AOA v Republic (Miscellaneous Criminal Application E026 of 2024) [2025] KEHC 4655 (KLR) (10 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4655 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

MISCELLANEOUS CRIMINAL APPLICATION E026 OF 2024

JN ONYIEGO, J

APRIL 10, 2025

BETWEEN

AOA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being a revision application against the order of Hon. Otuke (RM) made on 03-10-2022 in S.O case No.32 of 2019 in Garissa CM' Court)

RULING

1. The applicant was arrested and arraigned before the Chief Magistrate's Court at Garissa *vide* Criminal Case No. SO 32 of 2019. He was charged with the offence of; sexual assault contrary to section 5(1)(a)(ii)(2) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 10.07.2019, at around 1000hrs at Bulla Iftin Location within Garissa County he unlawfully penetrated the genital organ namely vagina of F.Y., a child aged 5 years old with a stick.

2. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 10.07.2019 at around 1000hrs at Bulla Iftin Location within Garissa County, he willfully and intentionally touched the genital organ namely vagina of F.Y., a child aged 5 years with his hands.

3. Having been assessed and found unfit to stand trial on account of mental infirmity, he was referred to Mathari Mental Hospital for treatment.

4. Upon being certified fit to stand trial, he pleaded not guilty. The matter then proceeded to full trial. Upon conclusion of the trial, accused was found guilty and consequently, the court entered a special finding of guilty but insane.

5. Subsequently, the court ordered for a presentencing report and a further mental assessment to be carried out before mitigation and sentence.

6. According to the probation report dated 3.10.2022, the probation officer from the interviews carried out with the applicant's family, victim's family, circumstances under which the offence was perpetrated and the society at large, opined that the applicant needs an institutionalized supervision. In the same breadth, a further mental assessment report dated 09.07.2024 showed that the applicant had since recovered from his mental infirmity.

7. The trial magistrate on the other hand via a sentence delivered on 07.10.2024 ordered that the applicant be committed at Mathari Mental Hospital for medical treatment and rehabilitation where he shall remain until such time as a psychiatrist in charge of the hospital certifies that he is no longer a danger to society or to himself but that period should not exceed or be more than six years from the date the order was made.

8. Aggrieved by the order of the trial court, the applicant moved this court via an application dated 13.08.2024 urging that this court metes out a definite non-custodial sentence or he be set at liberty. The application was supported by an affidavit sworn by the applicant on even date with the application deposing that having been admitted at Mathari Mental Hospital for treatment, the said facility discharged him and a report was forwarded confirming that he was of stable mental status. That this court be pleased to consider his application and grant the order sought.

9. The court directed that parties file written submissions in canvassing the application and via submissions dated 10.02.2025, the applicant submitted that the finding of guilty but insane opens up to three possible outcomes to wit: acquittal, mandatory and automatic post acquittal commitment to a mental institution and mandatory criminal commitment. That best practice demands that punishment of persons who are found guilty but insane does not serve the three policy rationales of deterrence, retribution and rehabilitation.

10. To that end, this court was urged that the appropriate resolution would be that of acquittal as was held in the case of Hassan Hussein vs Republic [2016] eKLR. This court was therefore urged to review the orders by the trial magistrate and discharge the applicant noting that he is currently healed and he is not a danger to society.

11. Mr. Owuor, the learned prosecutor in opposing the application argued that nothing was presented before this court to support the averment that the applicant is mentally fit. That the trial magistrate sentenced the applicant a definite sentence of six years and therefore, the application herein was moot.

12. I have considered the application herein together with the parties' respective submissions. In my view, the main issue for determination is whether the application has merit.

13. Statutorily, Sections 362 and 364 of the *Criminal Procedure Code* empower this Court to deal with the issue at hand. The said sections provide as follows:

> "362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court"
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(1). In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to his knowledge, the High Court may-

a) ...

b). In the case of any other order other than an order of acquittal, alter or reverse the order.

2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence."

14. I have perused the record herein and the submissions thereof. The applicant herein seeks before the court an order to determine the legality or propriety of the sentence by the trial magistrate delivered on 07.10.2024 in as much as prior to the delivery of the sentence, Dr. Oroko Obegi, a consultant psychiatrist had examined and certified him to be of stable mental status.

15. The issue regarding persons found guilty but insane has been a subject of consideration by our courts yet with no common determination. However, majority of the decisions tend to lean towards discharge upon certification of the accused by a medical expert that he is recovered and therefore not a danger to himself nor society. On his part, Waweru Kiarie in Hassan Hussein Yussuf V Republic (supra) declared Section 166 of the CPC unconstitutional and held that the president had no role in the Judicial process. To the Judge a discharge was appropriate.

16. The High Court in Nairobi, in exercise of its jurisdiction to hear any question in respect to the interpretation of the *Constitution* under Article 165(3)(d) of the *Constitution*, in *Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* (Petition 226 of 2020) [2022] KEHC 114 (KLR) (Constitutional and Human Rights) (1 February 2022) (Mrima J.)declared sections 162(4)&(5), 166(2),(3),(4),(5),(6)&(7) and 167(1)(a)(b), (2)(3)&(4) of the *Criminal Procedure Code* unconstitutional for contravening various Articles of the *Constitution*.

17. That court stated that the special finding of "guilty but insane" resulted in the convicted person being held at the pleasure of the President. Such holding interfered with the independence of the Judiciary and the doctrine of separation of powers.

18. Prior to this finding, Courts would order that the accused person be held in custody awaiting the President's pleasure or order on his sentence. Following the case of *Kimaru & 17 others* (*supra*), the Judiciary Sentencing Policy Guidelines 2023 came up with guidelines as follows;

" For offenders who are found 'guilty but insane'

3.4.18: ...

3.4.19: On the question of sentence following findings under Sections 166 or 167, the court must be guided by relevant expert opinion based on the thorough examination of the offender. Among other things, courts should specifically request for advice on the treatment and care regime suitable for the offender.

3.4.20: The court should then determine where the offender should be placed and give a direction that he or she be detained until a psychiatrist responsible

> for that facility, at such time certifies the offender as no longer a danger to society. The court should expressly state that upon making such a finding, the psychiatrist responsible for the facility must refer the matter back to the court before any release is made for further directions/order. This would also apply where treatment is failing, whereupon the court may make further orders on treatment."

19. The spirit of these guidelines is that where a special finding of guilty but insane has been entered, there must be a thorough examination of the offender to determine the most relevant punishment in light of the mental illness. At the same time, the rights of the victim's family should be balanced against the rights of the accused person who has been found guilty but insane.

20. In the same breadth, the Court of Appeal in the case of *Wakesho vs Republic* (Criminal Appeal) [2021] KECA 223 KLR held that:

> " For purposes of the present appeal, however, we are satisfied that the learned judge ought to have made a special finding of guilty but insane. We therefore allow the appeal. We quash the conviction and set aside the sentence of death. We substitute therefore, a special finding that the appellant did the act charged but he was insane at the time he did it. We order that the appellant, who has been in custody since his arrest on May 18, 2012, shall immediately be taken to a mental hospital for medical treatment where he shall remain until such time as a psychiatrist in charge of the hospital certifies that he is no longer a danger to society or to himself."

21. In the instant case, it is clear from the assessment report dated 09.07.2024 that the applicant has since healed from his mental infirmity. As such, it was not necessary to commit him at Mathari Mental Hospital any further. For avoidance of doubt, I wish to reproduce the words used by Dr. Oroko Obegi;" "I hereby confirm that based on the current mental status examination the above named is of stable mental status to lead a normal life and continue with his usual duties/responsibilities in the society"

22. In view of the above, the convict herein is certified fit to lead normal life within the society. Mathari hospital is not a place for detention of convicts but a treatment facility which upon recovery refers the convict back to court for necessary action. In this case, the Mathari hospital has done its work and certified him fit to join society hence we cannot return him back. Society has a social obligation to accommodate people suffering from mental infirmity after recovery.

23. In the spirit of Wakesho case, the accused herein shall be discharged unconditionally under Section 35(1) of the penal code. He is however, advised to attend regular review at a mental facility and the family members to accord him or facilitate counselling services. Accordingly, the orders of the trial court committing him to a mental institution for six years is set aside. It was not clear as to what the accused will be doing in Mathari hospital yet he has recovered. Accused to be released to a close relative who will take necessary steps to support him and facilitate reconciliation with society.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 10TH DAY OF APRIL 2025

J. N. ONYIEGO

JUDGE