REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 125 OF 2014

M M……………..……….....…………APPELLANT

VERSUS

REPUBLIC…………………...……RESPONDENT

(An appeal arising out of the conviction and sentence of H.M. Ng'ang'a RM delivered on 15th August 2013 in Criminal Case No. 377 of 2010 in the Resident Magistrate's Court at Tawa)

JUDGMENT

The Appeal herein essentially raises one ground of appeal, which is the legality of the proceedings in the trial Court. The Appellant herein was convicted of the offence of defilement , contrary to section 8(b) as read with section 8(3)of the Sexual Offences Act, and thereupon detained at the Machakos G.K Prison during the President's pleasure subject to confirmation by this Court. It was further ordered by the trial magistrate that the file of the trial Court be placed before this Court for confirmation of the legality of the proceedings therein and confirmation of the order of detention.

The Appellant was charged in the trial Court with the offence of defilement of a child aged six years contrary to section 8 (1) as read with subsection 2, and in the alternative with committing an indecent act with a child contrary to section 11 of the Sexual Offences Act. The judgment he has appealed was given after a retrial was ordered by the High Court. Before proceedings with the retrial, the trial magistrate sought a medical report on the Accused which revealed that he was suffering from mental retardation, and proceeded to rule as follows on 22nd November 2012:

> **"I have read the report dated 19th November 2012 from the Ministry of Medical Psychiatric Machakos Level 5 hospital prepared by Dr. Mungai Edgar. The opinion of the doctor is that the accused seems to have intellectual impairment/mental retardation and would not be able to advice. However there is nothing to suggest that he is not fit to stand trial.**
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> **He had already taken plea afresh and pleaded not guilty. His mental status would only inform the likely sentence in case of conviction but would not prejudice the retrial in my opinion. As ordered by the High Court , I am ordered to direct that this matter be fixed for hearing on 20th December 2012"**

On 31st January 2013 the trial magistrate sought a conclusive medical report as to whether the accused was or was not fit to stand trial. A second report dated 11th March 2013 found that the Appellant was suffering from mental retardation and that his condition could not be treated. Further, that he was not able

to advice counsel, follow court proceedings or understand charges against him. The trial magistrate then ruled as follows:

> **"The doctor has opined that the condition of the accused cannot be treated. As guided by the decision of the learned judge, it is therefore not necessary to refer the accused as this stage to a mental institution. It is my finding that the only viable route to follow in the interest of justice is to proceed with the retrial of this case. I therefore direct that this case proceeds for hearing on priority basis"**

The trial magistrate proceeded to hear seven prosecution witnesses, and the Appellant stated he had no question in cross-examination for all the said witnesses. I have also evaluated the evidence in the trial Court and note that the complainant M M M in her evidence clearly stated that the Appellant removed his underpants and put something in the place she uses to urinate and that she felt pain. There was thus evidence of penetration, which was corroborated by the evidence of Dr. Andrew Mulwa who was PW7, and who produced a P3 form that showed that upon examination of the complainant's genitalia, there was laceration, an awful smell and hymen was broken. Lastly, Peter Kioko Mbilu, who was PW3 also corroborated the complainant's evidence by placing the Appellant at the scene of the crime when he testified that at the material time which was on 15th October 2012 at around 12 pm he saw the Appellant go into the complainant's father's house, and come out after about twenty minutes.

The trial Court found that the Appellant had a case to answer and put the Appellant on his defence. The Appellant chose to remain silent, whereupon the trial Court in its judgment held that he was guided by section 167(1) of the Criminal Procedure Code and proceeded to convict the Appellant on the basis of the evidence adduced, and detained him at Machakos G.K. Prison at the President's pleasure.

The Appellant's grounds of appeal as stated in Amended Grounds of Appeal and submissions dated 27th November 2015 that he availed to the Court, are that the trial magistrate failed in points of law and fact when he failed to comply with due process of law as set out in Article 50(2)(h) and Article 54 (1)(c) of the Constitution. According to the Appellant, once it was found that he was not able to give advice to legal counsel or understand the proceedings he was entitled to be informed of his right to have an Advocate and to be provided with an Advocate.

Ms Mogoi Lilian, the learned prosecution counsel relied on sections 166 and 167 of the Criminal Procedure Code to argue that the insanity of an accused person or failure to follow or understand court proceedings does not stop criminal proceedings and the case does not automatically terminate. Reliance was also placed in this regard on the decision in **Republic vs Amani Davi Dena (2001) e KLR.**

As this is a first appeal, I am 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**).

From the foregoing submissions and evidence, I find that the issues raised in this appeal are firstly, whether the appellant's case was handled in accordance with the relevant provisions of the law, and secondly, if so, whether the Appellant's conviction and sentence for the offence of defilement was legal.

In **Leonard Mwangemi Munyasia v Republic [2015] eKLR**, the Court of Appeal sitting at Malindi set out the procedures to be followed by the court in two instances where the. considered at length the different procedures that apply when the question of insanity arises at the 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 questions is bailable (all offences are today bailable subject to the circumstances of each case) 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 subordinates 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.

The trial magistrate in his judgment held that at the commencement of the trial he was faced with the challenge of whether to proceed with the trial in view of the psychiatric report dated 11th March 2013 or refer the accused person to a mental institution. He further noted that the psychiatrist report was clear that the accused person could not understand the proceedings and/or instruct counsel, and that this is made it difficult to contemplate an order that the accused be accorded legal representation at the expense of the state. Therefore, that in proceedings with the trial he was guided by section 167(1) of the Criminal Procedure Act.

There are two faults I have noted in the findings and proceedings at the trial Court. The first concerns the stage of the trial at which the election as to which procedure to follow is made and communicated, after the discovery of a mental condition that may affects an accused person's participation in the trial. It is my view and holding in this regard that such an election as to which procedure as between the ones provided in sections 162, 166 and 167 of the Criminal Procedure Code should be made at the earliest possible moment, when it becomes apparent to the trial Court that the accused person is suffering from some mental impairment, and a ruling clearly made on the record in this regard.

Therefore, the trial magistrate at the time of electing to proceed with the trial, should have clearly ruled that the procedure he was following was the one provided for under section 167 of the Criminal

Procedure Act, and given his reasons. This also gives an opportunity to the accused person to give his views and opinion as to the procedure being employed by the Court. The trial magistrate instead explained the procedure used during the judgment stage, which was by then too late for any intervention by the accused person.

Neverthless, having considered the contents of the medical report given in the trial Court particularly the finding that the accused person was of low intelligence and not able to follow proceedings, I am in agreement that the proper procedure that ought to have been followed is the one provided for under section 167 of the Criminal Procedure Code, as there was no clear finding of insanity. In addition, in substance this is the procedure that was largely employed by the trial magistrate.

What I need to consider is whether the irregularity noted in the foregoing occasioned a failure of justice or whether it is one that can be cured under section 382 of the Criminal Procedure Code. Section 382 obliges this Court when making this determination to have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. In light of the medical report and findings on the mental state of the Appellant, and the fact that he was unrepresented during the trial in the lower court, he was not in a position to raise an objection. Further, given that the procedure applied affected his liberty in a significant manner, I find that he was prejudiced to this extent, and that the trial proceedings in the lower court were therefore vitiated.

In this respect this Court also ordered that another psychiatric examination be conducted on the Appellant, and a report dated 13th April 2016 was filed in Court on 28th April 2016 by Dr. Munga Edgar who confirmed that the Appellant is suffering from a condition Intellectual Development Disorder (Mental Retardation) which is characterized by subnormal level of intelligence and difficulty in performing normal daily activities. Further, that the condition is not treatable but can be managed. In relation to the proceedings the report stated that the Appellant would have profound difficulty in effectively following court proceedings, fully understanding the charges facing him and advising counsel. This Court also observed during the hearing appeal that the Appellant was not able to coherently participate in the hearing.

The second area of concern noted by this Court in the judgment of the trial magistrate, was the finding made as regards the legal representation of the Appellant, whereby the trial magistrate held as follows:

> **"The psychiatrist report was clear that the accused person could not understand the proceedings and/or instruct counsel . This made it difficult to counterplate *(sic)* and order that the accused person be accorded legal representation at the expense of the state"**

It is my view that his inability to understand the trial proceedings on the contrary entitled the Appellant to legal representation at the State expense. Article 50 (2) (h) of the Constitution in this regard provides that an advocate ought to be assigned to an accused person at State expense if substantial injustice would otherwise result.

This article was the subject of the Court of Appeal's decision in the case of **<u>David Macharia Njoroge vs Republic</u> [2011] eKLR** . The court after reviewing the past and current law stated that as follows:-

> *"**Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."***

An accused person who is not able to understand proceedings due to a mental impairment clearly falls within the category of persons who qualify for legal representation at the state's expense, and to this extent the Appellant's right to a fair trial were violated by his participation in a trial process he did not understand and without legal representation.

In addition, taking into account that the judgment appealed from in the present appeal was as a result of a second trial that the Appellant was undergoing in the trial Court, the Appellant has been doubly prejudiced, and his appeal should succeed. Needless to say, accused persons found not mentally fit and unable thereby to understand the trial proceedings or make their defence should now be among the categories of accused persons that should benefit from legal aid under the Legal Aid Act, 2016 which came into force on 10th May 2016.

Before I conclude will at this point also add my voice to the concerns raised and noted by various Courts as regards the law and procedures on trials of persons who are suffering from a mental illness. I note in this regard the decisions by the High Court (Kiarie Waweru Kiarie J.) in **Hassan Hussein Yusuf vs Republic (2016) e KLR** that the procedure in section 167 of the Criminal Procedure Code is unconstitutional on account of the provisions that allow for the keeping a sick person in prison for an indeterminate period, which was found to be cruel, inhuman and degrading treatment.

In **Karisa Masha v Republic [2015] eKLR** the Court of Appeal also recommended that the C*abinet Secretary responsible for the Kenya Prison Service notes the concerns raised in the judgment therein and takes remedial measures regarding the examination and evaluation of prisoners by psychiatrists. I am of the view that the time is nigh for an overhaul of the law relating to criminal proceedings involving persons suffering from a mental illness, to align it with the Constitution and provide for other more appropriate and humane alternatives for the management and treatment of such accused persons.*

It is in this regard important to appreciate that the subs-stratum of the provisions as regards the right to fair trial in criminal cases in Article 50(2) of the Constitution is that an accused person should be fully informed, understands, and is thereby facilitated to effectively participate in a criminal trial. To go through the motions of a trial which an accused person does not from the outset understand and be convicted on the basis of such a trial as is provided for in section 167 of the Criminal Procedure Act is in my view manifestly unconstitutional.

I accordingly allow the Appellant's appeal and quash his conviction for the offence of defilement contrary to section 8(b) as read with section 8(3)of the Sexual Offences Act. I also set aside the order detaining the Appellant in prison during the President's pleasure, and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER 2016.

P. NYAMWEYA

JUDGE