Republic v Bante (Criminal Case 11 of 2018) [2024] KEHC 9144 (KLR) (24 July 2024) (Sentence)

Neutral citation: [2024] KEHC 9144 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL CASE 11 OF 2018

JN ONYIEGO, J

JULY 24, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

ISMAEL BIDU BANTE ..... ACCUSED

SENTENCE

1. Accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *penal code*. Particulars are that on the 5th day of October 2018 at Kibilay location in Habaswein Sub-county within Wajir County, he murdered Rahma Dokow Gabow. Having been assessed and found unfit to stand trial on account of mental infirmity, he was referred to mathari mental hospital for treatment.

2. 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 subsequently convicted on a special finding of guilty but insane. Subsequently, the court ordered for a pre-sentence report before mitigation and sentence.

3. According to the pre-sentence report, accused's family and community is not positive about his release on probation. Nobody wants him at home as he is allegedly a threat to society.

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

5. The parties did not offer much assistance as the prosecution orally submitted that there was no previous criminal record on the convict and that he be treated as a first offender. Counsel for the accused on the other hand equally orally submitted that the accused is 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.

6. I have considered submissions by both parties. As already noted, the ruling herein is in respect to the sentence of the accused where a special finding of guilty but insane has been made.

7. 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..."

8. It is worth noting that courts have been grappling with how to deal with a convict on a special finding of guilty but in 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.

9. 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 hence discharged the accused. The court of appeal in the Wakesho case 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.

10. 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 tothe Constitution, in order to align the provisions of section 166 of the CPC tothe Constitution.

11. Further, the learned Judge proceeded to align Section 166 tothe 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.

12. 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.

13. The learned judge had this to say:

> " 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 underthe *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.

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.

22.1 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.....

14. The hon. Judge further stated, It is clear that under sub-section (5) 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. That the former is a judicial function and the latter is an executive responsibility. The court went further to sentence the accused to 13 years imprisonment.

15. 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".

16. 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".

17. 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.

18. 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.

19. In the case of *Kimaru & 17 others v Attorney General & another ; Kenya national humans rights and equality commission* (Interested party)(petition 226 of 2020) KEHC 114(KLR) Murima J declared Sections 162 to 167 of the penal code unconstitutional.

20. 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.

21. In the case herein, I have had an opportunity to hear the mitigation as submitted by both counsel. Counsel for the accused stated that the accused 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.

22. 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 law and other authorities that apply to the case at hand.

23. 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].

24. 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 the appellant was to remain until such time as a psychiatrist in charge of the hospital certified that the appellant was no longer a danger to society or to self.

25. Unlike Wakesho case where the convict had not recovered at the conclusion of his case, in this case, the accused has fully recovered. He cannot be taken to a mental institution. Section 166 and 167 having been declared unconstitutional, the order to be held at the pleasure of his excellency the president cannot apply. With the two options out, I am left in a precarious position as to where to take the accused.

26. There is a *lacuna* in the law as to how the persons found guilty but insane should be treated. The AG should move with speed to have the law amended and have clear road map on how to deal with such persons.

27. 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 v republic* case petition No.15 and 16 of 2015, the most appropriate order to make is a non-custodial order.

28. Unlike wakesho case where the court returned the accused to the mental institution to continue with treatment and upon recovery be set free, in this case he has recovered hence can not be taken to mathari or any other mental institution. As to the direction taken by Majanja as stated above, it lacks certainty as it is an indefinite way of holding an accused person in a mental institution yet it is not a prison nor is the accused required there for treatment. Since the accused has recovered, then, he can be released as he is not a danger to society.

29. However, from the pre-sentence report, the family and the community at large do not want him back home. My challenge then is, where does the accused go if holding him at the pleasure of his excellency

the president is unconstitutional and he has healed? With that predicament, I would find guidance from the holding of kiarie J (*supra*)and the court of appeal in wakesho case that upon recovery and certification by a psychiatrist an accused has recovered and is not a danger to society or himself, he can be released. The release here in my view refers to a discharge just as judge Kiarie had held.

30. In view of the above, 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.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF JULY 2024

J. N. ONYIEGO

JUDGE