



REPUBLIC OF KENYA



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**SKK v Republic (Criminal Appeal 51 of 2020)
[2023] KECA 1088 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1088 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 51 OF 2020
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
SEPTEMBER 22, 2023**

BETWEEN

SKK APPELLANT

AND

REPUBLIC REPUBLIC

(An appeal from the judgment of the High Court of Kenya at Malindi (Omondi, J.) delivered on 10th February 2012 in High Court Criminal Case No. 20 of 2009)

JUDGMENT

1. The appellant, SKK, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence as set out in the information dated December 23, 2009 were that on December 9, 2009 in Ngerenya location within Kilifi district of the then Coast province, he murdered KKN.
2. In a judgment dated November 15, 2011 delivered on February 10, 2012, the High Court (H. A Omondi, J) as she then was) made a special finding under section 166(1) of the Criminal Procedure Code (CPC) and found the appellant guilty of the act but was insane at the time he committed the act. The judge expressed:

“...my finding is that the charge is proved, and I find the accused guilty but insane at the time of committing the offence.”
3. The appellant is aggrieved and lodged this appeal. During the hearing of the appeal before us on March 13, 2023, the appellant appeared virtually via link from Malindi Prison where he is held. He was represented by Mr Gicharu Kimani learned counsel. Mr Kirui learned prosecution counsel appeared for the respondent.



4. In his home-made supplementary grounds of appeal amplified in his written submissions, the appellant complains that the High Court judge erred in law by failing to consider that presidential pleasure under section 166 of the CPC “...is no longer a punishment in Kenya as it denies judicial officer discretion in sentencing thereby faulting the doctrine of separation of powers between the judiciary and the legislature (parliament)”. However, in supplementary grounds of appeal filed by Mr Gicharu Kimani on behalf of the appellant, the complaint is that:

“...the learned judge erred in giving a manifestly excessive, harsh, indefinite and indeterminate sentence that violates the human dignity of the appellant and denies the judicial officers discretion and faults (sic) the doctrine of separation of powers.”

5. Based on the evidence presented by the prosecution before the High Court, the facts as developed from the testimonies of the prosecution witnesses in brief are that in the early evening hours of December 9, 2009, the deceased, KKN, was at home with her children, including her son RNR (PW1). The appellant arrived, and out of the blue, began to scold the deceased. He physically attacked and punched her, whereupon she fell. According to PW1, the appellant then stepped on her, produced a panga with which he then “cut her twice on the head and shoulder/arm area”. The appellant then fled. The deceased, PW1 and his younger sister screamed.

6. ECK (PW2) a headmaster at C Primary School, was amongst those who heard the screams, but did not, initially, think much of it. When the screaming persisted, he proceeded in the direction the screams were emanating from and on the way met the appellant’s mother SKK (PW6) and two others (the appellant’s sister and wife) holding and restraining the appellant who was apparently speaking in a raised voice saying, “niacheni nikamumaliza kabisa” (leave me so that I can finish her completely) “maana siwezi kuvumilia kuona mtu akitesa watoto wangu” (as I cannot tolerate someone tormenting my children); that as PW2 inquired what was going on, the appellant ran off in the direction where the screams had come from but was pursued by his sister and wife who caught up with him and restrained him and called upon PW2 to assist them in restraining the appellant.

7. PW2 talked the appellant into calming down, he persuaded him to go into his mother’s house where they locked him up. PW2 then went to scene, about 100 meters from there and found the deceased in a pool of blood, “her breathing was slow and very weak, she was dying”, he said. PW2 then called the chief (PW3), and then returned to where the appellant was held before moving him (the appellant) to his (PW2) house. Thereafter the chief (Lennox Baraka Yeri-PW3) arrived with the police and the appellant was arrested.

8. The appellants mother, SKK (PW6) had gone to the shamba on December 9, 2009 when she heard screams and rushed to the scene and found the deceased was dead. On the way she met the appellant coming from the direction of the scene. She stated that the appellant had epilepsy and would go to hospital frequently and that at one time he was sick and hospitalized.

9. At the material time, KHK (PW4), the husband of the deceased, was away in his farm and only learnt that his wife, the deceased, had been killed and the body taken to Kilifi mortuary. He went there and identified the body. The postmortem was performed by Dr Ogwang whose report was produced before the trial court by Dr Malik Tajbhai (PW5). The cause of death was indicated as “severe head injury.”



10. The appellant's younger brother KK (PW8) stated that he heard noise on the day in question and went to the scene and found the deceased already dead; his brother the appellant was there next to the deceased holding a panga which he "snatched away" from him and ran off with it. In his words:

"I did not see him killing deceased, but I found him holding a panga. I didn't see him cutting the deceased. I got to the scene, I grabbed accused, struggled with him, and took away the panga and rushed to hide it."
11. PW8 stated further that the appellant had a history of mental illness and at one time he was admitted at Kilifi Hospital, but that he did not know whether the appellant was mentally ill at the time.
12. Corporal Cosmas Kanyi (PW7) of Kilifi Police Station received information at about 7.45 p.m on December 9, 2009 that someone had been murdered in Ngerenya. He proceeded to the scene with his colleague and found members of the public gathered at the home of the deceased. The deceased lay about 10 meters from the house with deep injuries on the head and right hand. PW7 and his colleague re-arrested the appellant who had already been arrested by wananchi and escorted him to the police station where he was booked. He stated that the appellant "appeared mentally disturbed" when he arrested him and that during his investigations, he had the appellant undergo psychiatric examination at Coast General Hospital. He produced a medical report by Dr Mwangombe dated June 25, 2010.
13. In his defence, the appellant stated that he was at home with his three children at 6:45 p.m. on the material date when he heard screams; that he listened for about half an hour and came out of the house to figure out what was happening and left his children behind; that he found a crowd gathered near the door of his brother's house and tried to enquire what was going on, but he did not get information; that he decided to go and inform his mother what was happening so that she too could witness; that he saw his mother leaving the shamba rushing to see what the screaming was about, he passed her on the way as she was going in the opposite direction as he was going home; that at about 8.00 p.m., police officers came, arrested him, and beat him but he could not understand why he was being beaten; and that he was surprised at the allegation and knew nothing about the murder.
14. Upon reviewing the evidence, the trial court was not in any doubt that the appellant committed the act of killing the deceased but concluded that he was not in control of his mental faculties at the time.
15. Counsel for the respondent Mr Kirui had initially taken the view that there is no right of appeal but withdrew that challenge during the hearing. He urged that there was evidence that the appellant committed the unlawful act that caused the death of the deceased. He however urged the court to reconsider the sentence on the strength of the High Court decision in Republic v SOM, High Court criminal case No 6 of 2011 [2017] eKLR.
16. We have considered the matter. There is no contest, in this appeal regarding the finding that the appellant committed the act that resulted in the death of the deceased and that he was insane at the time. The appellant's grievance, as we understand it, is that his incarceration at the pleasure of the president under section 166 of the CPC is illegal.
17. Section 166 of the CPC provides as follows:

"(1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was



insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.

2. When a special finding is so made, the court shall report the case for the order of the president, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.
 3. The president may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.
 4. The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the president under subsection (3) shall make a report in writing to the minister for the consideration of the president in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the president's order and thereafter at the expiration of each period of two years from the date of the last report.
 5. On consideration of the report, the president may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the president thinks fit.”
18. Until recently, there does not appear to have been difficulties with the application of section 162 and section 166(2), (3), (4) and (5) of the CPC in relation to the powers of the President and the role of the Executive in the process. However, in a judgment delivered on December 19, 2017 in *Republic v SOM* (above) the High Court (Majanja, J) having found that the “accused was suffering from a disease of the mind at the time he committed the felonious act” made “a special finding under section 166(1) of the *Criminal Procedure Code*...to the effect that the accused committed the act of killing but was insane at the time.”
19. The judge in that case went on to say that he was required by law to direct the accused be kept in custody pending the president's order in accordance with section 166(2) of the CPC. However, doubting “the constitutionality” of section 166(2) of the CPC “particularly in light of the recent Supreme Court decision in *Francis Muruatetu and another v Republic* SCK petition No 15 and 16 of the 2015...where the court held that it is a judicial duty to impose a sentence that meets the facts and circumstances of the case” and which, according to the learned judge, “suggests that a law that leaves the length of the sentence to another authority violates the fundamental rights and freedoms of the accused” the judge adjourned the sentencing proceedings and invited the parties to address him “on the constitutionality or otherwise of section 166 of the CPC and the appropriate sentence to be imposed on the accused.”
20. In his subsequent ruling on sentence delivered on April 30, 2018 in the same matter (*Republic v SOM*, High Court criminal case No 6 of 2011 [2018] eKLR) the learned Judge held:
- “ 11. Turning back to the provisions of section 166 of the CPC, it is clear that the court's duty comes to an end when it enters the special verdict against the accused and directs the accused's detention pending the President's decision. As Mativo J., noted in *AOO and 6 others v Attorney General* (Supra), “The imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and



is therefore the exercise of judicial, not executive, power.” This holding is, in my view, consistent with that the Supreme Court held in the *Muruatetu Case* (Supra). The vesting of discretion on the President on how the accused is to be treated after conviction is inimical to the fundamental duty of the Judiciary to determine the guilt of the accused and determine the terms upon which he or she serves the sentence. The fact that the statute provides for a periodic review by the President upon advice of executive functionaries goes further to buttress this key point.

12. I therefore 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. It also violates the right to a fair trial protected under article 25 of the *Constitution*”

21. The judge went on to state in the same case as follows:

“ 13. Article 2 of the *Constitution* provides that any law which is inconsistent with the *Constitution* is to the extent of the inconsistency void. Under section 7(1) of the Sixth Schedule to the *Constitution*, the Court is entitled to construe existing laws, such as the *Criminal Procedure Code* as one of the ‘existing laws’ that continue to be in force, with such modifications, adaptations, qualifications and exceptions necessary to bring its provisions into conformity with the *Constitution*.

14. In this case the defect in section 166 of the CPC is that the review is carried out by the President rather than the court hence the reference to “president” shall be read to mean, “the court.” The effect of this is to ensure that the accused is brought before the court periodically so as that the court may review the matter and if necessary call for and take necessary expert and other evidence before making an appropriate order within the framework of a definite period of detention imposed by the court.”

22. Prior to that, this court had stressed that the executive had an important role by dint of powers conferred on it under section 162 of the CPC and that courts should discourage a practice that is contrary to those statutory provisions. The case of *Karisa Masha v R* [2015] eKLR, for example, touched on section 162 of the *Criminal Procedure Code* relating to procedure to be followed by a trial court where an accused person is of unsound mind and incapable of making his defence.

23. Section 162 of the CPC confers upon the President powers similar those under section 166(3) of the CPC, to direct the detention of the accused person in a mental hospital, prison, or other suitable place. The court cited with approval an earlier decision of the court delivered on November 2, 2007 in the case of *Grace Nyaroka v Republic*, Cr App No 246 of 2006 (Nyeri) [2007] eKLR, that courts of law should discourage emergence of a practice that is contrary to statutory provisions and procedure unless the provisions or procedures are first expressly invalidated by the court, amended, or repealed. The court observed that under section 162(5) of the CPC, apart from making an order for the detention of the accused person in a mental hospital or any other suitable place, the president is empowered to make any further order in the matter. The court noted that such an order could be an order that is



potentially for the benefit of the accused person, including possibly regarding his or her further trial or non-trial. The court stressed that:

“By short-circuiting the prescribed procedure, the trial court could therefore unwittingly be denying an accused person an order that could be to his or her benefit. We are of the view that the provisions ought to be strictly followed and if they have outlived their purpose, they should be properly invalidated or repealed instead of encouraging a practice that is in direct conflict with statutory provisions.”

24. Following in that path and departing, somewhat, from path charted by Majanja, J. in *Republic v SOM* (above), the High Court ((Lesiit, J. (as she then was)) in a judgment delivered on May 16, 2019 in *Republic v Edwin Njibia Waweru*, Cr. A No 78 of 2015 [2019] eKLR entered a special finding of guilty but insane under section 166 of the CPC having found that the accused in that case was not in control of his senses and was therefore not capable of knowing what he was doing or that it was wrong at the time of the incident. In her subsequent ruling on sentence in that case delivered on July 23, 2019, the judge stated that section 166 of the CPC is pegged to the power given to the president to exercise a power of mercy; that under section 166(5):

“...the President is empowered, not to pass a sentence over the person against whom the court has entered a special finding under sub-section (1), but a power of mercy. The former is a judicial function and the latter is an executive responsibility.”

25. The judge expressed that while sentencing is reserved to the judicial process and cannot be taken away, the law gives the executive a responsibility to decide whether a person need not suffer the punishment imposed against him by the court and may remit such punishment for some reason, in certain cases. The judge went on to state:

“20. It is clear that passing sentence is an integral part of the judicial function. Equally important is the exercise of power of mercy, a responsibility that has been donated under the *Constitution* (2010) to the president acting on recommendations by the power of mercy committee. This is an important role which has both constitutional and statutory underpinning. It is for that reason that I would hesitate to take the route suggested by my learned brother in the SOM case, supra where he declared that the name of the President be replaced with that of the court in section 166 of the CPC untenable.

21. In addition, once a trial court passes sentence after conviction, it becomes *functus officio*, and can no longer handle the matter again. Unless of course for purposes of review where that is applicable. The case file will have come to an end and will be marked concluded. I would hesitate to keep the matter open for further periodic action after concluding it as, in my view, it would render the doctrine of *functus officio nugatory*.”

26. The Judge opined that the frustration courts face where persons are detained at the President’s pleasure and remain incarcerated indefinitely is “a matter that the ministry concerned needs to look into to ensure that the cases of

persons sentenced under section 166 of the CPC, or those of underage children are attended to as provided under section 25(2) and (3) of the *Penal Code*.”



27. See also the ruling the High Court (Lesiit, J) (as she then was) delivered on July 25, 2019 in [Republic v Ibrahim Kamau Irungu](#), High Court criminal case No. 7 of 2018 [2019] eKLR, as well as a ruling on sentence of the High Court, Lesiit, J. delivered on May 7, 2021 in [Republic v Anthony Wainaina Nganga](#), Cr Case No 60 of 2014 [2021] eKLR.
28. As already stated, there is no dispute that the appellant was not of sound mind when he caused the death of the deceased. The complaint is that the appellant was sentenced to an indefinite and indeterminate sentence by the trial court. But is a special finding under section 166 of the CPC a sentence?
29. The circumstances in this case are not unlike those in the case of [KCK v R](#) [2016] eKLR where the court in its judgment delivered on February 26, 2016 explained that in section 166 (1) of CPC the word “guilty” is used only as a confirmation that the appellant was indeed the person who caused death; but this confirmation does not include the mental state with which he did the act; that, that is why the special finding is treated as an acquittal because one essential element for the commission of the offence of murder contrary to section 203 is absent; that by section 166 (1) of the CPC, once the trial court found as a fact, that the appellant committed the act charged, and that at the time of doing so he was insane so as not to be responsible for his acts, the only course open to it was to make a special finding; that it cannot amount to a conviction because insanity is recognized in law as an illness requiring treatment and not punishment; that when detained at the President’s pleasure the accused is considered a patient and not a prisoner; that a person who is found by a court of law to have committed an offence when suffering from a disease of the mind that renders him incapable of knowing what he is doing or knowing that what he is doing is wrong cannot, in a case of murder be said to do so with malice aforethought.
30. In the same vein, in the case of [Nyawa Mwajowa vs. Republic](#) [2016] eKLR, this court in its judgment delivered on July 29, 2016 found that the evidence in the case was indicative that the appellant could have been suffering from a disease of the mind and could be entitled to a defence under the M’Naghten Rules that by reason of unsoundness of mind at the time of the commission of the offence, he was either incapable of knowing the nature of the act or was incapable of knowing that it was wrong or contrary to law and that the trial court should have made a special finding of guilty but insane under section 166. The court set aside the conviction for murder and substituted therefor a special finding under Section 166(1) of the CPC then directed the Deputy Registrar, pursuant to section 166(2) of the CPC “to have this special finding reported for the order of the President” and that in the meantime, the appellant was to be kept in custody at Port Reitz Hospital Mombasa, where he was to continue receiving treatment.
31. Based on the foregoing, the appellant in the present appeal cannot be criminally liable, and the learned judge was right in making a special finding under section 166 of the CPC, which in our view is not a “sentence” in the sense of punishment that is imposed on a criminal wrongdoer. Consequently, the question of an indefinite and indeterminate sentence having been imposed by the trial court does not arise. There are of course concerns with the administration of the provisions of section 166 of the CPC as noted by Lesiit, J. (as she then was) in the decisions to which we have referred.
32. For present purposes, what the appellant requires is medical attention. In that regard, we would adopt the approach taken in [Wakesho vs. Republic](#) (Criminal Appeal 8 of 2016) [2021] KECA 223 (KLR), where this court in reference to section 166 of the CPC expressed as follows:

“It is clear from the few decisions of the High Court we have sampled that judicial opinion is divided on the constitutionality of some of the provisions of section 166 of the Criminal



Procedure Code. As we have mentioned, beyond passing reference, counsel did not address us on this issue which certainly requires to be fully canvassed. It is a matter on which the state of the law is clearly unsatisfactory and in dire need of reform and the Attorney General should take immediate steps to initiate reform.

We can only add our voice to the many on the reforms that are needed to the provisions of section 166 of the Criminal Procedure Code in two respects. First, in our view, it is a legal paradox to find a person guilty but insane, in light of the requirements of criminal responsibility and culpability, which require that for a person to be criminally liable, it must be established beyond reasonable doubt that he or she committed the offence or omitted to act voluntarily and with a blameworthy mind. A finding of not guilty for reason of insanity would be more legally sound in circumstances where an accused person is suffering from a defect of reason caused by disease of the mind at the time of commission of an offence. In addition, it is our view that the court should be granted discretion to impose appropriate measures to suit the circumstances of each case, upon a finding of not guilty for reason of insanity.”

And later

“For purposes of the present appeal, however, we are satisfied that the learned judge ought to have made a special finding of guilty but insane. We therefore allow the appeal. We quash the conviction and set aside the sentence of death. We substitute therefor, a special finding that the appellant did the act charged but he was insane at the time he did it. We order that the appellant, who has been in custody since his arrest on May 18, 2012, shall immediately be taken to a mental hospital for medical treatment where he shall remain until such time as a psychiatrist in charge of the hospital certifies that he is no longer a danger to society or to himself.”

33. Consequently, we order that the appellant be taken to a mental hospital for medical treatment. He shall remain there until such a time as a psychiatrist in charge of the hospital certifies that he is no longer a danger to society or to himself. The appeal otherwise fails and is hereby dismissed.
34. We direct the Registrar of the court to forward a copy of this judgment to the Hon. Attorney General.
35. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.



Signed

DEPUTY REGISTRAR

