



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 106 OF 2004

LESIT J

REPUBLIC.....PROSECUTOR

VERSUS

VKK.....ACCUSED

RULING

1. The accused **VKK** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are:

“That on the 19th day of November 2000, at Kambaa Village in Kiambu District of the Central Province murdered Mwai Kinyanjui.”

2. I have noted that this file has been handled by a number of Judges since 2004 when the information was filed in court. It is worth noting that having perused through the file, I note that this case has taken close to Fifteen (15) years since its inception. That is quite a long period of time for all parties involved to have been patient enough. I take this early opportunity to sympathize with all the parties concerned.

3. The accused first took plea on the 16th November 2005, approximately 1 year and 2 months after he was first produced in court. The lapse of time is explained by the fact that three Psychiatrist medical reports filed in court on diverse dates opined he was not fit to plead to the charges. They had further recommended for the accused admission at Mathari Mental Hospital for in-patient treatment. It is worth noting that soon after the accused pleaded to the charge, the court ordered for his remanding at Mathari Mental Hospital for in-Patient treatment.

4. From the record, it is evident that the accused was further hospitalized for two (2) years at Mathari Hospital beginning 16th November 2005 and ending on 13th November 2007. On 4th of July 2007 the defence counsel on record applied for a fresh mental assessment. A report dated 13th November 2007 by one Dr. Hinga was filed and he opined that the accused was now fit to plead.

5. A Further report dated 14th January 2008 opined the accused was fit to plead and the matter was fixed for hearing. This report necessitated the defence counsel to seek for a plea bargain which seems to have hit a dead end as nothing seems to have come off his intentions.

6. On 24th March 2009, two witnesses were heard by the court and further hearing was slated for 27th and 28th of July 2009. On the preceding date, a new Judge took over the matter and counsel on record sought to have the client make a choice as to whether the case was to start *de novo* or not.

7. This court took over the matter on 17th November 2009, the accused mental status seemed to have changed and he was no longer fit to stand trial. I directed that he be re-admitted at Mathari Hospital. From the record, several Psychiatric reports were filed and a majority of them opined the accused was not fit to stand trial. The reports further recommended for the accused admission at Mathari hospital for in-patient treatment.

8. Three reports dated 29th June 2016, 24th March 2017 and 30th October 2017 from Dr. Ngugi Gatere opined the accused was now fit to stand trial. A fresh plea was taken on 23rd January 2018 where the accused pleaded not guilty. However the court noted some abnormality from the accused response when asked to plead and recommend that an updated mental status report be filed. One dated 23rd April 2018 by Dr. Gatere was filed and true to the courts observation, the accused was found not fit to plead. The Doctor further recommended that the accused should be re-admitted to Mathari Hospital for treatment.

9. The latest Psychiatric report dated 18th April 2019 by Dr. Mucheru Wang’ombe shed enough light on the accused condition. The doctor explained that the accused was suffering from a condition known as schizophrenia which is chronic and a relapsing disorder characterized by

abnormal beliefs and perceptions. The report further indicated that since the accused was arrested in 2004, he had been under medication but unfortunately no improvement had been noted clinically despite optimal treatment. The doctor opined that the accused is unlikely to be able to recover sufficiently so as to stand trial.

10. The prosecution through Learned Counsel Ms. Onunga made an oral application on 2nd May 2019 seeking to have the matter proceed under **Section 162(4)** of the **Criminal Procedure Code**. Counsel sought to have the record presented to the Cabinet Secretary Ministry of Interior Affairs and co-ordination, for consideration by the President. The defense stated that they had no objection and were awaiting the courts direction.

11. I have taken time to peruse and state in brief the history of this case. The question that begs is:

What ought to be the most appropriate action to take where it has been determined that the accused person is unlikely to ever be fit to take plea or stand trial despite optimal treatment?

12. **Article 50 2(b) of the Constitution 2010** gives an accused person several rights that are intended to guarantee him/her a fair hearing. Amongst other rights under that Article are that; **the accused has a right to be informed of the charge that he/she is facing, to be accorded sufficient details to answer it, to be informed in advance of the evidence that will be tendered against him and to be accorded an opportunity to challenge that evidence and to adduce evidence.**

13. It is manifestly evident that for these rights to be realized the accused must understand the proceedings and be able to instruct his advocate. That can only be possible if the accused person is of sound mind and is able to follow the trial process. In the instant case, the Doctor has opined that there is no likelihood of the accused ever being able to follow proceedings and stand trial.

14. The applicable procedure in cases of the lunacy or other incapacity of an accused person is provided under **Section 162** of the **Criminal Procedure Code**. **Section 162** provides as follows:

162 (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defense, it shall inquire into the fact of unsoundness.

(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defense, it shall postpone further proceedings in the case.

(4) If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall order that the accused be detained in safe custody in such place and manner as it may think fit, and shall transmit the court record or a certified copy thereof to the Ministry for consideration by the President.

(5) Upon consideration of the record the President may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody, and the court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the court which found him incapable of making his defense orders him to be brought before it again in the manner provided by sections 163 and 164.

15. The mental condition that the accused is ailing from has been described by Dr. Mucheru Wangombe as a chronic and relapsing disorder that makes it impossible for trial process to take off since the accused will never fully recover.

16. In light of the afore-mentioned and having regard to the fact that the accused has been incarcerated for a period of 15 years, I find that it would be best to have the accused placed in a safe place where he can get the appropriate medical care, security, day to day monitoring and management as provided under **section 162(4)** of the **Criminal Procedure Code**.

17. Consequently I order as follows:

1. The accused shall remain under the Security, Care, Management and treatment of Mathari National Teaching & Referral Hospital.

2. The proceedings herein be typed and a certified copy of the record be transmitted to the Ministry concerned for consideration by the President as provided under section 162(4) of the Criminal Procedure Code.

3. In the meantime, I mark this file as closed.

4. The Director of Public prosecution is at liberty to institute a fresh information if and when the accused is found fit to stand trial.

DATED AT NAIROBI THIS 17TH DAY OF JULY, 2019.

LESIT, J.

JUDGE.