



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRC NO. 18 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

GILBERT KIPTANUI KIBILIOCH.....ACCUSED

RULING

1. The accused seeks release on bail pending trial. He is charged with murder contrary to section 203 as read 204 of the Penal Code. The accused’s trial for the offence had previously been terminated by *Nolle Prosequi* entered by the DPP before the High Court at Nakuru in Criminal Case No. 62 of 2013, on the 31/3/2016.

2. It is trite that a *Nolle Prosequi* only discharges an accused person until the prosecution is able to proceed with the trial following the availability of witnesses or other enabling circumstances. It does not lead to an acquittal of the accused but only to a discharge and prosecution may be resumed if the circumstances change.

3. In this case, however, the accused is said to have suffered a debilitating injury to his brain following an accident after the offence making him unfit to plead as certified by the examining psychiatrist, Moi Teaching and Referral Hospital whose certificate dated 28/10/2019 indicated that accused “*has feature consistent with Post traumatic brain injury psychosis and is not fit to plead*”.

4. The defence seeks the release of the accused to his family members for purposes of treatment of his mental condition and Counsel gives undertaking by the family members will abide by any conditions of bail relating to treatment, period report to Court and progressive assessment reports on the mental health status of the accused.

5. The DPP does not oppose the release of the accused on bail and only requests that conditions of bail impose on the accused duty to report monthly to the DCIO and on the family on duty to ensure the treatment of the accused with monthly reports to the Court as to progress of the treatment. In this submission, I take it that there is no compelling reason to deny the accused bail.

6. An accused person without discriminating whether he/she be of sound mind is entitled to bail under Article 49 of the Constitution, and the provisions of the Criminal Procedure Code under section 167 of the Criminal Procedure Code making provisions for a different treatment of an accused person who may be of unsound mind or other mental infirmity making him unfit to plead his case are discriminatory to the extent that they deny such a person has constitutional right to bail.

7. As material to this application, section 167 of the Criminal Procedure Code provides as follows:

1) **167. * (1) If the accused, though not insane, cannot be made to understand the proceedings—**

a. in cases tried by a subordinate Court, the Court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the Court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the Court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President’s pleasure; but every such order shall be subject to confirmation by the High Court

b. In cases tried by the High Court, the Court shall try the case and at the close thereof ... shall either acquit the accused person or, if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President’s pleasure.

(2)A person ordered to be detained during the President’s pleasure shall be liable to be detained in such place and under such conditions as the President may from time to time by order direct, and whilst so detained shall be deemed to be in lawful custody.

(3) The President may at any time of his own motion, or after receiving a report from any person or persons thereunto empowered by him, order that a person detained as provided in subsection (2) be discharged or otherwise dealt with, subject to such conditions as to the person remaining under supervision in any place or by any person, and such other conditions for ensuring the welfare of the detained person and the public, as the President thinks fit.

(4) When a person has been ordered to be detained during the Presidents pleasure under paragraph (a) or paragraph (b) of subsection (1), the confirming or presiding judge shall forward to the Minister a copy of the notes of evidence taken at the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.

In view of the fair trial guarantee of Article 25 of the Constitution, the trial should not proceed when the accused is not able to make his defence! It is also unconstitutional to the extent that it does not permit bail for persons of unsound mind. I would also respectfully agree with Kiarie, J. in *Hassan Hussein v. R* (2016) eKLR that “section 167 (1) of the CPC is discriminative to the people with mental illness for prescribing their detention in prison instead of a health facility and for the detention to be indeterminate”.

8. Bail in cases of persons of unsound mind or other mental infirmity must be considered on the same principles as bail for persons of sound mind. The unsoundness of mind or other mental illness may only become a compelling reason to deny bail if the circumstances are such that treatment is not possible for the particular accused while out on bail and it is, therefore, necessary to have such an accused taken to a suitable facility for the treatment of his condition to enable him subsequently to defend himself in his trial. This accords with section 162 of the Criminal Procedure Code as follows:

“162. Inquiry by Court as to soundness of mind of accused

(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 defence, 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 defence, it shall postpone further proceedings in the case.

(3) If the case is one in which bail may be taken, the Court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the Court or such officer as the Court may appoint in that behalf.

(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 Minister 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 defence orders him to be brought before it again in the manner provided by sections 163 and 164.

[Act No. 22 of 1959, s. 15, Act No. 13 of 1967, First Sch., L.N. 124/1964,

Act No. 13 of 1982, First Sch.]”

9. Bail for persons of unsound mind like for persons of sound mind, should not be an avenue for avoidance of criminal prosecution of the accused. It should not be abused to grant an accused immunity from prosecution on account of his mental status, the treatment of which he actively or passively avoids so as to maintain the status of “unfit to plead” and thereby forestall any prosecution for the offence. Bail for persons of unsound mind, therefore, must be conditioned upon the accused’s family or relatives or friends undertaking to actively pursue effective treatment of the accused so that his prosecution resumes upon recovery of his mental faculties and ability to defend himself in the trial. To demonstrate progress of treatment, periodic reports to Court are necessary. See paragraphs 169-172 of the Kenya Judiciary Criminal Procedure Bench book, 2018 at pp.104-5.

Orders

10. For the reasons set out above, the Court allows the release on bail of the accused person herein who has been certified unfit to plead to his family members/relatives/friend proof of relationship being determined by the Court/Deputy Registrar. The said family/relative/friend shall secure the attendance of the accused in Court by a Bond of Ksh. 500,000/=.

11. As a further condition of Bail, the said family member/relative or friend shall undertake to present the accused to hospital for the treatment of his mental condition and to report to Court on such treatment by progressive reports made by the attending doctor every 90 days.

12. In addition, the Surety shall file in Court a Mental Status Assessment Report by a Psychiatrist serving at a Public Hospital in the Republic every six months, and the matter shall be mentioned before the Court accordingly.

13. Mention on 21/11/19.

Order accordingly.

DATED AND DELIVERED THIS 7TH DAY OF NOVEMBER 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Ochieng' Gai & Co. Advocate for the Accused.

Ms. Macharia, Ass. DPP for the Prosecution.