



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 69 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JWK.....ACCUSED

RULING ON SENTENCE

JWK pleaded guilty to manslaughter contrary to section 202 as read with section 205 of the Penal Code following a plea bargaining agreement entered into by the prosecution and the defence. It is alleged that on 9th June 2013 at Njiku sub location in Kiambu County he unlawfully killed MKW. He had been initially charged with murder contrary to section 203 as read with section 204 of the Penal Code. This offence was reduced to manslaughter after the agreement.

The facts of the case were presented by the prosecution. They show that on 9th June 2013 the deceased MKW was in the sitting room when the accused went to the house and without saying anything he hit the deceased on the head using a hammer. The accused then ran away leaving the hammer stuck on the deceased's head. The accused went to his grandmother's place in Mwimuto in Kiambu County where he spent the night. The grandmother tipped the police of the whereabouts of the deceased. Police from Karuri Police Station arrested the accused and took him to the Police Station. He was charged with murder which has been substituted with manslaughter. He was taken for mental assessment at Mathare Mental Hospital where he was diagnosed with bipolar disorder. A report to that effect is dated 20th June 2013. A second report is dated 25th July 2013. This report shows that the accused had a history of delusion and violence. A further report dated 17th November 2016 indicated that the accused had healed from bipolar disorder and was normal and fit to plead.

The body of the deceased was examined at Chiromo Mortuary on 11th June 2016 and the doctor found that the cause of death was head injury due to blunt force trauma.

The accused admitted that the facts as presented were correct. Consequently, this court found him guilty on his own plea and convicted him for manslaughter. The court called for a comprehensive report on the mental status of the accused and a report from the probation officer. The two reports have been filed. The medical report dated 24th January 2019 discloses that the accused suffers from bipolar mood disorder and at the time of examination he was in the manic phase of this disorder. The doctor recommended re-start of treatment. The probation report reveals that the family of the accused does not want anything to do with him. The two factors, total rejection by the family his mental health, come to play in determining the suitable sentence.

The circumstances under which the deceased died are unfortunate and given the two factors I have highlighted above, this court finds itself in a very challenging situation. The report dated 24th January 2019 by Dr. P Onyancha reads as follows on its concluding part:

Examination

Mental status examination revealed a 'gradiosed' person who believes he is a politician and aspires to be an international president. He also believes he is a diplomat.

Impression

Manic phase of Bipolar Mood Disorder

Conclusion

Re-start the treatment.

The record shows several reports indicating that the accused was fit to plead and make his defence. One such report is dated 18th November

2017. On the strength of this report this court proceeded to take the plea for manslaughter and convicted the accused on his own plea of guilty after he admitted committing the offence and confirmed that the facts as presented were correct. The last report dated 24th January 2019 was filed after this court called for it. The situation obtaining prior to the declaration of Section 166 of the Criminal Procedure Code as unconstitutional was as follows:

166 (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.

(3) The President may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.

(4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report.

(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.

(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.

(7) The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.

In Kisumu High Court Criminal Case No. 6 of 2011 Republic v S O M [2018] eKLR the court (Majanja J) while dealing with Section 166 of the Criminal Procedure Code had this to say:

“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 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 that the Supreme Court held in the Murutetu Case (Supra). The vesting of discretion on the President on how the accused it 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.”

In R. v. SOM (supra) the court, in addition to declaring Section 166 of the Criminal Procedure Code unconstitutional to the extent that it takes away the judicial function to determine the nature of the sentence or consequence of the special finding, also declared that in order to remedy the constitutional defect the reference to “the President” under section 166 of the Criminal Procedure Code and the review carried out under that section shall be by the Court. The court sentenced the accused in that case to Mathari Mental Hospital for a term of fifteen (15) years subject to periodic review by the court in accordance with section 166 of the Criminal Procedure Code and in any case before the expiry of every two (2) years.

The above authority has persuasive value to this court. The dilemma I face as the arbiter in this matter is the fact that the accused is not mentally stable to serve sentence in custody. His family has also rejected him and this becomes a challenge because a non-custodial sentence is not favourable given that without family support it would be difficult to supervise him. I find the solution in the above case. In view of the circumstances of this case I hereby make a special finding that the accused is guilty of manslaughter but he was insane when he committed the act. Consequently in line with the case I have cited above, I order that the accused shall be committed to Mathare National Teaching & Referral Hospital for ten (10) years. During that time the accused shall undergo treatment as recommended by the doctor. He shall be subject to periodic reviews by the court in every two (2) years in accordance with the requirements of Section 166 of the Criminal Procedure Code. Orders shall issue accordingly.

Delivered, dated and signed this 7th day of March 2019.

S. N. Mutuku

Judge