



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 56 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

A K M.....ACCUSED

RULING

Learned Prosecution Counsel approached this court by way of verbal application under Section 162 (4) of the Criminal Procedure Code seeking an order of this court to detain A K M, the accused, at Mathare National Teaching and Referral Hospital, Nairobi until such time when a medical officer shall file a certificate declaring him fit to plead. The application was not opposed by Mr. Kariu, learned counsel for the accused, who submitted that the accused is not able to receive treatment at the Industrial Area Remand Prison where he is currently being held. The accused is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code in that on the 26th day of June 2014 at Kahawa Sukari within Nairobi County he murdered Gladys Wairimu Muraguri.

I have taken time to read the court file. I have also read Section 162 of the Criminal Procedure Code which is the relevant law in respect of the matter before me. I note that this matter has been handled by various judges. The record shows that the accused was arraigned in court on 7th July 2014 to plead to this charge. The learned Prosecution Counsel, referring to a letter by Dr. Ochieng' J. a consultant psychiatrist at Mathari National Teaching & Referral Hospital, dated 3rd July 2014 informed the court that the accused was found not fit to plead to the charges. The court ordered that the accused be committed to Mathari National Teaching & Referral Hospital for treatment and further assessment. The case was placed for mention on 15th September 2014 when the court was informed that the accused was then fit to plead to the charges. I have seen a record of a letter from Dr. Kisivuli, A. J a consultant psychiatrist dated 4th August 2014 to the effect that as at that date the accused had no features of mental illness. The plea was taken on 2nd October 2014 with the court registering a plea of not guilty.

The court record shows that several letters on the mental status of the accused have been filed in court since that time. On 12th April 2016, Dr. Mugo, consultant psychiatrist informed the court that the accused was not fit to plead. Another letter from Dr. Mucheru Wang'ombe, dated 4th July 2016 stated that the accused was not fit to plead and that he would benefit from inpatient treatment. On 22nd November 2016 Dr. Jumba, J notified the court through a letter that the accused was fit to make a plea and a certificate to that effect was issued. However on 10th May 2018 Dr. Mercy Karanja informed the court through a letter of even date that the accused was not fit to plead and finally on 24th July 2018 Dr. Catherine Syengo Mutisya through a letter of even date informed the court that the accused was not fit to plead.

Because of this intermittent mental status of the accused this case could not proceed. Although the matter has been scheduled for hearing on 19th, 20th and 21st March 2018 it could not proceed. During the pre-trial conference on 28th February 2018 in preparation for the trial, Mr. Kariu, learned counsel for the accused, told the court on that day that he was unable to take instructions from the accused because the accused seemed mentally unstable and that he was incoherent. This information necessitated a referral of the accused to Mathare National Teaching & Referral Hospital for treatment. As stated above two letters from two different doctors have been filed after that referral. One by Dr. Mercy Karanja dated 10th May 2018 and the other by Dr. Catherine Syengo Mutisya dated 24th July 2018 both indicating that the accused is not fit to plead. As a result this court is not able to proceed with the hearing of this case.

The applicable procedure in case of the lunacy or other incapacity of an accused person is provided under Section 162 of the Criminal Procedure Code. For ends of justice to be met therefore, I do hereby invoke these provisions. Section 162 (1), (2), (4) and (5) 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.

For clarity purposes the provisions of sections 163 and 164 specify that if such a person is found by a medical officer to be capable of making his defense a certificate to that effect shall be forwarded to the DPP who shall then inform the court which recorded the finding concerning that person whether it is the intention of the Republic to continue with the proceedings against that person or not. In the event that the proceedings are to continue the court then shall order the removal of that person from the place of his detention and shall cause him to be brought before its custody and shall resume the trial. In the event that the proceedings are to be terminated the court shall forthwith issue an order that the person be discharged in respect of the proceedings brought against him and released from custody. Such a discharge is not a bar to future proceedings against that person on account of the same facts. If the court considers such a person to be still incapable of making his defense, it shall act as if the accused were brought before it for the first time.

Court of Appeal in *Karisa Masha v. Republic [2015] eKLR* clarified this procedure as follows:

“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.”

See also *Republic v. E K M [2018] eKLR* where the trial court was faced with almost similar circumstances as in this case and where it made the following order:

“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.”

In view of the several reports by psychiatrists contained in the letters I have cited above, it is my finding that the accused person is not capable of defending his case. He is not able to coherently instruct his advocate and therefore this court is not able to proceed with the hearing of this case. I hereby postpone this trial and order that the accused shall be detained at Mathari National Teaching & Referral Hospital, it being a safe custody where the accused is able to receive treatment in the meantime. I further order that the record of this court or certified copy thereof shall be transmitted to the Cabinet Secretary responsible for the Kenya Prison Service for consideration by the President in line with section 162 (4) of the Criminal Procedure Code. Orders shall issue accordingly.

Delivered, dated and signed this 18th day of September 2018.

S. N. Mutuku

Judge