



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL REVISION NO. 83 'A' OF 2015

(Original Criminal Case No. 1250 of 2013 of the Chief Magistrate's Court at Narok, Temba A. Sitati - SRM)

PHILIP TARAKWAI.....APPLICANT

-VERSUS-

REPUBLIC.....PROSECUTOR

RULING ON REVISION

1. The Applicant, Philip Tarakwai was the accused in Criminal Case 1250 of 2013 before the Principal Magistrate's Court in Narok. He was charged with Creating disturbance in a manner likely to cause a breach of peace Contrary to Section 95 (1) b of the Penal Code. In that on 13/9/2013 at Olongomei village in Narok North District, Narok County within the Republic of Kenya, the Accused created disturbance in a manner likely to cause breach of peace by abusing **Nyaikune Ole Sakale Kamoiro** and by threatening to cut him with a sword.
2. On his first appearance in court on 16/9/2013, the Accused denied the charge and was granted bail. He was however to remain in custody for the entire duration of his trial, which terminated, with a guilty verdict on 4th August, 2014.
3. In his judgment the trial magistrate observed interalia that:-

“During the conduct of his case, the accused exhibited weird behaviours including shouting unnecessarily and uttering incoherent and incomprehensible things. But in his lucid moments he seem (s) to be articulate as shown by his able and intelligent cross-examination of the prosecution witnesses. Based on these pieces of evidence and the product of the cross examination of the state's witnesses, thiscourt makes a special finding that Philip Tarakwai is guilty but insane. This finding is made under Section 166 (1) of the Criminal Procedure Code.”

4. Consequently the court proceeded to report the matter for the order of the President while committing the Accused to the G. K. Prison Narok pursuant to Section 166 (2) of the Criminal Procedure Code.
5. The current application for review is expressed to be brought under Article 22 and 50 of the Constitution. Of relevance to the application are various court orders cited in the Applicant's grounds, for the medical examination of the Applicant. He alleges that his fundamental rights were breached during the trial.
6. I have called for and perused the lower court file in Criminal Case Number 1250 of 2013. The

record confirms that on 28/11/2013 an order was made by Z. Abdul RM, for the accused to be taken to hospital for a mental check up. I presume this order was made pursuant to Section 162 of the Criminal Procedure Code. However the record does not indicate that order was complied with or that a certificate was forwarded to the Office of Director of Public Prosecutions in terms of Section 163 (1) of the Criminal Procedure Code.

7. Neither was the trial adjourned in accordance with Section 162 of the Criminal Procedure Code. Instead on 11/12/2013, the hearing commenced and the prosecution closed its case on 25/6/2014 after calling 3 witnesses. The Accused upon being placed on his defence, yet again indicated that he wished to plead guilty. He however disputed the facts as read out before the court.
8. A similar thing had happened on 30/9/2013. After he retracted his guilty plea on the second occasion the Accused was ordered to proceed with his defence. He offered no defence, subsequent to which the trial court made the following order:

“O-I-C (Officer in Charge) to escort Accused to Mathare Mental Hospital for mental check up.”

9. On the following mention date which fell on 18/7/2014 the prosecution informed the court that the accused had not been taken to hospital as ordered. Nothing more in this regard happened thereafter and on 4/8/2014 the court proceeded to deliver judgment.
10. It is evident from the two orders of the court, before and during the trial, that the court had reason to doubt the Accused’s mental soundness, and to make inquiry thereto as provided under Section 162 of the Criminal Procedure Code. However it would seem that the court commenced and resumed the trial without any compliance by the Officer in Charge with its orders or the certificate of the medical officer envisaged under Section 163 of the Criminal Procedure Code.
11. The description of the Accused’s “weird behaviours” at the trial in the judgment of the learned trial magistrate confirms what the court had noted well before the trial regarding the mental capacity of the accused.
12. The court’s evident failure to fully comply with Section 162 and 163 of the Criminal Procedure Code resulted in the conduct of a trial in respect of a person, who for all intents and purposes was not capable of making his defence. The Accused was clearly not fit to stand trial before and during the trial.
13. The court’s final finding under Section 166 (1) of the Criminal Procedure Code that the Accused was guilty but insane, may have been accurate with regard to the time of the offence. However, such a finding could only be made after the trial of the Accused person upon medical certification in the currency of the trial, that he was fit to make a defence.
14. A trial conducted in respect of a person who is incapable of making a defence runs counter to the right to a fair trial under Article 50 (2) of the Constitution, and in my view amounts to a mistrial. In the circumstances, I will quash the finding of the trial court made under Section 166 (1) of the Criminal Procedure Code, and the related orders made pursuant to Section 166 (2) of the Criminal Procedure Code.
15. The Accused was charged with a misdemeanor. He has been in prison custody for a total period of 2 years. I direct that he be set at liberty unless otherwise lawfully held so that he can seek medical treatment. Secondary to the foregoing, the officer in-charge of the prison where he is held is directed to ensure that upon release the Accused is escorted to his home or handed over to his identified relatives.

Written and signed at Naivasha this **9th** day of **October, 2015**

C. W. MEOLI

JUDGE