



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 81 OF 2005

REPUBLIC.....PROSECUTOR

-VERSUS-

E K M.....ACCUSED

RULING.

Postponing criminal proceeding

[1] The accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code CAP 63 of the Laws of Kenya. The prosecution case was heard and the accused was put on his defence on 7th February 2013 after the court found that *prima facie* case has been established against him. Much time passed by and the defence hearing did not take off for reason that the accused is not mentally capable to mount his defence. The defence hearing was scheduled for 6th March 2018. But, Mr. Gitonga for the accused person intimated to court that, even though the medical report showed that the accused was able to enter his defence, it appeared he was not as he has had a history of mental illness for which he had been admitted at Mathari hospital but which keep on recurring. He thus urged the court to find him to be of unsound mind, thus, incapable of making his defence and suspend proceedings against him and have him committed into custody of relevant authority.

[2] Mrs. Mwathi Learned Counsel for the State merely stated that she was leaving it to Court except that the court should note that this was a 2005 matter.

ANALYSIS AND DETERMINATION

[3] The court has been invited to find under section 162(3) of the Criminal Procedure Code that the accused is of unsound mind and consequently incapable of making his defence, and postpone further proceedings in the case. The accused has had a history of mental illness and has been in and out of hospital several times. For example on 4th April 2007, Dr. K.S Njuguna informed court through a letter from Meru District Hospital signed by him that the accused person was of unsound mind and unfit to plead. But, in a subsequent letter signed by Dr. Rieu Mwenda a Psychiatrist Consultant on 7th December 2011, it was indicated that his current mental status was normal and in the doctor's opinion he was fit to stand trial, the charges and proceedings presented in a simple manner and slowly for him to follow. Another letter dated 19th February 2013 signed by Doctor Thuo J.N indicated that the accused was mentally sick and required treatment in a maximum security hospital and that he was not mentally fit to stand trial. Similarly vide letters dated 6th March 2015 and 2014 respectively, the officer in charge Meru G.K prison intimated to the Deputy Registrar of the court that the accused person could not be produced in court as he was admitted at Mathari mental hospital. Another letter by Dr. Mwaikamba Andrea from Meru Teaching and Referral Hospital on 3rd March 2016, indicated that the accused was in a normal mental examination and that he was fit to plead. On 24th November 2016, the same Doctor opined that the accused suffered from a mental disorder called schizophrenia and was of unsound mind and unfit to plead.

[4] In a letter dated 3rd July 2017 under reference was "*progress mental report on E K*", Dr. Jumba J a Consultant Psychiatrist at Mathare National Teaching and Referral Hospital opined that the accused's judgment was normal and had inter alia full insight and that he was still undergoing treatment. On 17th October 2017, Mathari Hospital issued a certificate of capability to make defence pursuant to Section 163 (1) of the Criminal Procedure Code, and opined that the accused person had now become capable of making his/her defence.

[5] The above chronology of events show that the accused person has had a prolonged history of unpredictable intermittent mental illness. A certificate pursuant to section 163 (1) of the Criminal Procedure Code CAP 75 of the Laws of Kenya however show that the accused was now capable of making defence. But his legal counsel is of the view that the recurring nature of his mental illness in unpredictable and sporadic manner makes him unfit to stand trial and the trial should just be postponed under section 163 of CPC.

[6] The law should guide these proceedings. Section 162 and 163 of the Criminal Procedure Code are relevant and is produced ex tenso below:

“PROCEDURE IN CASE OF THE LUNACY OR OTHER INCAPACITY OF AN ACCUSED PERSON

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 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.

163(1) If a person detained in a mental hospital or other place of custody under section 162 or section 280 is found by the medical officer in charge of the mental hospital or place to be capable of making his defence, the medical officer shall forthwith forward a certificate to that effect to the Director of Public Prosecutions.

(2) The Director of Public Prosecutions shall thereupon inform the court which recorded the finding concerning that person under section 162 whether it is the intention of the Republic that proceedings against that person shall continue or otherwise.

(3) In the former case, the court shall thereupon order the removal of the person from the place where he is detained and shall cause him to be brought in custody before it, and shall deal with him in the manner provided by section 164; otherwise the court shall forthwith issue an order that the person be discharged in respect of the proceedings brought against him and released from custody and thereupon he shall be released, but the discharge and release shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

[7] I am aware mistakes have been made in respect of the procedure in section 162 of the CPC. See the case of **GRACE NYAROKA vs. REPUBLIC, CR. APP. NO. 246 OF 2006 (NYERI)**. But, the correct procedure was set out in the case of **KARISA MASHA vs. REPUBLIC [2015] ECLR** by the Court of Appeal sitting in Mombasa to be;

“When the trial judge made the order of 20th September 2011 postponing the trial of the appellant and committing him to Port Reitz Hospital, it was pursuant to section 162 of the Criminal Procedure Code. By invoking that provision the court was proceeding on the basis that the appellant was of unsound mind and incapable of making his defence. Instead of the order which it made committing the appellant to Port Reitz Hospital, section 162 (4) obliged the court to order the appellant to be detained in such place and manner as it may think fit (including Port Reitz Hospital) and to transmit the court record or certified copy thereof to the Cabinet Secretary responsible for the Kenya Prison Service for consideration by the President. Upon considering the record the President would, by order, direct the appellant to be detained in a mental hospital or other suitable place of custody until such time as the President makes a further order or until the court, upon receiving a certificate from the relevant medical officer that the appellant was capable of making his defence and upon hearing the Director of Public Prosecutions on whether he wished to proceed against the appellant or not, orders the appellant to be brought before it for further proceedings.

[8] I wish to be properly grounded. In this case, the accused was found by the medical officer in charge of Mathari hospital to be capable of making his defence and a Certificate to that effect was issued under section 163(1) of the CPC. In ordinary circumstances, the Director of Public Prosecution should inform the court which recorded the finding concerning that person under section 162 whether it is the intention of the Republic that proceedings against that person shall continue or otherwise. See section 163 below:

163(1) If a person detained in a mental hospital or other place of custody under section 162 or section 280 is found by the medical officer in charge of the mental hospital or place to be capable of making his defence, the medical officer shall forthwith forward a certificate to that effect to the Director of Public Prosecutions.

(2) The Director of Public Prosecutions shall thereupon inform the court which recorded the finding concerning that person under section 162 whether it is the intention of the Republic that proceedings against that person shall continue or otherwise.

[9] The prosecution did not act in accordance with section 163(2) of the CPC when it merely stated that; ‘I leave it to court’- something I find to be curious. Perhaps- and I am not saying this is the case- the dilemma on the part of the DPP could be due to the effect of termination of proceedings at this stage stated in article 157(7) of the Constitution. Article 157(7) provides that:-

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.

[10] In the circumstances, and after the court required the accused to appear, the court considers the accused to be still incapable of making his defence. I shall, therefore, act as if the accused were brought before this court for the first time. I am guided by section 164 of the CPC which provides as follows:-

164. Wherever a trial is postponed under section 162 or section 280, the court may at any time, subject to the provisions of section 163, resume trial and require the accused to appear or be brought before the court, whereupon, if the court considers the accused to be still incapable of making his defence, it shall act as if the accused were brought before if for the first time.

[11] In light thereof, this court finds that the accused person is not capable of making his defence given the intermittent and almost frequent episodes of mental illness. Accordingly, pursuant to section 162 (4) of the Criminal Procedure Code, I postpone further proceedings in this case. The accused person shall be detained at Mathari mental hospital and a certified copy of this record be transmitted to the Cabinet Secretary for Ministry of Interior and National Coordination for consideration by His Excellency the President. It is so ordered.

Dated, signed and delivered in open court at Meru this 17th day of May 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Kiarie advocate for Mr. Namiti for State

Mr.Ojiambo for Gitonga for accused.

F. GIKONYO

JUDGE