

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

CRIMINAL APPEAL 167 OF 1986

LIVINGSTONE NGURE.....APPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

The sole question of law in this appeal is whether the decision of the judge to invoke section 166(1) and (2) of the Criminal Procedure Code is warranted on the evidence.

It is common ground that at the time material to the offence the appellant was insane so as not to be responsible for the unlawful killing. The complaint advanced on behalf of the appellant as we understood it is that the prosecution acted unfairly in adducing the medical evidence upon which the High Court adjudged that the appellant was mentally sick at the time when he killed the three children. Mr Aminga urged that that particular evidence was within the province of the defence and that if the defence had had the opportunity to lead medical evidence, the defence would have demonstrated that there were no chances of the mental illness recurring and therefore that the court could exercise its discretion and set the appellant at liberty.

We say at the outset that we found the submission made on behalf of the appellant rather startling.

We take first the contention that somehow the defence would have persuaded the High Court to find that there was no risk of illness recurring. The evidence of Dr Feks, PW 5 was to the effect that the appellant would not know if the illness is developing further that,

“Even in future, if it were to recur he would not be able to help himself”.

It is not conceivable that there would be medical evidence suggesting that the appellant could be set at liberty without any risk before the illness which PW 5 diagnosed is treated and cured.

Secondly, the defence was not barred from calling their own medical evidence. The prosecution was required to prove intent and the nature of things the prosecution properly decided that it had become necessary to satisfy the court that the appellant was insane at the time he killed.

Thirdly, on the evidence the judge was bound to invoke section 166(1)(2) of the Criminal Procedure Code in order that further consideration, supervision and safety of the appellant could be ensured – vide subsections (5) (6) and (7) section 166: We are unable with respect, to agree with Mr Aminga that in the instant case the defence could have put the appellant’s case in such a strait-jacket as to preclude it from the provisions of section 166 of the Criminal Procedure Code.

Finally, the judgment in *Regina v Picker* [1970] 2 WLR 1038 to which we were referred raised the question what were the right principles to be applied in deciding whether to impose life sentence eg where the nature of the offence and the make up of the offender are of such a nature that the public require protection for a considerable time unless there is a change in the condition of the offender.

Here a statutory provision has to be applied to a person who acts under a state of insanity. Clearly the two

set of circumstances are different one from the other.

The appeal is dismissed. That is the order of the court.

February 24, 1987

NYARANGI, PLATT & GACHUHI JJA