Republic v Korwa (Criminal Case E004 of 2022)
[2024] KEHC 3013 (KLR) (15 March 2024) (Sentence)

Neutral citation: [2024] KEHC 3013 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL CASE E004 OF 2022

JN ONYIEGO, J

MARCH 15, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

NOOR KORWA ..... ACCUSED

SENTENCE

1. The accused herein was convicted by this court on 09.02.2024 for the offence of murder. However, the court also found that he was insane at the time of the commission of the offence. Section 166 (2) of the Criminal Procedure Code requires that where such a finding of guilty but insane is made, the accused should be held in custody in such place and manner as the court deems fit. The case should then be reported to the President for an order of committal.

2. Following the said judgment, this court ordered that parties file submissions in respect to sentencing.

3. The parties did not offer much as the prosecution orally submitted that the there was no previous criminal report on the convict and that he be treated as a first offender. Counsel for the convict on the other hand equally orally submitted that the convict was remorseful and given that he was suffering from a mental illness when he committed the offence herein, he was no longer a danger to himself or to the society.

4. I have considered submissions by the parties and as already noted, the ruling herein is in respect to the sentence of the convict where a special finding of guilty but insane has been made.

5. It is clear that passing sentence is an integral part of the judicial function. The Court of Appeal in the case of Dismas Wafula v Republic [2019] eKLR expressed itself as follows;

   In appropriate case therefore, the court freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demands..."

6. It is worth noting that courts have been grappling with how to deal with a convict on a special finding of guilty but insane. The Court of Appeal in the case of Wakesho v Republic (Criminal Appeal) [2021] KECA 223 KLR in its attempt to deal with the constitutionality of an indeterminate sentence in respect to special finding of guilty but insane made reference to several High Court decisions on the matter.

7. The Court referred to the case of Hassan Hussein Yusuf v Republic [2016] eKLR where the High Court at Meru (Kiarie Waweru Kiarie, J.) found section 167(1) of the Criminal Procedure Code requiring an accused person to be detained at the President's pleasure to be unconstitutional for being discriminative to people with mental illness. The court instead directed that the appellant be accorded mental treatment and thereafter be set at liberty unless in the opinion of a psychiatrist the appellant would pose any danger to the public and to himself.

8. In the same breadth, in Republic v SOM [2017] eKLR, the High Court at Kisumu, Majanja, J. expressed "doubt as to the constitutionality" of section 166(2) of the Criminal Procedure Code which requires the court, on making a special finding, to report the case for the order of the President and to order the accused to be kept in custody. He instead proceeded to apply the provisions of section 7(1) of the Sixth Schedule to *the Constitution*, in order to align the provisions of section 166 of the CPC to *the Constitution*. Further, he proceeded to align the section to *the Constitution* by holding that the reference to President shall be read to mean, the Court. He continued to state that it would be imperative for the accused to be brought before court periodically in order for the court to give directions based on the facts of the circumstances as they play and further, the evidence of an expert and other evidence.

9. In Republic v ENW [2019] eKLR, Lesiit, J. (as she then was), distinguished, for purposes of section 166, the judicial function to pass sentence as a reserve of the judicial process, and the executive responsibility of the President regarding power of mercy.

10. The learned judge had this to say:

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> "20. It is clear that passing sentence is an integral part of the judicial function. Equally important is the exercise of power of mercy, a responsibility that has been donated under *the Constitution* (2010) to the President acting on recommendations by the Power of Mercy Committee. This is an important role which has both constitutional and statutory underpinning.
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> It is for that reason that I would hesitate to take the route suggested by my learned brother in the SOM case, supra where he declared that the name of the President be replaced with that of the court in section 166 of the CPC untenable.
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> 21. In addition, once a trial court passes sentence after conviction, it becomes functus officio, and can no longer handle the matter again. Unless of course for purposes of review where that is applicable. The case file will have come to an end and will be marked concluded. I would hesitate to keep the matter open for further periodic action after concluding it as, in my view, it would render the doctrine of functus officio nugatory.
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> 22. I can understand the frustrations we face as a court when you find children you detained at the President's pleasure still incarcerated several years later, and worse still without any word from the POMAC or Ministry concerned.....

11. It is clear under sub-section (5) that the President is empowered, not to pass a sentence over the person against whom the court has entered a special finding under sub-section (1), but a power of mercy. The former is a judicial function and the latter is an executive responsibility. In the case of REYES v R (BELIZE) [2002] UKC 11, the Privy Council decision observed that:

    The board is mindful of the constitutional provisions governing the exercise of the Power of Mercy by the Governor-General. It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter is an executive responsibility.

12. In the case of Felstead v Rex [1914] AC 534, the House of Lords unanimously held that the special finding was one and indivisible and was infact a verdict of acquittal and not a conviction notwithstanding the use of word guilty in the relevant section. Lord Reading explained that:

    It is unfortunate that this word (guilty) as used, the same suggests the responsibility for criminal act. If the requirement under the Act had been merely to find that the accused did the act, instead of that he was guilty of the act, there could have been no room for doubt that such a verdict was not a conviction, but was an acquittal.

13. Ngenye J (as she was then) in the case of JKW v Republic (Criminal Appeal 26 of 2019) [2022] KEHC 17017 (KLR) underscored the fact that insanity as a defence is provided for under section 12 of the Penal Code; and Section 166 of the Criminal Procedure Code provides for the procedure to be followed when a person is found guilty but insane.

14. The learned judge went further to state that, since the special finding under section 166 is neither a conviction nor a sentence, it can logically only be an acquittal with the consequence in terms of section 379 (1) of CPC. She proceeded that the same cannot amount to a conviction because insanity is recognized in law as an illness requiring treatment and not punishment. When detained at the President's pleasure the convict is considered a patient and not a prisoner.

15. From the above, this court adopts the view that the judicial function to pass sentence is reserved to the judicial process and thus cannot be taken away. However, the law gives the Executive a responsibility to make a determination whether a person need not suffer the punishment imposed against him by the court, and may remit such punishment for some reason, in certain cases.

16. In the case herein, I have had an opportunity to hear the mitigation as submitted by both counsel. Counsel for the convict stated that the convict was remorseful and given that he was suffering from a mental illness when he committed the offence herein, he was no longer a danger to himself or to the society.

17. The above notwithstanding, it is incumbent upon this court to arrive at a decision that is justified and further perceived justifiable on more general grounds reflected in previous case laws and other authorities that apply to the case at hand.

18. This court equally holds the view that in doing so, meting out a sentence is a vital element of the principle that each case should be treated on its own facts or merits. It is against this backdrop that sentencing discretion lies with the trial court; I say so for the reason that the discretion ensures that courts impose a just and appropriate sentence in regard to the circumstances of the case before it.

[See A Guide to Sentencing in South Africa 1st ed 1992 and Edwin Wachira and 9 Others v Republic Constitutional Petition No. 97 of 2021].

19. The Court of Appeal in the case of Wakesho v Republic supra, proceeded to substitute a special finding that the appellant did the act charged but was insane at the time of commission. The court ordered that the appellant, who had been in custody since the time of arrest be immediately taken to a mental hospital for medical treatment where he was to remain until such time as a psychiatrist in charge of the hospital certified that he was no longer a danger to society or to self.

20. Unlike Wakesho case where the convict had not recovered at the conclusion of his case, in this case, the accused has fully recovered. Since this court has the discretion to make a just decision and bearing in mind that there is no mandatory minimum sentence in murder cases as espoused in the Muruatetu vs republic case petition No.15 and 16 of 2015, the most appropriate sentence is a non-custodial sentence.

21. I note from the record that the convict has been in custody from the day of arrest hence spending two years or thereabouts in lawful custody. It is therefore my view that a probationary sentence is the appropriate sentence.

22. As a consequence of the above, the orders that are commendable to me are as follows:

    i. I sentence the convict found guilty but insane to probation for three (3) years with immediate effect at Garissa under the supervision of a probation officer in terms of Section 5 (1) of the *Probation of Offenders Act* (POA) Cap 164 Laws of Kenya.

    ii. The Probation Officer responsible for the supervision of the convict shall be selected by the principal probation officer in terms of Section 14 (1) of the *Probation of Offenders Act* (POA).

    ROA 14 days

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 15TH DAY OF MARCH 2024

J. N. ONYIEGO

JUDGE