



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM; R. MWONGO, J.

CRIMINAL CASE NO. 6 OF 2017

REPUBLIC....COMPLAINANT

VERSUS

JKN.....ACCUSED

JUDGMENT ON SENTENCE

1. The Accused was convicted by Meoli J. on 27th February, 2019, for murder. However the court also found that he was insane at the time 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. By a letter dated 4th July 2019, the case was duly reported to the President, and the accused has been held at Naivasha Maximum Security Prison pending the President's Order or committal. No response has since been received to the report made to the President.

3. In a Ruling dated 30th April, 2020, to determine what to do next with the accused, this court noted that the deceased's mental situation remained as previously found. Counsel argued that detention of the accused at the President's pleasure was not constitutional. After due consideration of authorities and arguments, I held:

“[21]..... I am persuaded that the proper way to proceed after convicting an accused as ‘guilty but insane’, is to take such action as will ensure the full and fair trial rights of the accused are complied with. These include appreciating that such rights can only be properly complied with if the court finally concludes the case before it with the issuance of a sentence; the sentence must be determinate so as to give finality, should the convict wish to exercise his right to appeal; and that a report be forwarded to the executive branch to enable it to take such constitutional action under Article 133 of the Constitution as it may deem appropriate, to exercise the power of mercy.”

4. I am further of the view that the provisions of **Section 166** and **167** of the **Criminal Procedure Code** are not in conformity with **Article 50 (1) (9)** of the **Constitution** as they avail an accused person no room to appeal or seek review against the President's pleasure.

5. Following the said Ruling this court ordered that a Probation Officer's pre-sentence report be availed. The report was subsequently availed dated 25th June, 2020 and a mitigation hearing held.

6. During mitigation, counsel pointed out that the accused was arrested on 4th August, 2013 and charged on 6th August, 2017. The hearing, however, started on 9th October 2019, due to the unstable mental health condition of the accused. Hearing was concluded by the conviction. I note from this that the accused has been held in custody for seven and a half (7 ½) years.

7. Counsel, during mitigation further dwelt at length on the Probation Report, which I will also review later herein. She pointed out that from the evidence in the case, which was essentially circumstantial, the accused and the deceased both suffered from mental illness; that the family of the accused had a history of psychiatric illness; that the prosecution had confirmed the accused to be a first offender; that he was remorseful; and that it was not known whether the deceased had a weapon at the time of his death.

8. Counsel concluded by urging the court to mete a non-custodial sentence. To this end, she relied on the cases of **Republic v Kennedy Matiba Oketch [2015] eKLR**, **Republic v Caren Kerubo Omosa [2016] eKLR** and **Republic v Ephantus Karanja Wangari [2016] eKLR**.

9. In both **Kennedy Matiba** and **Caren Kerubo's** cases the accused had pleaded guilty to manslaughter. The courts took note of the time spent in custody, 3 years in **Kennedy Matiba** and 1 year in **Caren Kerubo's** case. The trial court convicted **Kennedy Matiba** to 3 years supervised probation, and **Caren Kerubo** was sentenced to 1 year probation.

10. In **Ephantus Karanja's** case, the accused pleaded guilty to manslaughter following a Plea Bargain Agreement. The court noted that the death of the deceased followed a very brief confrontation where the accused head-butted the deceased; that the accused exhibited true remorse as he addressed the victim's family in court; and the court noted that the incident "*was the product of a momentary lapse of judgment*". That court also considered the probation report at length and determined as follows on sentence:

".....after considering all these factors, I have come to the conclusion that it will serve no useful purpose for the Accused Person to be sent to prison on a custodial sentence. I have noted that the Accused Person was in custody for five months. The context and circumstances here point to a non-custodial sentence. I am satisfied that the Accused is willing to comply with the conditions of any probation order imposed. The Accused Person is hereby sentenced to be under probation for a period of three (3) years."

11. All of the cases presented by counsel are dissimilar at the present case. Here, the evidence is that both the accused and deceased had a history of mental illness. Here, the accused when he was able to plead, did not plead guilty; Here the evidence is circumstantial because there were no eye witnesses since he and his son (the deceased) spent the night in the same room and the next morning the accused went to report to a relative that the deceased was dead; Here there is a conviction of the accused as guilty but insane.

12. I did not try the case, but I have carefully observed the accused on the occasions he was before me. He had lucid moments; he had moments when he was incoherent and appeared to be unaware that his case had been concluded with a conviction; there were times he was argumentative saying in frustration that he had suffered for a long time; but in the end, he would often say "*ni sawa Judge*" after hearing my orders: whether directing another mention, or to go for another psychiatric test.

13. Accordingly, the Probation Officer's social inquiry report offers useful insight and guidance. The report covers a wide range of information concerning the accused, family, circumstances and his environment. The information was obtained from a variety of sources indicated in the report, including information for the accused himself.

14. According to the Report, the accused has seven children from his marriage to FW in 1981 and had his own piece of land at Maraigushu Naivasha. Neighbours say he abused alcohol "*to a great extent*". He had a medical history of insanity shown by medical reports. The probation officer noted the accused was at times unaware he had been convicted, and although he knew his son, the deceased, was dead, he was not able to state whether he killed him.

15. The probation report also indicates that the accused's family are ready to receive him back and to assist him with medications that he uses. The Maraigushu Area Chief knew the accused for a long time as mentally challenged but not violent. The deceased son was also unstable. The Chief confirmed the accused had his own land on which the accused could settle; and he would aid his rehabilitation. Neighbours, two, had no objection to the accused's release.

16. The Probation Report concludes:

"The family and the community have no ill feeling on his release as they believe that he has reformed for the 7 years he has been in custody. He has his own place of abode where he can be assisted to resettle through our partnership with the village administration. Follow ups on his mental medication will be regularly made. If it pleases this Honourable Court, we recommend that the convict be released on a Probation Order Sentence. Probation department shall embark on a necessary resettlement plan in his case."

17. The prisons authorities at Naivasha Medium Prison stated that though the convict is mentally challenged, which is seen in his behaviour and utterances, he is not violent. Further, they stated that he has been on mental prescriptions for the last seven (7) years whilst in custody, and would not pose any danger.

18. The **Judiciary Sentencing Police Guidelines Paragraph 20.30 to 20.35** reiterate the provisions of **Section 166** of the **Criminal Procedure Code**. I had already dealt with that aspect at length in my Ruling of 30th April, 2020. I came to the conclusion, noted earlier herein, that the constitutionally protected full and fair trial rights of the accused can only be protected and complied with by issuance of a sentence that is determinate for finality and avails for review or appeal. **Sections 166 to 167** of the **Criminal Procedure Code** do not avail the convict of this right, and to that extent are not in conformity with **Article 50 (1) (9)** of the Constitution and the Constitutional principles established in the **Muruatetu** Case.

19. Ultimately, and having taken into account all the material before me; I am satisfied that the circumstances herein point to a non-custodial sentence; noting that the convict has already spent over seven (7) years incarcerated, I am of the view that a probationary sentence is the appropriate sentence herein.

20. a) Accordingly, I sentence the convict, found guilty but insane, to probation for three (3) years with immediate effect in Maraigushu 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.

b) 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)**.

21. A copy of this judgment will be availed to the Executive for their record in this matter.

Administrative directions

22. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

23. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

24. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 1st Day of February, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP
2. Ms Kithinji for the Accused
3. Accused - Joseph Kamau Njenga - present in Naivasha Maximum Prison

4. Court Assistant - Quinter Ogutu