REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 5 OF 2012

REPUBLIC.....PROSECUTOR

V E R S U S

SAMWEL MWANGANGI MWENDWA.....ACCUSED

RULING

BACKGROUND

The accused herein Samwel Mwangangi Mwendwa was brought to court on 7th February 2012 on a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The allegation was that on 23rd January 2012 at Kiimu Location Kyuso district within Kitui County murdered Agnes Mawia Mbuvi.

He was taken for mental status assessment before plea as has been the practice in murder cases. Thereafter, on 28th February 2014, the court observed and directed as follows:-

> ***"court asks the accused who looks disoriented and he says he is having a headache and his heart is beating fast. The accused to be escorted to Garissa Provincial Hospital for treatment of headache and palpations. Mention on 12th March 2012 for plea taking."***

On 12th March 2012 there was no translator in court for the Kikamba language and the plea was deferred to 28th March 2012. On 28th March 2012 the accused pleaded not guilty, but on 6th June 2012 his advocate Mr. Kulow informed the court that the accused was disoriented and the court ordered that he be taken to Garissa Provincial General Hospital for checkup and second opinion on his mental status. From that time on wards, the accused was in and out of hospital due to his apparent disorientation.

Subsequently, on the 2nd of December 2015, learned Prosecuting Counsel Mr. Okemwa informed the court that though the accused had been certified fit to stand trial, he still appeared to be mentally unstable. The court then fixed a date on which both the prosecution and the defence counsel would address the court on the issue of insanity, for directions to be given on how to progress the matter.

This ruling relates to how matter should be handled, as the accused appeared not to be following the proceedings, though he had pleaded not guilty to the charge of murder.

SUBMISSIONS OF COUNSEL

Learned counsel for the accused Mr. Nyasani was the first to address this court. Counsel submitted that his client had been in custody since 2012 and had been in and out of Mathare hospital because he was not

able to follow court proceedings. Counsel stated that though Section 11 of the Penal Code presumed all accused persons to be of sound mind, there were circumstances in which people with diseases of the mind would have to be treated differently. However there was need to define or establish insanity before a person could be treated differently under Section 12 of the Penal Code.

Counsel referred the court to Section 162, 163, 164 and 167 of the Criminal Procedure Code (cap.75) on how courts were required to handle people who were insane, and emphasized that in all criminal cases the rights for a fair trial under Article 50 of the Constitution and the Criminal Procedure Code had to be observed.

According to counsel, to accord somebody a fair hearing meant that one must be informed and understand the charges levelled against him and be able to plead and also instruct a lawyer and follow the proceedings. If in the course of proceedings a court had reason to believe that an accused is of unsound mind it will inquire of sanity.

Counsel stated that the present case was one where the court should enquire into the insanity of the accused since it was obvious that he was not appreciating the progress of the proceedings. Counsel emphasized that since 2012 a number of medical reports had been made and the case postponed because the accused could not understand the proceedings.

Counsel stated that in certain cases a court, could release an insane accused person on security for his appearance in court. However in cases where bail could not be grant, a court could order that the accused be detained in custody in such a manner that it deemed fit and transmit the record to the Minister for the directions of the President. The President could then direct that such an accused be detained in a mental hospital or a suitable place of custody. Counsel added that even where such an order was made, the court could still to make further orders if the accused was found fit under Section 163 of the Criminal Procedure Code (Cap.75).

Counsel added that, for those who were detained in mental hospitals or place of custody and found by a medical officer to be fit to plead to a trial, the Director of Public Prosecution had a duty to inform the court whether they intended to continue with the proceedings. The court would then proceed with the proceedings or discharge an accused person in accordance with the request of the Director of Public Prosecution but such discharge was not a bar to further proceedings. Counsel added that where the proceedings continued to conclusion, the court could either acquit or if it convicted, it would order that accused be detained at the President's pleasure.

Counsel urged the court to take into consideration the period which the accused had spent in custody. Counsel also urged the court to consider the accused's health which was deteriorating. Counsel asked the court to note that this case had never commenced since the accused was charged in 2012, about 4 years ago now.

Learned prosecuting counsel Mr. Okemwa stated that it was unfortunate that the Kenya legislation had not properly factored situations of sanity. Counsel stated that the Mental Health Act (Cap 248) did not assist in court proceedings. It only dealt with the procedure on how insane people should be treated and handled. According to counsel, this was the reason why we could not rely on the mental Health Act, but the Penal Code and Criminal Procedure Code to address issues affecting insane persons in court.

Counsel submitted that in Britain there was the Trial of Lunatics Act of 1883, which did not address the issue of mental incapacity before trial. Counsel submitted that the sections Mr. Nyasani for the defence relied upon related to situations in the cause of trial, but not pre trial insanity.

Counsel submitted that at this stage, the prosecution could say from the bar that the accused was insane unless proper investigations by expert was done. Counsel submitted that it was clear that for the time being the accused did not understand what was going on in court though doctors had said he was fit to plead. Counsel submitted that Section 167 of the Criminal Procedure Code (Cap 75) could be used in the present situation, and suggested that the best course available, was to order that the accused be confined

to a mental hospital as it was not clear whether if left free, he would be safe and whether people in the community would be safe in his company in this mental state.

Mr. Nyasani for the accused in response, stated that the court should make an enquiry from relatives on whether the accused could be left loose in the society even though the prosecuting counsel had said that he would endanger lives if left free to join the society.

CONSIDERATIONS ON THE ISSUE OF INSANITY

This criminal case has not proceeded to hearing since 2012 when the accused was charged in court. It took sometime before he was initially able to plead guilty. It is on record that he has been in and out of mental hospital for a long time now. Looking at him in court, he does not appear to be understanding what is going on. He appears to be absent minded. Even when his name is called he does no respond. He laughs unnecessarily.

Section 11 of the Penal Code presumes that all accused persons are of sound mind. It states as follows:-

> ***"11. every person is presumed to be of sound mind and to have been of sound mind at any time he comes into question, until the contrary is proved."***

It is thus clear from the above provisions of the Penal Code that every accused person is presumed to be sane at all time, whether before, during or after trial. However that presumption is rebuttable presumption, where there is evidence to prove that the person is insane. If such proof is availed then the person is said to be of unsound mind and in that event, section 12 of the Penal Code will apply to him or her. Section 12 provides as follows:-

> ***"12. a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or commission although his mind is affected by disease, if such disease does not infact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."***

Section 12 above deals with criminal responsibility when somebody is of unsound mind. Certain unsoundness mind will make a person not to be criminally responsible for his acts or omissions.

How to deal with and determine insanity is contained in the provisions of the Criminal Procedure Code (Cap 75) Section 162 to 167 inclusive.

Section 162 to 164 of the Criminal Procedure Code deal with cases where an accused person is believed by the court when he or she appears in court, to be of unsound mind and incapable of making his defence. When an inquiry is done on that unsoundness and it is so confirmed by a doctor, the court will either release the person on bail or transmit the record or certified copy of the record to the Minister for consideration by the President. The President may order that he be detained in a mental hospital. If the medical officer certifies that the person is medically fit to plead then the Director of Public Prosecution will have to inform the court whether he intends to proceed with the case or otherwise. If the Director of Public Prosecution says that they do not intend to proceed with the case, the court will discharge that person and he shall be released but such discharge is not a bar to further proceedings. Where the Director of Public Prosecution says they intend to proceed with the case, then the court will order the accused be brought before it and will deal with him or her under the provisions of section 164.

Section 164 of the Criminal Procedure Code provides as follows:-

> ***"164. whenever a trial is postpone 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 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 it for the first time."

Section 166 of the Criminal Procedure Code deals with the defence of insanity. A defence of insanity relates to an allegation by the defence that at the time of committing the offence, the accused was not of sound mind and was therefore not criminally responsible for his or her action. So far there is no indication from the defence that they intend to raise such a defence.

Section 167 of the Criminal Procedure Code deals with situations where an accused person, though not insane cannot be made to understand proceedings. With regard to such cases in the High Court, it is provided that the court shall try the case and at the close thereof, either acquit the accused person or, if satisfied that the evidence would justify a conviction shall order that the accused be detained during the President's pleasure. In my view this situation will arise where an accused person has an incapacity to comprehend the surrounding but not amounting to insanity. This could be possibly where he or she is completely deaf, or just confused.

DETERMINATION

In my view our present situation falls within Section 162 to 164 of the Criminal Procedure Code. The accused has already been taken to mental hospital at Mathare and a certificate issued that he is fit to plead. The State through the Director of Public Prosecutions had a responsibility of informing the court whether they wanted to continue with the proceedings or to discontinue the same, in terms of section 163 of the Criminal Procedure Code which provides as follows:-

"163(1) if a person detained in a mental hospital or other place of custody under Section 162 or Section 180 is found by the Medical Officer incharge 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 Attorney General (now DPP).

(2) the Attorney General (DPP) 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."

It is clear from the above provisions of Section 163 of the Criminal Procedure Code, that it is the mandatory obligation of the Attorney General, now Director of Public Prosecutions to decide whether they intend to proceed with criminal proceedings or otherwise, where an accused person is certified by the medical officer incharge of the mental hospital that he/she is fit to plead. In the present case, such a certificate was issued. The Director of Public Prosecution also informed the court in writing that they intend to proceed with the criminal proceedings herein. The court thus has no choice under the written law but to proceed with the criminal proceedings. As the present case now stands this court cannot do anything other than continuing with the criminal proceedings as communicated to the court by the Director of Public Prosecution. The court cannot discharge the accused as suggested by the defence counsel.

The resumption of the proceedings and further progress is provided for under Section 164 of the Criminal Procedure Code, which state as follows:-

"164. Whenever a trial is postponed under Section 162 or Section 280, the court may at anytime 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 it for the first time."

It follows therefore that, once the Director of Public Prosecution informs the court following compliance with the provisions of Section 162 or 280 of the Criminal Procedure Code that the State wishes to proceed with the case, the court has to take necessary steps to progress the case. Where it emerges to the court that the accused is still incapable of making his defence the court is required to act as if the accused was brought before it for the first time. This means that the court can still order the accused to be taken for mental examination, if the situation justifies such an order.

I will thus continue with the criminal case as communicated by the DPP. However at any point, if this court is convinced that the accused is not capable of making his defence, then the court will have to make orders for his re-admission to a mental hospital for enquiries to establish his soundness of mind and expect a medical officer to forward his certificate to the Director of Public Prosecution as per the requirements of the written law under the Criminal Procedure Code (cap.75).

Dated and delivered at Garissa this 11th day of January, 2017.

GEORGE DULU

JUDGE