

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CRIM REV CASE 33 OF 2007

ABDULL ADEN :::::::::::::::::::: APPLICANT

VERSUS

REPUBLIC :::::::::::::::::::: RESPONDENT

RULING

This matter has come to me by way of revision. Abdull Aden is, in Mombasa CM.CR.C.NO. 661 of 2007, charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code.

When he appeared before the Chief Magistrate for plea the court realized that he was mentally unstable and remanded him for one week during which time he would be examined. There was some delay but after two weeks a Psychiatrist gave a report that the accused was suffering from a mental sickness and that he was not fit to plead. On the basis of that report the Chief Magistrate committed him to Mathari Mental Hospital until he is declared fit to plead. That was on the 9th March 2007.

It was not until the 20th June 2007 that the Permanent Secretary in the Office of the Vice President and Ministry of Home Affairs directed, under Section 166(1) of the Criminal Procedure Code, the removal of the accused from Shimo La Tewa Prison to Mathari Mental Hospital alleging that the accused had been found guilty of the offence charged but was insane at the time he committed the offence.

That was of course erroneous as the accused had not even pleaded to the charge. I think the Permanent Secretary was not properly served. When the Accused's counsel wrote to court to have the Accused produced in court as the complainant wished to withdraw the charge the lower court allegedly declined stating that the Permanent Secretary having directed the removal of the Accused from Shimo La Tewa Prison to Mathari Mental Hospital the court was functus officio. There is nothing on record to show that indeed that was the court's position. If that is the case, then that was also erroneous. The lower court has still powers to deal with the matter.

The accused having not been found guilty, let alone pleaded to the charge, his remand under Section 166(1) of the Criminal Procedure Code was unwarranted. In the circumstances I revise the Chief Magistrate's order of 9th March 2007 and direct that the Accused be produced before the Chief Magistrate's Court on 13th November 2007 for the complainant to withdraw the charge. If the charge is not withdrawn then the Chief Magistrate should consider releasing the accused under Section 162(3) to his family pending the hearing of the case.

DATED and delivered this 25th day of October 2007.

D.K. MARAGA

JUDGE