when a matter is already part-heard before another judicial officer, and provides the options of either relying on the evidence of that judicial officer, having the matter proceed before the said judicial officer, or having the hearing of the matter start *de novo.*

However, the correct procedure that ought to have been followed, and which was initially followed by Hon. Karanja when he ordered that the accused be taken for psychiatric examination, is the one provided for in section 162 of the Criminal Procedure Code, as held by the Court of Appeal **Charles Mwangi Muraya v Republic [2001] eKLR** as follows;

"We have previously, quoted verbatim section 162(1) CPC in this judgment.

The words of the section, to our minds, are clear and unmistakable. They place a duty on the Court, to invoke the section, at the time, in the trial or committal proceedings, when the issue of unsoundness of the accused's mind arises. That is the stage at which, the Court should carry out an inquiry into the issue. We stress the use of the word "shall" in the section which, to our mind, places a mandatory obligation on the Court to carry out the inquiry at the time at which the issue arises in the trial or committal proceedings. We are satisfied that the section does not allow the Court to defer the inquiry until the judgment because, at that stage, it will be too late to carry out an inquiry and, even if the inquiry is carried out, its results would be inconsequential to the trial, should, for example, the accused be found to have been mentally unfit to stand trial.

We are fortified in our view by section 162(2) CPC which we quoted earlier in this judgment. It is obvious, that sub-sections (1) and (2) of section 162 of the CPC, must be taken together. The inquiry is carried out in terms of sub-section (1). If the inquiry indicates that the accused person is capable of making his defence, then the Court adjourns further proceedings and the steps set out in the sub-sections 3, 4 and 5 of section 162 of the CPC are then taken. It is a fundamental requirement in criminal trials that an accused person should understand, follow and fully participate in his trial. Section 162 CPC as a whole, is a safeguard meant to achieve that fundamental requirement. That is the reason why the section makes it mandatory for an inquiry to be done immediately when the issue arises, and if, upon inquiry, there is evidence of unsoundness of mind, further proceedings must be adjourned and further consequences follow to ensure the accused is medically treated and becomes mentally fit to understand, follow and participate in the trial."

Section 162 of the Criminal Procedure Code in this regard 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. 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."

Section 163 provides for the procedure to be followed when a person who was found mentally unfit during trial, is subsequently found capable of making his defence as follows:

"(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."

Section 164 of the Criminal Procedure Code in this respect provides that the court may 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.

The trial Court therefore ought to have proceeded under section 163 and 164 of the Criminal Procedure Code, and examined the import and effect of these sections on the trial, before deciding that the matter should proceed to hearing before the trial magistrate who had previously heard the matter. In particular the decision whether the Applicant should be discharged or the trial should resume ought to have been considered, and if the trail was to resume, in what manner. In other words it was premature to apply the provisions of section 200 of the Criminal Procedure Code before first determining the application of sections 162, 163 and 164 of the Criminal Procedure Code in the circumstances of the Applicant's case.

Coming to the application of section 163 and 164 and what consequences should follow in the present application, I have had regard to the effect and construction of section 162 of the Criminal Procedure Code, as was considered by Gikonyo J. in **Republic vs J W K (2013] eKLR,** wherein the learned Judge held as follows;

> **"With tremendous respect, I think, the use of the words *incapable of making his defence* in section 162 may be the source of the believe by the prosecution that the section relates to a case whose hearing has commenced. I think, the phrase '*incapable of making his defence*' refers to the entire course of the proceeding; from the inception of the charges and throughout the trial to the time when sentence is passed, for, the defence of the accused person begins, at least, immediately the charges are instituted in court, if not earlier. Section 162 of the CPC would therefore applies at the time of taking plea and at any other time during the trial. That is why under Article 50 of the Constitution, the accused person should be fit to plead, be informed of the charge with sufficient details, be informed in advance of the evidence the prosecution intends to rely upon, be given sufficient time and facilities to prepare a defence and so on…"**

I am persuaded by this reasoning for the reason that it is a fundamental constitutional principle that the right to fair trial in criminal proceedings includes the right to be informed of the charge, to understand the charge, be able to follow the proceedings and instruct counsel for purposes of objective legal representation. If a person is suffering from a disease of the mind and cannot plead or understand the proceedings or make his defence, then there is a fundamental error in the proceedings, which cannot then be allowed to continue.

In the present application it cannot be said with certainty that the Applicant's mental illness was only present at the time the trial magistrate noted that he was unwell, and could have arisen earlier in the proceedings. In addition the medical report that was filed upon the psychiatric examination of the Applicant noted that the Applicant was did not understand and was unfit to plead to the charge. In the circumstances, justice in this matter will only be served if the Applicant's trial before Hon. J. Karanja PM is declared a mistrial. **A mistrial has in this respect been** defined in **Black's Law Dictionary (9th Edition)** as follows:

> ***"a trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings"***

As to whether the Applicant's trial should resume, it is my view that any such resumption of the trial would have to be *de novo*, with the Applicant taking a plea when it is certified that he is mentally fit to plead. However, given that the prosecution has in the present application indicated that it will have difficulty procuring the witnesses, it will be unjust to hold the Applicant in custody indefinitely awaiting the procurement of the said witnesses. I accordingly discharge and release the Applicant forthwith pursuant to the provisions of section 163(3) of the Criminal Procedure Code. The office of the Director of Public Prosecutions is however at liberty to charge the Applicant for the same or similar offence on the same facts, once they have procured their witnesses.

Orders accordingly.

DATED AT MACHAKOS THIS 3RD AUGUST 2016.

P. NYAMWEYA

JUDGE