



**Republic v JWK (Criminal Case 57 of 2009)  
[2013] KEHC 6001 (KLR) (12 February 2013) (Ruling)**

*REPUBLIC v J W K [2013] eKLR*

Neutral citation: [2013] KEHC 6001 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA**

**CRIMINAL CASE 57 OF 2009**

**F GIKONYO, J**

**FEBRUARY 12, 2013**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JWK ..... ACCUSED**

**In all cases where one was of unsound mind, the proper approach was to look at the overall effect of the incapacitation by the disease of the mind.**

*The issue that had arisen was that of unsoundness of mind of the child offender, which made him unfit to plead, understand the proceedings and also make his defence. The court held that in all cases where one was suffering from a disease of the mind, the proper approach was to look at the overall effect of the incapacitation by the disease of the mind to see if it rendered the person incapable of understanding the charge, and to make his defence. The court further held that to place a person suffering from such a condition, and more so a child, under a cloud of criminal proceedings ad infinitum would be a great prejudice to known human qualities, the right to fair trial and rights of a child, and largely, it would be a disparage of the Constitution.*

Reported by Kakai Toili

**Family Law** - children - children in conflict with the law - child offenders of unsound mind - rights of children of unsound mind - duties of the court in a trial process of children of unsound mind - best interests of the child - whether child offenders were fit to stand trial - whether detaining child offenders was appropriate - Constitution of Kenya, 2010, article 53 and 159 - Criminal Procedure Code, Cap 75, sections 162 and 167.

**Brief facts**

The issue that had arisen was that of unsoundness of mind of the child offender, which made him unfit to plead, understand the proceedings and also make his defence. The analysis was therefore an inquiry by the court into the condition of the unsoundness of mind of the offender under section 162 of the Criminal Procedure Code (CPC), for the court to determine whether it should proceed as per sections 162, or 167 or as demanded by the



Constitution in dealing with the proceedings in the obtaining circumstances. The trial had not commenced at all, and so the inquiry was not in the context of a defence of insanity by the juvenile offender.

### **Issues**

- i. Which was the appropriate legal process to undertake in dealing with a child offender who suffered a disease of the mind and therefore incapable of pleading, understanding proceedings or making his defence?
- ii. What was the distinguishing factor when dealing with persons of unsound mind under section 162 and 167 of the Criminal Procedure Code (CPC) and which was the applicable section in the circumstances?
- iii. What was the best legal process to adopt in cases where the disease of the mind of the child offender was developmental in nature and had no prospects of subsiding?
- iv. What did the Constitution provide as being the best course to take particularly where an offender was of unsound mind?

### **Relevant provisions of the Law**

#### **Constitution of Kenya 2010**

##### **Article 53**

*(1) Every child has the right -*

*(f) not to be detained, except as a measure of last resort*

*(2) A child's best interest is of paramount importance in every matter concerning the child.*

### **Held**

1. The fact that the offender was a minor made it imperative on the court to consider and be guided by the best interest of the minor. The rights of the child called the Constitution into play, particularly article 53(2) and other implementing statutes to wit, the Children Act and the international instruments on the rights of the child.
2. The court would keep the requirement of the right of every child not to be detained at the back of its mind and would accord it due significance when making the final decision.
3. When a court was informed of the unsound mental condition of an offender, it was to carry out an inquiry under section 162(1) of the Criminal Procedure Code (CPC) to establish whether the offender was of unsound mind and consequently incapable of pleading, understanding the proceedings and making his defence. That was done by calling for thorough medical examination of the offender.
4. Where in a criminal proceeding the question of unsoundness of mind of the offender was in issue, the applicable law was section 162 of the CPC, and section 167 of the CPC would not therefore apply. But in both sections, it was the prosecution to begin and prove fitness of the offender to stand trial.
5. The application of the procedure provided in section 167 and section 162 of the CPC should be dictated by the different situations that obtain in every case. The procedure provided in those sections should enable the court to apply its mind properly in the case where it had found that the juvenile offender was suffering from a mental condition that made him incapable of making his defence. It was only in very clear cases where unsoundness of the mind was not an issue, that the court should feel constrained to strictly apply section 167 of the CPC.
6. For section 167 of the CPC to apply, the prosecution must prove that the juvenile offender was sane only that he did not understand the proceedings. However, the prosecution found the offender incapable of making his defence.
7. In all cases where one was suffering from unsound mind, the proper approach was to look at the overall effect of the incapacitation by unsound mind to see if it rendered the person incapable of understanding the charge, and to make his defence.
8. The essence of section 7 of the Sixth Schedule to the Constitution was that courts should interpret and apply provisions of existing law such as the CPC deliberately by reading in necessary qualifications, modifications or alterations as to give effect to the objects, purposes and values of the Constitution.



9. The duty of the court was to reconcile the statutes with the Constitution and Bill of Rights, and avoid setting the Constitution against the Legislature or international treaties that were relevant to the subject matter of the case. That was an approach that was permitted by the Constitution itself and a practice that had gained approval in almost all jurisdictions.

10. According to section 162 of the CPC, the trial should have been suspended, and perhaps indefinitely commit the child offender to the care of a person who would be able to prevent the child offender from harming self or somebody else and for his attendance in court. However, it was apparent from the medical evidence offered that the condition he was suffering from (moderate mental retardation) was unlikely to improve in the future and it would therefore be against the Constitution and a violation of the rights of a child to keep the proceedings of the child offender *ad infinitum*.

11. The prevailing scientific and medical knowledge was and would certainly be advanced, but none offered evidence of any prospects that the condition the child offender was suffering from would be reversed or become better. Thus in the absence of such evidence it would be inappropriate to give any hope that the trial could resume in the future.

12. To place a person suffering from such a condition, and more so a child, under a cloud of criminal proceedings *ad infinitum* would be a great prejudice to known human qualities, the right to fair trial and rights of a child, and largely, it would be a disparage of the Constitution. In the absence of such medical and scientific hope of the condition becoming better, suspending the trial was not the appropriate path.

13. Article 53 and 159 of the Constitution weighed heavily in the case, and the appropriate path would be to discharge the child offender, who was in need of care, and should be committed to a person or institution to take care of him, prevent him from injuring self or somebody else.

14. It was in the best interest of the child offender for the court to have the advantage of a report from the office of the probation officer and children officer which would assist the court to identify a proper person or institution to carry out the exercise. The decision was informed by the interest of the child offender as guaranteed under the Constitution and the circumstances of the case.

*Juvenile offender discharged and committed to a person for care to prevent him from injuring himself.*

#### **Orders**

*The probation officer and or children officer was to submit reports in 14 days. The child offender was to remain in the custody of the juvenile remand home in the meantime.*

#### **Citations**

##### **Cases**

##### **Kenya**

*Republic v Chairman Matungu Land Dispute Tribunal ex parte Electina Wang'ona & another* Miscellaneous Application 107 of 2010 - (Mentioned)

##### **United Kingdom**

1. *M'Naughten* [1843-60] All ER Rep 229 - (Explained)
2. *R v Lambert* [2002] 1 All ER 2 - (Explained)
3. *R v Spriggs* [1958] 1 All ER 300 - (Mentioned)
4. *R v Sullivan* [1983] 2 All ER 673 - (Mentioned)

##### **Regional Court**

1. *Kaplotwa s/o Tarino v Republic* [1957] EA 553 - (Explained)
2. *Sohan Singh s/o Lakha Singh v Republic* [1958] EA 28 - (Mentioned)

##### **Texts**

1. Garner, BA., (Ed) (1999), *Black's Law Dictionary* St Paul Minnesota: Thomson West 7th Edn

##### **Statutes**



## **Kenya**

1. Children Act (Repealed) (cap 141) - (Cited) In general
2. Constitution of Kenya - (Interpreted) articles 50, 53, 159, 259; Schedule 6; section 7
3. Criminal Procedure Code (cap 75) - (Interpreted) sections 162(1)(2)(3);163; 167(1)(b)

### **Instruments**

1. Declaration of the Rights of the Child, 1959

## **RULING**

### **Introduction Bad Times**

- (1) Bad times come. You see a young person entangled in a charge of murder in a court of law. That is not all. The young person is suffering from Moderate Mental Retardation; a condition the Psychiatrists describe as a congenital medical condition which is a developmental mental disorder without any prospects whatsoever of getting better. He will not even get the benefit of medication or admission to lessen or slow the progress of this condition. The young person is JWK, aged seventeen years or thereabout, and the offender in this case. For purposes of this ruling, I will refer to J as the juvenile offender.

### **The Issue**

- (2) What is the appropriate legal way of dealing with a proceeding where it is found that the offender:-
  - a) Is suffering from a condition of mental retardation which is developmental in nature and has no any prospects of subsiding;
  - b) Is incapable to plead, understand proceedings or make his defence due to the condition; and
  - c) Is a minor.Should the court proceed in accordance with the procedures provided in:-
  - a) Section 167 of the Criminal Procedure Code; or
  - b) Section 162 and 163 of the Criminal Procedure Code (hereafter CPC)?The ultimate questions however should be:-
  - a) What does the Constitution command as being the best course to take particularly where the offender so suffering is a minor?
  - b) What should be the necessary reconciliation between the Constitution and the provisions of the existing law to wit, the CPC, the Children Act and the relevant international instruments?

### **Scope**

- (3) The issue that has arisen is that of unsoundness of mind of the juvenile offender which makes him unfit to plead, understand the proceedings and also make his defence. The analysis herein is therefore an inquiry by the court into the condition of the unsoundness of mind of the offender under section 162 of the CPC, for the court to determine whether it should proceed as per sections 162, or 167 or as by the Constitution demanded in dealing with this proceeding in the obtaining circumstances? The trial has not commenced at all, and so the inquiry is not in the context of a defence of insanity by the juvenile offender.



## The Plea

- (4) The Juvenile offender had pleaded not guilty on 25/5/2010. But during the plea, by what I think was an inadvertent oversight on the part of the Prosecution, the mental fitness of the Juvenile offender to plead was not brought to the attention of the court. By law it is the Prosecution to ascertain fitness to plead. Fortunately, before the case could proceed to hearing on 28/6/2010, the Prosecution informed the court that on perusal of their file, they noted that the Doctor had given an opinion that the Juvenile offender was not fit to plead.

## Mental Condition of the Juvenile Offender

### Inquiry by the court

- (5) On being informed of the unsound mental condition of the offender, the court should carry out an inquiry under section 162(1) of the *Criminal Procedure Code* to establish whether the offender is of unsound mind and consequently incapable of pleading, understanding the proceeding and making his defence. This is done by calling for thorough medical examination of the offender.
- (6) On July 1, 2010, the mental status of the Juvenile offender was assessed and he was diagnosed with Mild Mental Retardation. Further examination was done on March 23, 2012, by Dr Wakhudu SO who observed that the Juvenile offender was mentally handicapped, and that there is a familial intellectual challenge within the family of the Juvenile offender.
- (7) The Juvenile offender was then committed to Mathari Hospital on 23/3/2012 for care and treatment.
- (8) On 21/6/2012, Dr Mucheru - Wangombe, a Consultant Psychiatrist examined the Juvenile offender and filed a report. The Report confirmed that, the juvenile offender suffers from a developmental mental disorder (Moderate Mental Retardation), a condition that is unlikely to get better. The juvenile offender is unlikely to ever be able to understand the charge he is facing. The offender would not even benefit from any medication or admission.

Dr Wakhudu SO again on 23/11/2012, examined the Juvenile offender and concluded that he suffers from mental retardation of moderate severity. It had progressed from mild to severe.

Now that all medical and psychiatrists reports revealed that the Juvenile offender is not fit to stand trial, the issue at hand is what is the best course that the court should take in order to protect the rights of the Juvenile offender as well as secure due application of the law?

## The Appropriate Legal Path

### Prosecution favours section 167 of CPC

- (9) Mr Kibelion, on behalf of the Director of Public Prosecutions, submitted that the best option in dealing with this case is by adopting the procedure in section 167(1)(b) of the CPC. He argues that section is the one that deals with situations where the offender does not understand the proceedings. Section 167 of the CPC provides:-

167(1) If the accused, though not insane, cannot be made to understand the proceedings-

- (b) in cases tried by the High Court, the court shall try the case and at the close thereof shall either acquit the accused person or, if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President's pleasure."



- (10) He further urged that, section 167 of the CPC is the perfect course to take, because plea had already been taken on 25/5/2010 and the case has not been heard. According to him, section 162(1), (2) and (3) of the CPC cannot apply in the circumstances of this case, as that section applies, where the accused is incapable of making a defence. Mr Kibelion also argued that section 162(2) relates to steps to be taken after trial has commenced.

#### **Defence favours section 162 of CPC**

- (11) Mr Makali, counsel for the juvenile offender, respectfully disagrees with Mr Kibelion. He submits that the juvenile offender has been in court since 2009. the court acted on section 162 of the CPC and enquired about the mental status of the juvenile offender. Mathari Hospital then confirmed that the juvenile offender is unfit to stand trial. For trial to commence a plea must be taken. Section 162 provides:-

"162(1) When in the course of 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.

(3) If the case is one in which bail may be taken, the court may release the 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."

- (12) Under article 50 of the Constitution, the person charged must understand the offence, follow proceedings and instruct counsel of own choice or one be availed by the state. The person charged must be able to give instructions to counsel. These are the rights of an arrested or accused person under article 50 of the Constitution.
- (13) If proceedings were to continue, in the condition of the Juvenile offender, it will be a nullity. In the circumstances of the case, the court has two options: either 1) to have the Juvenile offender undergo treatment until he is capable of understanding the proceedings; or 2) invoke section 162(3) and admit him to bail with an order that he be taken care of by another person to prevent him from injuring himself or another person, and for his attendance in court.
- (14) Section 162(2) & (3) of the CPC is most ideal in view of the fact that the matter has taken long. He should be discharged as such discharge does not operate as a bar to any further proceedings in the future should the Juvenile offender be found to be fit to stand trial. Section 167 is not appropriate.

#### **Mr Kibelion reply**

- (15) Mr Kibelion was of the view that section 167 of the CPC is the appropriate one in this case as it relates to procedures where plea has been taken but the Juvenile offender does not understand the proceedings. Section 162(2) and (3) is not applicable to this case as it relates to a situation where the person charged is incapable of making his defence. Similarly, section 162(2) relates to steps after trial has commenced.



- (16) Under article 50, there are procedures that limit the article, and section 167 of the CPC is one such procedure. It is for the security under section 167 of the CPC. According to Kibelion discharge is not an option given the circumstances of this case.

### **Court renders itself thus the supreme law**

- (17) Issues on the right to fair hearing and rights of a child have arisen. The Constitution is the supreme law on these issues. What the Constitution says about the two issues will form the basis for the decision of the court. I propose to deal with each subject at a time and in a conclusive manner in order to ensure that proper proportion of importance is accorded to the issues.

### **Rights of a Child**

- (18) The fact that the Offender is a minor makes it imperative on the court to consider and be guided by the best interest of the minor. The rights of a child, calls the Constitution into play, particularly article 53, and other implementing statutes, to wit, the Children's Act and the international instruments on the rights of a child. Article 53 of the Constitution follows after the internationally acceptable proclamation and protection of rights of a child and sums up the right relevant part more specifically that:-

"53(1) Every child has the right -

- (f) not to be detained, except as a measure of last resort,
- (2) A child's best interest are of paramount importance in every matter concerning the child."

- (19) The court will keep this requirement at the back of its mind and will accord it due significance when making the final decision. Meanwhile let me consider the other pivotal issues herein.

### **Fair hearing**

- (20) Fair hearing is a cardinal facet of due process and natural law whose place in the dispensation of justice cannot be dwindled an iota. It is a fundamental constitutional right of any person who has been charged with a criminal offence. I want to agree with Mr Makali that the right to fair trial is a criminal proceeding includes the right to be informed of the charge, to understand those charges, be able to follow those 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, can he be said to have been accorded a fair hearing in the sense of the Constitution? Fair hearing is an inherent right in any quasi-judicial or judicial proceeding or an administrative action. and the duty of the court is to ensure it is accorded to the parties. In answering the question I have asked above, let me first make a finding on whether or not the condition the Juvenile offender is suffering from fits the legal standards of disease of the mind.

### **Unsoundness of mind in law**

- (21) Although it is natural to feel reluctant to attach the label of insanity to a sufferer and more so when the sufferer is a minor, I am really constrained by law to make a finding of whether the Juvenile offender suffers from a disease of the mind that makes him legally to be of unsound mind as to be incapable of making his defence. Unsound mind or mental abnormality or disease of the mind are legal expressions of a legal incapacity. It is also a requirement under the law and particularly section 162 and 167 of the CPC that the court must first make a finding on whether the offender is of unsound mind (section 162)



or is not insane (section 167). This is informed by the phraseologies used in those sections; ‘though not insane’ (section 167); and ‘is of unsound mind’ (section 162). See [R v Spriggs](#) [1958] 1 All ER 300.

### **Moderate Mental Retardation; A Mental Condition:**

- (22) The Consultant Psychiatrist, Dr Mucheru and all the medical doctors who examined the minor, confirmed that the Juvenile offender is incapable of pleading to or understanding the charge; the incapacitation is due to the developmental disorder called Moderate Mental Retardation he is suffering from. That condition will not improve overtime. This condition makes the Juvenile offender unfit to stand trial. Applying the legal standards, is the condition one of unsound mind or legal insanity?

### **The value of the M’Naughten Rule**

- (23) As I pointed out earlier, unsoundness of mind or insanity for purposes of section 162 and 167 of the CPC, is a question of legal rather than medical standards. See the [Black’s Law Dictionary](#), 7th Edition. It is however arrived at by juxtaposing the factual medical condition with the legal standards on legal insanity or unsoundness of the mind. It is important to note that it is of immense general assistance in this case to take note of test laid down on legal insanity in the famous case of [M’Naughten](#) [1843-60] All ER Rep 229 which was arrived at by the Legislative Chambers of the House of Lords, after a long debate among the Scholars, Jurists, Lawyers, Judges and other Eminent Personalities on the subject, and on the answers given by the Judges of Common Law who had been assembled to answer five abstract questions that had been set for the purpose of defining legal insanity. The answers to the second and third of those five questions constituted what is now known as M’Naughten Rule on insanity. The test is whether the condition the offender is suffering from is a disease of the mind; that causes defect of reason; in our case, as to be incapable of pleading, understanding the proceeding and making his defence. See also [R v Sullivan](#) [1983] 2 All ER 673. That test will assist the court to decide whether the offender... is of unsound mind and consequently incapable of making his defence, and chart the appropriate procedure to adopt in dealing with the issues at hand; should the court proceed strictly on the basis of section 162 or 167 of the CPC or does the [Constitution](#) permit another way that is in consonance with its objects, purposes and values?

### **The Juvenile Suffers from a disease of the mind**

- (24) In applying the test above, the medical evidence tendered in court, reveals that the Juvenile offender is suffering from a condition of a developmental disorder called Moderate Mental Retardation which makes the Juvenile offender incapable of pleading to or understanding the charge herein. When juxtaposed with the legal standard set out above, regrettably, the court is of the opinion that the Accused is of unsound mind and consequently incapable of making his defence in this case. I now move on to the next critical stage. Which legal path do the court believe is most apt in dealing with this case?

### **The Appropriate Path**

- (25) The fact that plea was taken and entered on behalf of the Juvenile offender should not confuse the applicable principles in this situation. The issue at hand is the sort of thing that courts are particularly experienced at deciding. The law on the subject was clearly stated in the case of [Kaplotwa S/O Tarino v R](#) [1957] EA 553 That:-

“.....it was the duty of the court to consider not only whether he was capable of understanding the charge, but also whether he was capable of making his defence ”

- [26] the court in that case considered both section 162 and 167 of the [Criminal Procedure Code](#) and it is apparent section 167 is restricted to only clear cases where the unsoundness of mind of the Offender



is not in issue, only that he cannot be made to understand the proceeding. The section itself clearly sets its realm of influence in the phrase; though not insane. The issue in the present case is not whether the Juvenile offender was sufficiently sane to appreciate the charge against him but whether he was “of unsound mind and consequently incapable of making his defence”. 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. Therefore where unsoundness of the accused is in issue, the law applicable will be section 162 of, and section 167 of the CPC will not apply. See the case of *Sohan Singh S/O Lakha Singh v R* [1958] E A 28.

- (27) After considering the well argued standpoints by counsel for the Republic and counsel for the Juvenile offender, the court concludes that proper reading of the Kaplotwa case within the new constitutional framework seems to suggest that the application of the procedure provided in section 167 and section 162 should be dictated by the different situations that obtain in the particular case, and the distinct procedures thereto should not really be a source of confusion as long as the court is properly guided by the Constitution to serve substantial justice in accordance with the circumstances of each case. The procedure provided in those sections should enable the court to apply its mind properly in this case where it has found that the Juvenile offender was suffering from a mental condition that makes him incapable of making his defence. As I have 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 of CPC to apply, the Prosecution must prove that the Juvenile offender is sane only that he does not understand the proceedings. This has not been done as the Prosecution agree his mental status makes him incapable of making his defence. Therefore, in all cases where one is suffering from a disease of the mind, the proper approach is to look at the overall effect of the incapacitation by the disease of the mind to see if it renders the person incapable of understanding the charge, and to make his defence. Even under section 162, if the court has reason to believe, in any particular case, to doubt his fitness, it is the duty of the court to inquire into the matter and the onus is on the Crown to begin and prove fitness. See the case of Kaplotwa. The Prosecution is the one which first established through mental assessment that the Juvenile offender suffers from a disease of the mind and is not fit to stand trial.
- (28) The condition of the Juvenile offender is such that he cannot understand the charge, is incapable of pleading or understanding the trial whatsoever. This is a condition that will not get better even with medication according to the Psychiatrists who examined him. Therefore applying section 167 and proceed with the trial just because plea had been taken, will produce great injustice in the case. I take judicial notice that courts of law are not designed to preside over a procedure that is unjust. In fact the Constitution in article 159 and 259 favours substantial justice being served as opposed to paying homage to procedural rectitude that results into injustice. See Bgm HC JR Appl No 107 of 2007 Re ex parte Electina Wang'ona [2012] eKLR.

### **Application of Existing Law**

- (29) The essence of section 7 of the sixth schedule of the Constitution, 2010, is that courts should interpret and apply provisions of existing law, and CPC is such existing law, deliberately by reading in necessary qualifications, modifications or alterations as to give effect to the objects, purposes and values of the



Constitution. Once the objects, purposes and values of the Constitution have been ascertained, the duty of the court is to reconcile the statutes with the Constitution/Bill of Rights, and avoiding setting the Constitution against the Legislature or International Treaties that are relevant to the subject matter of the case. This is an approach that is permitted by the Constitution itself and a practice that has gained approval in almost all jurisdictions. See R v Lambert [2002] 1 All ER 2 particularly the opinion of Lord Hope that:-

"...so far as possible to do so, primary and secondary legislation must be read and given effect in a way which is compatible with the Convention rights."

### **Suspend trial or discharge the Juvenile offender?**

- (30) I pointed out earlier and I repeat, that I am of the opinion that the circumstances of this case require the court to give effect to the right to fair trial under article 50, rights of children under article 53, the provisions of the Children Act and the requirements of International instruments on rights of a child. A combination of all these, gives an initial feeling that the trial should be suspended, and perhaps indefinitely under section 162(2) of the CPC, and commit the Juvenile offender to the care of a person who will be able to prevent him from harming himself or somebody else and for his attendance in court as per section 162(3) of CPC. But objectively, on second thought, even with the advanced modern medical and scientific knowledge, the doctors opine that his condition is not likely to improve and he may not have the benefit of medicine or admission. I am also aware that the scientific and medical knowledge of today is far in advance of that of the past years, and that of the years to come will even be far in advance than the current one, but none offers evidence of any prospects that the condition the Juvenile offender is suffering will be reversed or become better. Thus, in the absence of any such evidence, I do not think it would be appropriate to give any hope that the trial may resume in the future. Also, to place a person suffering from such a condition, and more so a juvenile, under a cloud of criminal proceedings *ad infinitum* will be a great prejudice to all known human qualities, the right to fair trial and rights of a child, and largely, will be a disparage of the Constitution. In the absence of any such medical and scientific hope of the condition becoming better, I am convinced that suspending the trial is not the appropriate path.
- (31) The elegant provisions of article 53 and 159 of the Constitution weigh heavily in this case, and I am convinced the appropriate path would be to discharge the juvenile offender, whom I consider to be in need of care, to be committed to a person who will take care of him, prevent him from injuring himself or somebody else. But before I make the order for discharge, in the best interest of the Juvenile offender, the court should have the advantage of a report or reports from the offices of the Probation Officer, and Children's Officer, Bungoma, which will assist the court to identify a proper person or institution to carry out the exercise. The Report or Reports should be filed within 14 days to enable the court give its final orders in the matter. This decision is informed by the interest of the Juvenile offender as guaranteed under the Constitution and the circumstances of the case. Meanwhile, the Juvenile offender shall remain in the custody of juvenile remand home.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 12TH DAY OF FEBRUARY, 2013**

**F. GIKONYO**

**JUDGE**

12.2.2013

Before Gikonyo J



Alusa-C/A

Offender present

Murunga for offender

Kibelion for state

Court: Ruling read in open court

**F. GIKONYO**

**JUDGE**

Kibelion: I apply for certified copy of the ruling.

Court: Certified copies of the ruling to be supplied to the DPP, Children Officer and Probation Officer, Bungoma.

**F. GIKONYO**

**JUDGE**

