



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO.119 OF 2003

REPUBLIC.....PROSECUTION

VERSUS

FESTUS MBUTHIA MWANGI.....ACCUSED

SENTENCING RULING

The accused person Festus Mbuthia took plea for the offence of murder contrary to section 203 as read with s.204 of the Penal Code on the 22nd October 2003. It was alleged that on 22nd June 2003 at Muthuthini village in Nyeri District, Central Province he murdered Charles Mbuthia Mwangi, who was his father.

After a full hearing the assessors returned a unanimous verdict of guilty. On 9th July 2004, Khamoni J in his judgement, satisfied that the evidence on record justified a conviction, agreed with the assessor's finding. He however proceeded to state " *but as I suspect the accused person is not understanding the proceedings and as this court could not make the understanding of the accused better than what it was , I feel I should revert to s.167(1) (b) of the Criminal Procedure Code which states:*

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

He then ordered that the accused person be detained during the pleasure of the President.

In the ruling delivered on 27th September 2006, in which the Judge criticized the manner in which the state and the defence had acted keeping information about the accused person's actual state of mind away from the Judge until the last minute, the Judge complied with the order of the Court of Appeal though he considered it un procedural and ordered that the accused be detained in G.K Prison under Cap 90 Laws of Kenya under s.162 (5) of the CPC and any further proceedings be conducted by a different Judge.

For purposes of this ruling, this is how it went On 27th September 2006. Mr. Orinda, state counsel addressed the court in the presence of Mr. Mukunya counsel for the accused person. He informed the court that there had been an appeal no. 250 of 2004 where Omolo, Okubasu and Deverrel JJ. A allowed the appeal in part , vacated the orders of Khamoni J of 9th July 2004 and ordered the case remitted back to him ***'to comply with all the relevant provisions of s. 162 of the Criminal Procedure Code, and if the appellant is found fit to stand trial, then he shall be tried before another Judge other than Hon. Khamoni J'*** .

This holding appears to have caused some consternation to both Counsel, each wondering what Justice Khamoni should do, and whether the matter would not be better off in court no. 2? In fact Mr. Mukunya expressed the view' ***the Court of Appeal ought to have completed the matter. I did my job and the state counsel did his job. File to court two?'***

The Hon. Justice Khamoni retired, wrote and delivered a ruling stating ***'Since I have to comply with s. 162 of the Criminal Procedure Code I take I have to do it through a ruling which I hereby do...'*** He proceeded to set out the background to his judgment. He noted that the pages of the proceedings where the record of the accused's plea ought to have been were missing. That as the trial court he was kept completely in the dark by both the state and the defence as to the accused persons mental state that had led to the decision of the court of appeal. In addition, a very senior psychiatrist had certified and testified on oath the accused person was fit to stand trial. Neither the state nor the defence made any claims of insanity before him as the trial judge. He posed the question ***"how on Earth could I stop the proceedings to tell both sides that the accused person was a person of unsound mind and therefor correctly invoke section 162...courts have to be scape goats... the prosecuting counsel [is not to blame?]....with his evidence that the accused was fit to stand trial ...proceeding to prosecute the accused to a conviction? ..in the Court of Appeal a state counsel who had urged the High Court to convict the Appellant was the one who was one supporting the Appellant's counsel in criticizing the trial judge for the conviction the State was granted...'***

He explained why at the end of the trial he found it would have been unjust to the accused person, and the witnesses, to revert to s. 162 with

all its uncertainty; detention in a facility for an indefinite period, until certified to stand trial, to stand trial again, in the future hence the orders under s. 167 which he thought were fair and just in the circumstances.

He also pointed out that the what the Court of Appeal had required him to do was to be done **'in the course of a trial'** despite the fact that his trial had ended on 9th July 2004. **"But the Court of Appeal has ordered me to do it, who am I to refuse doing it"**. He then ordered that the Accused person be detained in a G.K prison under the Prisons Act Cap 90 Laws of Kenya and s. 162(5) of the CPC be complied with.

Section 162(5) states: 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.

He also directed that that further proceedings be conducted before another judge in compliance with the order of the Court of Appeal.

That was 12 years ago on 27th September 2006. The record reveals a very interesting twist in the accused person's case, the manner in which courts have in the past dealt with persons whose mental health is in issue. Three years later on 11th February 2009, M.S.A Makhandia J (as he then) was dealt with another aspect of the case, the fact that by virtue of s.162(5) of the CPC the court had ceased to have jurisdiction over the accused person as his fate now solely lay in the hands of the President. This was after the matter was mentioned twice before the court to confirm whether a psychiatrist report had been compiled to confirm whether he was now fit to stand trial. The Judge was of the view that the accused having been committed to prison at the pleasure of the President the court had no jurisdiction to deal with him unless there was word from the President. The judge was of the view that had accused been committed to a mental institution for treatment awaiting certification of his capacity to stand trial, then, the court would be seized of jurisdiction. On 22nd October 2009 the court decided that there could be no further mentions of the matter before it until there were directions from the President.

On 6th December 2011 Justice Sergon who was now seized of the matter, made orders that he was of the view that the Court of Appeal orders were that the case be heard before another Judge and not Khamoni J. Taking a different view from M.S.A Makhandia (as he then was) he decided to follow the order of Court of Appeal with regard to the manner of hearing the matter. He directed that the accused person be escorted to the Provincial General Hospital for examination by the psychiatrist to determine his state of mind in preparation for hearing.

On 8th December 2012 the matter ended up before Wakiaga J who fixed the case for hearing on 2nd May 2012. It was never heard for various reasons.

On 7th July 2015 it was now before Ngaah J who began the hearing only for the prosecution to realize it was a retrial and the accused person had not only not taken plea afresh, but there was also no fresh psychiatrist's report as to whether the accused person could stand trial as at 7th July 2015.

On 28th September 2015, the state counsel told the court that there was the psychiatrist's report was dated 6th August 2015 showing that the accused was fit to stand trial. When the court sought to take plea, the accused told the court **'I am not ready to take the plea right now'**

On 29th September 2015, The information was read to accused person. His response: - **"I am not doing the case"**. The Judge entered plea of not guilty.

On 18th January 2016 the matter came for hearing before Mativo J but had been listed before Ngaah J. It was adjourned to 3rd March 2016 and from then on the matter came for hearing severally but never took off because the exhibits could not be traced.

The matter landed in my docket on 20th February 2017. There were issues as to whether the exhibits and witnesses could be availed. Several mentions and aborted hearing dates followed. On 20th November 2017, the matter finally took off with Mr. Gori appearing for the accused, Ms. Jebet for state. There was a witness in court. When the plea was taken afresh, the accused person responded: - **"It is true"** to the utter consternation of his counsel who apparently was not aware they were coming to plead guilty. Mr. Gori told the court that his client had lost hope. He did not want a trial in Kenya. He had instructed him that morning that he wanted to his case to be filed in The Hague. Mr. Gori asked the court to have the accused re-examined as to his capacity to understand the proceedings. The court proceeded to explain to accused person the nature of the offence he was facing and the that sentence for murder as provided by law was death. His response **"I have no problem with the sentence of death"**.

The prosecution presented to court the medical examination of 6th August 2015 but taking into consideration the time frame and the record, I ordered for a fresh psychiatric examination. A fresh mental assessment report was brought dated 30th November 2017. This is what the report stated:

'Past psych(sic) History: Previous history of cannabis dependance (sic) which he has now quit and reformed. No psychiatric records at Nyeri.

General Physical examination: essentially normal

Mental state assessment: He is well oriented in all aspects, rapport is well established, well groomed, speech, mood, thoughts are within normal limits. He has no perceptual abnormalities. He has full emotional insight. He lacks basic understanding about his case and has unrealistic expectations concerning his case. For instance, he expects to appeal and not have to face his mother in

court. He also expects to plead guilty as a way of preventing his mother to stand in the witness box.

Conclusion: Normal mental status, fit to plead

Recommendation: Suspect may be presented to court; suspect may require legal advice in a simple way he can understand (emphasis added)

What I gathered from this was that the accused person's greatest fear was facing his mother in the witness box. He did not want her to testify. It appears to me that all along that was the trigger for his unstable mental status, every time he imagined his mother giving testimony as to the events that took place on the day he killed his father, her husband. Secondly he was now fit to plead to the charges, and stand trial as long as he had legal advice.

He did get legal advice and on 15th January 2018 Mr. Gori, the counsel for accused reported to court that the defence had proposed plea bargaining to the prosecution. The presumption here was that upon receiving proper legal advice the accused person had understood the state of his case, and had chosen to plea bargain instead of having to face his mother in court in the witness box. A plea agreement was signed and on 12th June 2018 the accused took plea for the lesser charge of manslaughter contrary to section 202 as read with s.205 of the Penal Code.

It was alleged that around the month of June 2003, the accused had returned from Nairobi where he had been staying for 4 years. On 21 June, 2003 he had burned some clothes belonging to his brother, his father was very unhappy and upset about it. He told him to see a doctor or be reported to the police.

On the 22 June, 2003, at about 11 AM, the accused's mother Florence Wangechi Mwangi was in the kitchen with her husband. She was preparing to go to church. She took water and entered the bathroom which is adjacent to the kitchen. While there she heard the accused person telling his father to repeat the threat he had issued about taking him to the police. The father insisted that he needed to go and see a doctor or he would be reported to the police. The father followed him out of the kitchen while telling him this. The accused got angry when back into the kitchen. He picked an axe with which he hit his father on the head with the blunt part. The deceased fell on the ground. The mother came out to find the deceased lying down with blood oozing from the head. She screamed for help and one neighbour Veronica Muthoni came. Other villagers came later. The deceased was taken to Mukurueini sub-county hospital where he was given 1st aid and referred to Nyeri provincial hospital but died on arrival.

The accused person was later arrested and on 15th of July 2003 and underwent psychiatric examination at Nyeri provincial general hospital where he was found fit to stand trial. The post-mortem examination revealed that the cause of death was cardiorespiratory failure following severe head injury. The accused person was arraigned for murder on 16th of July 2003. This was reduced to manslaughter following the plea bargain, and the accused person took the plea on 12 June, 2018. The accused pleaded guilty to the charge and the facts and was convicted at his own plea of guilt.

The prosecution submitted that accused was a first offender.

I asked for a pre-sentence report and victim impact statement. The sentence hearing proceeded on 9th October 2018 after the 2 reports were filed on 27th September 2018.

Mr. Kinuthia for accused rooted for a non-custodial sentence arguing that the accused had been in custody for 15 years. That the case involved the family where the offender and the victim were from the same family; that over the years the family members had been visiting the accused in prison and had forgiven him and were ready to receive him back home and reintegrate him. The accused was remorseful and had apologized to the family.

Of significance was the fact that at the time of committing the offence the accused person was found to have been suffering from mental illness and the court had to commit him to detention at the President's pleasure. He had gone to prison in his late 20s, he was coming out in his mid -forties. He had suffered punishment; it was time for rehabilitation. The defence referred me to 3 authorities: -

1. *Yussuf Dahar Arog Vs Republic [2007] eKLR* where court in overturned a 40-year imprisonment sentence.
2. *Republic Vs Adan Godana Galgalo [2017] eKLR* where the court cited 1 above
3. *Republic Vs F.L. [2017] eKLR*

The state on its part sought a deterrence sentence being of the view that the accused knew what he was doing and that the family also deserved justice. For a moment Mr. Magoma appeared to have forgotten the plea bargain where the accused person had pleaded guilty to manslaughter.

I have considered the submissions and the long and tortuous journey of this case carrying the accused along with it through the criminal justice system. It is a classic case study of the fate of persons who found themselves in conflict with the law when suffering an unstable state of mind according to the assessment of those in the know. The law was, to remove them from the society, in two scenarios, where found guilty but insane, into the pleasure of the President, whence the court would lose jurisdiction over the person, or lock up in 'Mathare' for indefinite periods of time until they were certified ready to face the Judge.

It is not in dispute that at the time the accused committed the offence he was suffering from a mental illness induced by dependency on cannabis. Over the years in custody the habit went but it would appear that there are residues of the psychosis despite his being found fit to

plead.

Thankfully this court in **Republic v S O M [2018] eKLR** Majanja J held:

The vesting of discretion on how the Accused would be treated after conviction on the executive was inimical to the fundamental duty of the Judiciary to determine the guilt of the Accused and terms upon which he or she would serve the sentence. By vesting discretionary power on the executive and taking away the judicial function to determine the nature of the sentence to be imposed after the special finding was made, section 166 of the Criminal Procedure Code went contrary to article 160 of the Constitution and was unconstitutional. It also violated the right to a fair trial as protected under article 25 of the Constitution.

The Judge went on to:

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.

See also **Joseph Melikino Katuta v Republic [2017] eKLR B K J vs Republic [2016] eKLR** and **Hassan Hussein Yusuf vs Republic [2016] eKLR** where the judges found *inter alia* that it was a violation of the rights of persons suffering from mental illness to be detained in Prison at the pleasure of the President, while really their place was in a hospital where they were to receive treatment.

It is not disputed that the accused suffered mental illness at some point, and even when the offence was committed, the family was aware of his mental condition and were trying to find ways to assist him.

At this point in time Is the accused person the kind of person who should be released back to the society? The authorities cited by the counsel for the accused dissuade me from meting out a long sentence of imprisonment.

Looking at the principles of sentencing as set out in the Sentencing Policy, I have taken into consideration the pre-sentence report. Over the years the secondary victims have come to forgive him, and he is remorseful. They are of the view that he can be released back to them. However, It is clear from the Probation Officer's Report that the accused and the family have psycho-social needs as have been identified by the probation officer. How would these be addressed? Is the accused person willing to undergo counselling to deal with those issues? I borrow the words of Justice Ojwang (as he then was) in **Yussuf Dahar Arog v R**

“Such is of course, a maximum sentence and within that constraint, the court has a wide discretion which it exercises on judicial principles. Such principles would I believe, take into account the ordinary span of life of a human being, the general circumstances surrounding the commission of the offence, the possibility that the culprit may reform and become a law-abiding member of the community, the goals of peace and mutual tolerance and accommodation among people – those who are injured and those who have occasioned injury.”

The accused is in his early forties having spent his late 20s and his 30s in custody. There is the possibility that he will become a law abiding citizen in spite of the psycho social issues. It appears that those, and those of family reconciliation, reintegration and community rehabilitation may adequately be addressed through a non-custodial sentence. I find therefore that the recommended probation sentence is suitable in the circumstances of this case.

Before making the order and in compliance with s. 4 (3) of the Probation of Offenders Act Cap 64, It is incumbent upon me to find out whether the accused person is willing to comply with the provisions of the order and explain to the him that, if he fails in any respect to comply therewith or commits another offence, he will be liable to be sentenced for the original offence.

1. The probation order will be for three years
2. The accused will undergo intensive psychological counselling by himself and with the family at the assessment of the family.
3. The accused will attend hospital and obtain treatment should he be found to need the same
4. The accused is prohibited from smoking bhang or such other illicit drugs
5. The accused will report to the probation officer monthly but the probation officer may make it weekly or fortnightly should there need.
6. The officer is at liberty to seek review of these orders at any time should the need arise.

Dated delivered and signed in open court at Nyeri this 16th day of November 2018

Mumbua T Matheka

Judge

In the presence of:

CA Esther

The accused person

Mr. Kinuthia for accused

Mrs. Owuor for the state

Court: I have explained the probation order I intend to make to the accused in Kiswahili language and the fact that should he default the same can be revoked and substituted with a custodial sentence.

The Accused Person having understood the same states: In Kiswahili: *Nimeelewa, nakubaliana.*

Court: The accused person is sentenced to three years on Probation Supervision with the following additional conditions:

1. The accused will undergo intensive psychological counselling by himself and with the family at the assessment of the probation Officer.
2. The accused will attend hospital and obtain treatment should he be found to need the same
3. The accused is prohibited from smoking bhang or such other illicit drugs
4. The accused will report to the probation officer fortnightly but the probation officer may make it weekly or monthly should there need.
5. The officer is at liberty to seek review of these orders at any time should the need arise.

Dated Delivered and signed at Nyeri in open court this 16th Day of November 2018.

Mumbua T. Matheka

Judge