REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 23 OF 2018[MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

ERICK OCHIENG OKOTH.....ACCUSED

RULING ON SENTENCE

1. The accused person herein ERICK OCHIENG OKOTH was on 26th January 2021 found guilty of the offence of murder and convicted accordingly but a special finding of Guilty but insane was made by this court, pursuant to section 166 (1) of the **Criminal Procedure Code**.

2. This court then adjourned the matter for sentence as appropriate. The sentence for the offence of murder is prescribed under Section 204 of the Penal Code which is a mandatory death sentence. However, the Supreme Court in the **Francis Muruatetu &another v R [2017]e KLR** held that the mandatoriness of death sentence is unconstitutional hence opening up way for revision of death sentences passed in the past. In the instant case, a special finding of "guilty but insane" was entered under **Section 166(1)** of the **Criminal Procedure Code**. S**ection 166(2)** of the **Criminal Procedure Code** provides:

> *(2)"**when a special finding in so made, the court shall report the case for the order of the president and shall meanwhile order the accused to be kept in custody in such a place and in such manner as the court shall direct."***

3. The prosecution through Counsel Mr. Kakoi has asked the court to treat the accused as a first offender.

4. Mr. Ochanyo counsel for the accused has asked the court to consider that the accused has been in custody since 2018 and had been found not fit to plead to the charge as per the Psychiatrists report dated 16th October 2018. The accused was then committed to Mathari Hospital vide warrant of 24/1/2019 and it was not until 4/11/2019 that the Hospital returned a verdict of fit to stand trial that this case proceeded for trial after plea taking. In his view, the accused did not know what he was doing at the material time and that he said so in his defence.

5. There have been new developments in the area of cases similar to this one and in Republic **V SOM, Kisumu High Court Criminal Case No.6 of 2011 Majanja J** declared parts of the provisions of **section 166** of the **Criminal Procedure Code** unconstitutional on the basis of finding the indeterminate sentence under **section 166** of the **Criminal Procedure Code** cruel and inhuman. Majanja J., after making a special finding in the cited case under **section 166 (1)** of the **Criminal Procedure Code** observed:

> ***"However, this is not the end of the matter as I have doubt as to the constitutionality of these provisions particularly in light of the recent Supreme Court decision in Francis Karioko Muruatetu and Another v Republic, SCK Petition No. 15 and 16 of the 2015 (UR) where the court held that it is the judicial duty to impose a sentence that meets the facts and circumstances of the case. This suggests that a law that leaves the length of the sentence to another authority violates the fundamental rights and freedoms of the accused…***

6. The learned judge proceeded to examine various decisions of judges touching on the same or similar issue. Some of the cases and his observations are as follows:

> ***"Several cases have cast doubt on constitutional validity of provisions that impose an indeterminate sentence on an accused at the instance of an authority other than the courts. For example, in AOO and 6 Others v Attorney General and Another NRB Petition No. 570 of 2015 [2017]eKLR, Mativo J., held that the provisions of the Penal Code where a child found guilty of murder is held at the pleasure of the President is unconstitutional as it violates the right to a fair trial under the Constitution.***
>
> ***Our courts have also been concerned about the treatment of persons with mental disability under the provisions of the CPC. In***

Hussan Hussein Yusuf v Republic Meru High Court Criminal Appeal No. 59 of 2014 [2016]eKLR, Kiarie J., held that section 167(1) of the CPC which directs that a person suffering from mental disability and is unable to understand the proceedings is to be detained at the pleasure of the President is unconstitutional as it violates Articles 25 and 29 of the Constitution that prohibit cruel, inhuman and degrading treatment. The learned judge reiterated this position in B K J v Republic, MERU HC Criminal Appeal No. 16 of 2015 [2016]eKLR. In Joseph Melikino Katuta v Republic, Voi HC Criminal Appeal No. 12 of 2016 [2016]eKLR, Kamau J., emphasized the point that keeping a mentally ill person in prison for an indeterminate period of time is cruel, inhuman and degrading treatment contrary to Articles 25 and 29 of the Constitution.

Turning back to the provisions of section 166 of the CPC, it is clear that the court's duty comes to an end when it enters the special verdict against the accused and directs the accused's detention pending the President's decision*. As *Mativo J.*, noted in *AOO and 6 Others v Attorney General (Supra), 'The constitution being the supreme law of the land separates the powers of the legislature, the executive and the Judiciary. Judicial power is reserved to the Judiciary. The imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and is therefore the exercise of judicial, not executive, power.' This holding is, in my view, consistent with what the Supreme Court held in the Muruatetu Case (Supra). The vesting of discretion on the President on how the accused is to be treated after conviction is inimical to the fundamental duty of the Judiciary to determine the guilt of the accused and determine the terms upon which he or she serves the sentence. The fact that the statute provides for a periodic review by the President upon advice of executive functionaries goes further to buttress this key point.

I therefore find and hold that the provisions of section 166 of the CPC are unconstitutional to the extent that they take away the judicial function to determine the nature of the sentence or consequence of the special finding contrary to Article 160 of the Constitution by vesting the discretionary power in the executive. It also violates the right to a fair trial protected under Article 25 of the Constitution.

7. The learned Judge applied 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**. The learned judge correctly observed that the Court is entitled to construe existing laws, such as the **CPC** as one of the 'existing laws' that continue to be in force, with such ***modifications, adaptations, qualifications and exceptions necessary to bring its provisions into conformity with the Constitution,*** as provided under **section 7** of the **Sixth Schedule** of the **Constitution**.

8. He was of the view that **section 166** of the **CPC** which provides for the review of a sentence of one found ***"guilty but insane"*** to be carried out by the President rather than the court, was what created a problem. He proceeded to align the section to the Constitution by holding that henceforth the reference to "President" shall be read to mean, ***"the Court,"*** finding that the effect of this was to ensure that the accused is brought before the court periodically so that the court may review the matter and if necessary call for and take necessary expert and other evidence before making an appropriate order within the framework of a definite period of detention imposed by the Court.

9. **Section 166** of the **CPC** is pegged to the power given to the President to exercise **a Power of Mercy.** Under **sub-sections (2), (3), (5) and (6)** the **CPC** provides thus**:**

'(2) When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.

(5) On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.'

10. 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. We adopted that system from Britain and I believe many commonwealth countries adopted it too. As can be understood in the Privy Council decision in **REYES Vs. R (BELIZE) (2002) UKC 11:**

"…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."

11. The judicial function to pass sentence is reserved to the judicial process and cannot be taken away from it. 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. That executive power has constitutional underpinning under **Article 133** of the **Constitution** which stipulates:

"133(1) on the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by-

(a) granting a free or conditional pardon to a person convicted of an offence;

(b) Postponing the carrying out of a punishment, either for a specified or indefinite period;

(c) Substituting a less severe form of punishment; or

(d) Remitting all or part of a punishment."

12. The Advisory Committee is established under **Article 133(2)** of the **Constitution** and its membership includes the Attorney General as Chair and the Cabinet Secretary responsible for correctional purposes. Furthermore, Parliament was mandated to enact Legislation to provide for-

"(a)…

(b)…

(c) criteria that shall be applied by the Advisory Committee in formulating its advice."

13. In 2011, Parliament enacted the **Power of Mercy Act No. 21 of 2011**. The application of the Act is provided under **section 3** as follows:

"The provisions of this Act shall govern all matters relating to a petition under the Constitution for the exercise of the power of mercy by the President pursuant to Article 133 of the Constitution."

18. That committee is the one referred to under **section 166(6)** of the **CPC** which provides:

"(6) Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit."

14. Under **section 2** of that **Act,** the interpretation section**,** a picture is created of the kind of persons who may petition and therefore whose matters the committee may consider as:

"A convicted criminal prisoner" means any criminal prisoner under sentence of a court or a court martial, and includes a person detained in prison under sections 162 to 167 of the Criminal Procedure Code (Cap 75)."

15. Meting out 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. It is for that reason that I would hesitate to take the route persuasively taken by Majanja J 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.**

16. Further, once a trial court passes sentence after conviction, it becomes functus officio, and can no longer supervise implementation of the sentence meted out, unless there is an application for review where applicable. The case file will have come to an end and closed only available for appeal purposes. 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. See Lesiit J in **Republic v E N W [2019] eKLR** where the learned Judge used the very words that I have adopted in this Ruling and added:

"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. That is a matter that the ministry concerned needs to look into to ensure that the cases of persons sentenced under section 166 of the CPC, or those of underage children are attended to as provided under section 25(2) and (3) of the Penal Code. The delay cannot be cured by having the matter mentioned in court.

In conclusion, I do find that it is expedient and judicious to give a determinant sentence in cases concluded under section 166(1) of the CPC. After so doing, the court becomes functus officio, and should let the Executive carry out its responsibility under section 166 (2) to (7) of the CPC."

17. In this case, I take cognizance of the period the accused has been in custody during the pendency of this case, a period of nearly three years. The doctors found that the accused was laboring under a psychiatric /mental condition and that he required treatment which this court ordered for and he was treated at Mathari Hospital before being assessed as fit to stand trial. There was no indication, however, that the mental illness was due to drug or substance induced psychosis. What that means is that the accused cannot be blamed for the mental illness as his family confirmed that he was epileptic.

18. The good news is that he has now recovered unless the condition recurs and therefore he does not require to be kept into a mental

institution for an indefinite period to await the president's decision save that he can apply for consideration under the power of mercy.

19. Therefore, having taken into account all the relevant factors pertaining to sentencing, I make the following orders:

a) I sentence the Accused ERICK OCHIENG OKOTH to serve ten (10) years imprisonment to be calculated from the date of his arrest being the 8th day of October, 2018;

b) The proceedings herein be typed and a certified copy of the record and the notes from this court be transmitted to the Ministry of Interior and Coordination of National Government for consideration by the President.

c) Right of appeal explained to the accused.

20. This file is now closed.

Dated, Signed and Delivered at Siaya this 3rd Day of February, 2021

R.E.ABURILI

JUDGE

In the presence of:

Mr. Ochanyo Adv. for the accused-virtually via Microsoft Teams

Accused person present in court

Mr. Kakoi Principal Prosecution Counsel for the State

CA: Modestar and Mboya