REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HC CRIMINAL REVISION NO. 3 OF 2016

(IN THE MATTER OF REFERRAL UNDER SECTION 167 OF THE CRIMINAL PROCEDURE CODE, CAP. 75, LAWS OF KENYA)

J. M.……..…....…...APPLICANT

VERSUS

REPUBLIC…….....……...RESPONDENT

RULING

1. This file has been referred to this Court pursuant to the provisions of Section 167(1)(a) of the Criminal Procedure Code, Cap 75 (CPC) which provides:

> **"167(1) If the accused, though not insane, cannot be made to understand the proceedings-**
>
> **a. in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President's pleasure; but every such order shall be subject to confirmation by the High Court;"**

2. The question that comes to mind at this early stage concerns the reach of the power given to this court by the cited section. In my view, this Court is called upon to go through the entire court record before confirmation of the order of the trial court. It is a power akin to the revisionary power granted to this Court by Section 362 of the same Code. The Court is therefore under a duty to satisfy itself as to the correctness, legality or propriety of the proceedings and the resultant decision before confirming the order to the President.

3. The power donated to this Court is not one to be taken lightly. Firstly, the accused person in such a case is incapable of taking care of his or her interests and the Court should ensure that the rights of such a vulnerable member of society have been enforced before confirming a detention order. Secondly, as was pointed out by Meoli, J, which view I subscribe to, in the case of **K. K. v Republic [2016] eKLR,** an order under Section 167(1)(a) extinguishes an accused person's right of appeal. This is why I have opined that this power is akin to the revisionary power of this Court. In my view, a judge cannot be expected to hear an appeal arising from a decision he or she has confirmed.

4. I have also agonized as to whether I should proceed with this matter without the input of the parties herein. At the end I have reached the conclusion that this is a power that ordinarily should be exercised

after the parties have been heard. However, like the exercise of the revisionary powers of the Court, this is a power that can as well be exercised without involving the parties. In the case at hand, I have not found it necessary to involve the parties as the decision I intend to reach will not prejudice any of the parties.

5. It is important at this stage to briefly state the history of the matter. The Applicant was charged with defilement of a girl contrary to Section 8(1) (3) of the Sexual Offences Act, 2006. It was alleged that on diverse dates between 15th and 24th March, 2014 in [Particulars Withheld] Estate, Township Sub-Location within Busia County, he caused his penis to penetrate the vagina of C. O., a child aged 3½ years. He was faced with an alternative charge of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act, 2006.

6. At the conclusion of the trial the Applicant was found guilty and convicted of the main charge. The Chief Magistrate has correctly and in accordance with Section 167(1)(a) placed this file before me for confirmation. The issue for the decision of this Court is whether the decision of the Chief Magistrate convicting the Applicant and directing that he be detained at the President's pleasure should be confirmed.

7. The Applicant is a young man suffering from mental retardation which began when he was a minor. There is conflicting information on record as to his actual age. However from the court record, before committing the offence he was a student at [particulars withheld]

8. When the Applicant was first presented in court on 24th March, 2014, he was referred for psychiatric and age assessment. Subsequently, when the mental evaluation was done he was presented in court on 23rd April, 2014.

9. The initial report dated 16th April, 2014 was prepared by Dr. Kibet from Kakamega County General Hospital. According to this report, the doctor noted that the Applicant exhibited signs of mental retardation following an illness suffered in early childhood. This is what the doctor stated in his medical report:

> **"The above has been assessed as an individual and in the presence of the mother and found to be mentally retarded.**
>
> **As such his judgment for age is severally compromised. All previous medical care point to retardation following the illness suffered in early childhood.**
>
> **However he can still build a case, previous interviews and current interviews have been consistent."**

10. Based on this report, the trial Court had the charge read out to the Applicant to which he pleaded not guilty. This was however after counsel representing the Applicant, Mr. Makokha requested for another medical mental assessment to be done on his client to confirm if he was indeed of sound mind and fit to stand trial.

11. His concern and sentiments were confirmed by the prosecution which also concurred that the Applicant did not appear to be of sound mind.

12. A second report dated 30th June, 2014 was prepared at Mathari National Teaching and Referral Hospital by Dr. F.R Owiti who concluded that:

> "**I feel that the accused who looks thin with microcephaly (small head), has brain damage sometime referred to as subsderosi pan encephalitis (SSPE). He is therefore a handicapped person. Difficult for him to explain his acts if ever it happened. He is presently not fit to plead."**

13. On 16th September, 2014 when the matter was scheduled for hearing, Mr. Makokha counsel for the Applicant brought to the court's attention that the Applicant went for medical examination. Whatever else transpired in court on that day is a total blur as the handwritten proceedings are missing.

14. There is a third report dated 15th March, 2016 authored by Dr. Mbiti of the County General Hospital-Kakamega. His observation is as follows:

> **"During assessment the accused was [of] poor concentration, poor memory and judgment. He had incoherent speech not oriented in time, space and people.**
>
> **According to the mother, the accused developed medical complication when 3 months old.**
>
> **The accused has features suggestive of mental disturbance possible mental retardation.**
>
> **The accused is not fit to plea."**

15. It is noted that on 4th June, 2014 when the plea was taken the only medical report on record was that of Dr. Kibet in which he had opined that the Applicant could build a case. That report could have meant that the Applicant was fit to plead. The trial magistrate was therefore correct in asking the Applicant to respond to the charge.

16. On 16th July, 2014 when the matter came up for mention counsel for the Applicant indicated that he had seen the second medical report from Mathare but nevertheless suggested that a hearing date could be fixed. The prosecutor concurred. The trial magistrate, Ogola D. O., Acting Chief Magistrate indicated that he had also seen the report and fixed the matter for hearing.

17. In my view, that is the point at which the Applicant's trial was derailed. The second report of Dr. F. R. Owiti was clear that the Applicant was not fit to stand trial. On being informed of the condition of the Applicant, the Court ought to have halted the hearing and carried out an inquiry under Section 162(1) of the CPC to establish whether the offender was of sound mind and consequently whether he was able to understand the proceedings and make his defence.

18. In the case at hand, the trial Court did not make a determination as to why the matter was allowed to proceed under Section 167 of the CPC. The Court needed to do so in order to justify the decision to proceed under that Section as it is meant for persons who **"though not insane, cannot be made to understand the proceedings."** It was therefore necessary for the experts to determine that the Applicant is of sound mind but could not be made to understand the proceedings. In all the three medical reports the doctors formed the opinion that the Applicant was mentally retarded. They however failed to specifically indicate as to whether that amounted to unsoundness of mind necessitating the proceedings to be undertaken under Section 162 of the CPC. They also did not state whether the Applicant's condition is treatable.

19. In my opinion, Section 167 is one to be applied where it is very clear that whatever impedes an accused person from understanding proceedings is anything else but unsoundness of mind. My position receives backing from F. Gikonyo, J in **Republic v J. W. K. [2013] eKLR** wherein he stated that:

> **"It is also a requirement under the law and particularly sections 162 and 167 of the CPC that the court must first make a finding on whether the offender is of unsound mind (s.162) or is not insane (s. 167)….**
>
> **As I have already pointed out, it is only in very clear cases where unsoundness of the mind is not an issue, that the court should feel constrained to strictly apply section 167. For section 167 to apply, the prosecution must prove the juvenile offender is sane only that he does not understand the proceedings."**

20. It is important for anybody who desires to proceed under Section 167 of the CPC to remember that the said provision chips at the cornerstones of the right to a fair hearing. Among other things, a fair trial as envisaged by Article 50 of the Constitution requires that an accused person be informed of the charge; understands that charge; be represented by an advocate of his choice; and adduces and challenges evidence. A person who cannot follow proceedings is incapable of personally exercising those rights and great care must be taken and good reasons given before such a section can be invoked.

21. Considering the proceedings before the trial Court, it is apparent that no basis was established for proceeding under Section 167 of the CPC. For that reason alone I would not recommend to the President that the Applicant be committed to detention.

22. There is another reason why this Court cannot confirm that order. This is the fact that no *voire dire* examination was carried out on PW1 and PW2 who were both children of tender years. When PW1 C. A. A. appeared in Court to testify on 26th January, 2015 the Magistrate observed as follows:

> **"This court note the apparent age of the intended witness. She is obviously of a tender age. I rule that she may give an unsworn evidence. Case to proceed in camera as it is a children's case."**

23. The same comments were made about PW2 A. O. O. who was also said to be a child of tender years.

24. The purpose of a *voire dire* examination is to enable the Court to decide whether a child witness of tender age is possessed of sufficient intelligence and appreciates the importance of telling the truth-see **Maripett Loonkomok v Republic [2016] eKLR.**

25. It is imperative that the *voire dire* examination should appear on the Court record. The Court of Appeal discussed this issue in **Maripett**(supra) as follows:

> **"[T]he format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that *voire dire* examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child….The courts today accept both the question and answer format and the recording of the child's answers only….What is constant is that, whatever format the court adopts it must be on record."**

26. As already demonstrated, the Court in the matter which is the subject of these proceedings did not comply with the requirement to have the interview of PW1 and PW2 on record.

27. The importance of a voire dire examination was explained by the Court of Appeal in **Samuel Warui Karimi v Republic [2016] eKLR** thus:

> **"In our own understanding of the above provisions of the law voire dire is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the *Evidence Act*, the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence."**

28. The Court of Appeal went ahead and held that the purpose of undertaking *voire dire* examination in a criminal trial is to protect the accused person's guaranteed right to a fair trial and where it was necessary to conduct such an examination and no such examination had been carried out then a conviction resulting from such a trial, especially where the witness in question was the complainant, should not be allowed to stand.

29. The conviction herein was thus not safe and I find an illegality in the proceedings that resulted in the Applicant's conviction. The upshot is that this Court declines to confirm the proceedings and order of the trial Court.

30. The proceedings and conviction by the Chief Magistrate's Court are quashed. Considering the seriousness of the offence for which the Applicant was charged and convicted, this matter is referred back to the Chief Magistrate's Court at Busia where it shall proceed before a magistrate other than H. N. Ndungu, Chief Magistrate in accordance with the guidelines given in this decision.

31. With respect to the independence of the Office of the Director of Public Prosecution, I think, if the experts eventually establish that the Applicant's condition is untreatable this will be a matter for termination under Section 40 of the Sexual Offences Act, 2006.

32. Finally, I direct that the Applicant be produced before the Busia Chief Magistrate's Court within ten days from the date of this ruling.

Dated, signed and delivered at Busia this 29th day of Sept., 2016

W. KORIR,

JUDGE OF THE HIGH COURT