



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 34 OF 2007

REPUBLICPROSECUTOR

VERSUS

MIRIAM WACEKE MAINA.....1ST ACCUSED

ESTHER WATETU MAINA.....2ND ACCUSED

RULING

The accused persons were jointly charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The record shows that the trial was conducted before three different judges the last of whom was my predecessor at the station, Hon. Mr Justice Wakiaga.

On 19th March, 2015, I delivered the judgment in the case on behalf of Justice Wakiaga. In his judgment, my learned brother found that the prosecution had proved its case against the 1st accused beyond reasonable doubt and convicted her accordingly. The 2nd accused was acquitted of the murder charge.

Soon after I read the judgment and before mitigation, counsel for the accused persons Mr. Njuguna Kimani informed the court that according to the psychiatrist report of 10th August, 2007 the person convicted was unfit to stand trial. Based on this report, it was the counsel's view that accused person's trial was a mistrial and should be declared so.

When Ms, Maundu, counsel for the state responded, she urged that this is a question which could only be taken on appeal and that having delivered its judgment, this court was now *functus officio*.

Counsel for the accused could not agree because in his view the accused person had not been sentenced. Relying on the High Court decision in **Criminal Case No. 116 of 2007 Republic versus John Kimita Mwaniki** where it was noted that the Court of Appeal had previously held that even in offences where punishment is prescribed the court should always inquire whether there exists special circumstances that would mitigate the imposition of the prescribed punishment, counsel urged that the accused person could not be sentenced when her mental status had been certified to be unstable and thus not fit to mitigate. I went through the High Court but I could not find the citation of the said Court of Appeal decision.

A perusal of the Criminal Procedure Code, however, reveals at least two provisions which would be applicable in the circumstances of this case and in particular on the question of passing of sentence. The first of these provisions is **section 323** of the Code which **states**:

323. Calling upon the accused

If the judge convicts the accused person, or if the accused person pleads guilty, the Registrar or other officer of the court shall ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings.

Related to the foregoing provision is **section 329** of the **Code** which states:-

329. Evidence for arriving at a proper sentence

The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

These two provisions of the law suggest, first, that upon conviction, the accused person may mitigate on the sentence but that failure to accord him this opportunity does not affect the validity of the proceedings. Secondly, in considering the sentence against the accused person, the court has the discretion to take further evidence so as to inform itself of the proper sentence to be meted out.

These provisions provide what I suppose is a safer option out of this situation than declare the proceedings a mistrial as suggested by counsel for the accused; I would agree with counsel for the state that the best placed court to do that, if that court finds any merit in doing so, is the Court of Appeal. This court is ill-equipped to fault its own proceedings particularly where that fault is founded on what is alleged to be an error on a point of law.

For purposes of sentencing and concluding this matter, I would therefore invoke **section 329** of the Code and direct that the accused person be escorted to the consultant psychiatrist at Mathari Mental Hospital in Nairobi for mental assessment; the psychiatrist's report on the accused person's mental status should guide this court on the proper sentence to be meted out against.

I direct that the psychiatrist's report to be filed in this court within fourteen days of the date hereof. Orders accordingly.

Dated, signed and delivered in open court this 25th June, 2015

Ngaah Jairus

JUDGE