



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 60 OF 2014

LESITT, J

REPUBLIC.....PROSECUTOR

VERSUS

ANTHONY WAINAINA NG'ANG'A.....ACCUSED

RULING ON SENTENCE

1. The accused was arraigned before this court on the 22nd day of July, 2014 with one count of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The accused was found not fit to plead and subsequently admitted at Mathari Mental Hospital for in-patient treatment.
2. The accused was found fit to plead by Dr. Mucheru Wang'ombe who went ahead to recommend for regular medication and follow up. Vide a certificate dated 25th September, 2014. The accused pleaded to the charges upon which a plea of not guilty was recorded by the court.
3. The accused had two relapses before the hearing of this case commenced. In 2015 and 2017 respectively. In both, the accused was treated as an inpatient at Mathare Mental Hospital. A report dated 14th November, 2017 by Dr. Syengo Mutisya certified the accused fit to plead and a fresh plea was taken on 15th of November 2017.
4. The defence counsel intimated to court on 21st February, 2018 that they wanted to pursue a Plea Bargain considering the case involved family members. The Prosecution declined the offer and the case was slated for hearing. After the conclusion of the prosecution and defence case, the court in its Judgment arrived at a special finding under **Section 166(1)** of the **Criminal Procedure Code**, that the accused was guilty of murder but insane.
5. Ms. Amber, Counsel holding brief for Mr. Ogada mitigated on behalf of the accused. She urged that the court should take into account the health of the accused and the time the accused has spent in remand. Counsel urged that the accused should be given suitable sentence so as to enable him continue with his life after treatment.
6. I have considered the fact that the prosecution has treated the accused as a first time offender. I consequently treat the accused as such.
7. The court ordered for a pre-sentence report in respect of the accused. One dated 16th September, 2019 by Mr. Andrew Kanyutu M a Probation Officer was filed. The Probation Officer noted that the accused gave him a lot of information about his education, working life and marital life which all turned out as unfounded as other family members had a different account of events. The accused claimed to be married and blessed with four (4) children yet he is said to have never married.
8. The attitude of the accused towards the offence was described as that of a man who regrets the killing of his brother and being blamed for the offence. The accused indicated that he would start up a church in the event he was released.
9. The accused family was described as having kept a social distance from the accused and his predicament. Only a sister and her husband demonstrated support for the accused throughout his trial. The two stated that the accused had suffered from the mental illness since he was in form 2. They stated that it was regrettable and unfortunate that the accused murdered his brother who was responsible for the accused medication and support at home. They expressed their willingness to assist the accused in his rehabilitation and re-integration back to society. They also expressed their willingness to help the accused continue with his medication and the necessary psychological support.
10. The Pre-Sentence report included a Victim Impact Statement from the deceased wife and Children. They stated that the deceased death

had a profound effect on their lives to the extent that they lived in fear and trauma every time they visited their rural home in Kenya once they visit from Europe where they reside. They stated that they even had to undergo sessions of psychotherapy for them to deal with the trauma. The wife to the deceased stated that she is apprehensive that the accused lacks the viable support system at home since his mother passed on and the only sister at home is equally mentally ill. The victims refused to be responsible for the deceased murderer despite him being a family member.

11. The report also contained a community view of the accused. The community described the accused as having been a peaceful man despite being mentally disturbed. The community was said to be at a dilemma concerning the possibility of the accused being re-integrated back to the community. Their major concern was who would take care of the accused and his sister as they were both mentally ill.

12. I have considered that the accused is aged 59 years and has been in remand since 22nd July, 2014. That is approximately five (5) years and two months.

13. I have taken into consideration all the relevant factors, the accused mitigation, the Probation Officers' report and recommendation.

14. **Section 166 of the Criminal Procedure Code titled Defence of lunacy adduced at trial** states as follows:

(1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.

(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.

(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.

15. The issue in this case is quite similar to the one in a case I handled recently of **Rep. Vs Edwin Njihia Waweru, Milimani HCCR Case No. 78 of 2015**, and **Rep Vs Ibrahim Kamau Irungu HCCR case No. 7 of 2018**. I will immensely quote from them.

16. In **Rep Vs Ibrahim**, supra, I stated the following:

20" In Rep Vs. Waweru, supra, I stated, and I still hold that position, that it was clear under sub-section (5) of that Act 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 to exercise a Power of Mercy. The former is a judicial function and the latter is an Executive responsibility. Kenya adopted that system, of use of an Advisory Committee to advise the Executive on the Exercise of Power of Mercy over certain cases from Britain. Kenya is not alone. Many commonwealth countries also adopted that system, including Belize. 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."

21" I find that the judicial function is to pass sentence, and that function is reserved to the judicial process and cannot be taken away from it. I find that 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. Under the law, the Executive, if at all it determines to exercise the Power of Mercy in a case, can do so only by reducing and not enhancing or making it more severe. Otherwise it would make meaningless the aspect of 'mercy'.

17. At Paragraph 20 to 22 of **Rep Vs Edwin Njihia**, Supra, I expressed myself as thus:

20" 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" 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.

18. The right to a fair trial starts from the moment the accused is arrested and ends upon the determination of the case and when the sentence is delivered. The court finalizes the matter when it issues a determinate sentence.

19. I have considered that the accused caused his brother's death in this case, a matter he says he regrets. The accused family are said to have distanced themselves from the accused after this incident save for one of his sisters and brother-in-law. However majority of those interviewed by the Probation Officer be it in the community or the deceased family, all expressed some reservations to having the accused given a non-custodial sentence.

20. I have considered that the accused has been suffering from mental illness since 1995. I have considered the period the accused has been in custody during the pendency of this case, a period of five (5) years. The doctors found that the accused was suffering from schizophrenia, which is a mental illness dependent on medication. He has been in and out of Mathari Mental Hospital and the doctor said that he suffers from a condition that can only be contained by constant medication and supervision.

21. When this case came up for sentence on the 7th day of October, 2019 this court had to defer the same because the accused was in an uncontrollable condition. His state of mind seems to have deteriorated to a great extent. This necessitated this court to make an order for the accused to undergo inpatient treatment at Mathari Mental Hospital. The accused brother who was present in court expressed the same sentiments.

22. The brother of the accused was present in court for the ruling on sentence on the 7th of October 2019. The court saw the distress he was in to see the state of the health of his brother. Not to mention it was enough stress for him to make it to court. I guess judging his financial ability by his physical appearance.

23. This case is a stark reminder of the dire need for accessible and affordable mental health care in this country. That in itself is not sufficient due to the nature of the illness, and the government should take up responsibility to consider tracking down patients with a history of mental illness who require constant medication, with a view of ensuring such medication is accessed and administered. This will not be a new thing since tracking of patients with such illness as tuberculosis is done. Such patients are strictly monitored and medicated by the state to the extent of incarcerating them to achieve that purpose.

24. For the accused in this case, I find that it would be best to have him placed in a safe place where he can get the appropriate medical care, security, day to day monitoring and management as provided under **section 166(3)** of the **Criminal Procedure Code**.

25. Consequently, I find that the correct orders to make in this case are as follows:

a) Accused will serve 20 years' imprisonment from the date he was arraigned in court in July 2014.

b) The accused shall remain under the Security, Care, Management and treatment of Mathari National Teaching & Referral Hospital. Pending his admission there he will remain in prison custody.

c) The proceedings herein be typed and a certified copy of the record and the notes from this court be transmitted to the Ministry concerned for consideration by the President.

d) Upon completion of the sentence in this case, the Accused should be released from custody into the hands of a family member subject to an order of the President, if any.

e) Right of appeal explained to the accused.

DATED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

LESIT, J

JUDGE

DELIVERED THROUGH TEAMS ON 7TH MAY, 2021.

In the presence of:

Accused person present

Mr. Naulikha for State

Ms Hamba holding brief Mr. Ogada for the accused

LESIT, J.

JUDGE