IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CRIMINAL APPEAL NO 219 OF 2011

BETWEEN

J C S …… APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru

(Ouko, J as he then was) dated 5th July, 2011

in

H.C.Cr.C. No 51 of 2007

RULING OF THE COURT

1. The appeal before us has not been heard since it was filed more than four years ago in September 2011. The reason always given on the three occasions when it was listed for hearing, but was adjourned, was that the appellant could not be produced before the Court because she was still undergoing treatment at Mathari Mental Hospital, Nairobi.
2. The reason for the appellant's detention in Mathari was a finding made by the High Court (**Ouko J**. as he then was) which tried the appellant for the murder of her two-year old son on the night of 19th/20th May 2007 in Nakuru. The circumstances leading to the death of the child through deep and extensive burns covering 60% of the child's body appeared to show that the appellant was schizophrenic and had a history of mental illness. For that reason the High Court made a special finding under **Section 166** of the **Criminal Procedure Code (CPC)** that she was guilty but insane, and ordered her detention at the President's pleasure as she underwent further treatment. That was on 5th July 2011. Three months later, a notice of appeal and memorandum of appeal aforesaid were filed through Nakuru Women Prison.
3. The matter was listed for hearing before us on 23rd February 2016 and the appellant was once again not produced before us though she was represented by learned counsel, **Miss Alwala.** The state was on the other hand represented by **Senior Principal Prosecution Counsel** (SPPC) **Mr. J.K. Mutai**. At the request of the Court, both counsel were asked to argue three legal issues before consideration of the merits of the main appeal, and this Ruling pertains to those issues. They were

as follows:-

i. Whether an appeal lies from a special finding of 'guilty but insane' which is neither a conviction nor an acquittal.

ii. Whether this Court has jurisdiction to entertain such an appeal.

iii. If the Court has jurisdiction to entertain an appeal, whether it is necessary for the appellant who is detained in a mental institution to attend Court.

4. Miss Alwala submitted on the first two issues that the Court has jurisdiction to entertain the appeal and cited the decision of this Court, similarly constituted, in the case of ***Bgkm v Republic [2015] eKLR.*** On the other hand, Mr. Mutai argued that the Court was bound by **Section 379** of the **CPC** which allows appeals from all convictions and the finding made by the High Court was one. If the section has been construed otherwise following the law in England which has changed, then it is for Parliament in Kenya, and not the Court, to change the law. On the third issue, it was his view that the hearing of the main appeal cannot proceed in the absence of the appellant in person, but no authority was cited for that proposition.
5. We have considered the three issues and the submissions of counsel. It is indeed the case, that this Court has given judicial consideration to the first two issues in the **Bgkm case** cited by Miss Alwala. As in this case, the earlier case involved a finding of guilty but insane and the jurisdictional issue arose for consideration. We may cite it *in extenso*:-

> ***"14.*** **This Court, differently constituted (Madan, Miller and Potter JJA) in the case of PIM v Republic [1982] eKLR grappled with a similar issue and ultimately held:**
>
> ***"We are of the opinion, however, that in the law of Kenya, as in the law of England, the verdict upon a criminal charge must be a conviction or an acquittal, and there is nothing in between. If the accused is found guilty of the offence charged, he is convicted. If the accused is found "guilty" only of the act charged, as on a special finding, or not guilty of the offence charged, the effect is the same, for the accused has not been convicted of the offence charged. We would not object to the special finding or verdict being referred to as "technically an acquittal", see Smith and Hogan, Criminal Law, 4th edition page 176, but it is an acquittal.***
>
> **And therein lies the jurisdictional issue.**
>
> ***15.*** **The jurisdiction of this Court to hear appeals from criminal trials in the High Court is derived exclusively from Section 379 of the CPC. The material words of the section are -**
>
> ***"379 (1) Any person convicted on a trial, held by the High Court and sentenced … to imprisonment for a term exceeding twelve months … may appeal to the Court of Appeal - …"***
>
> **In the PIM case, the Court posed a specific question, thus:-**
>
> ***"Does an appeal to this Court lie from a special finding under Section 166 of the Code by the High Court of guilty of the act charged but insane. And is such a special finding a conviction or an acquittal for the purposes of Section 379 of the Code?"***
>
> ***16.*** **In answering the question, the Court referred to a similar provision in England, Section 3 of the Criminal Appeal Act, 1907, which provided in effect that only *"a person convicted on indictment may appeal under this Act to the Court of Criminal Appeal";* the question therefore being whether by reason of the special verdict under the Act of 1883 the accused was *"a person convicted on indictment."***

17. **This Court then accepted the answer given by the House of Lords to the question in the case of Felstead v Rex [1914] AC 534 where it was held**:

"..that the accused was not "A person convicted … " It was also held that the special verdict was one and indivisible and was a verdict of acquittal.."

18. **In the end, this Court answered the question posed earlier as follows:-**

"Accordingly, in our judgment, no appeal to the Court of Appeal from the High Court lies under Section 379 of the Criminal Procedure Code in respect of a special finding under section 166 of the Code, and a special finding is not a conviction, but is an acquittal." (Emphasis added).

6. The **Bgkm case,** however, differed with that conclusion on the basis that:

"..the law in England upon which the decision was predicated has since changed, specifically casting doubts that a special finding was an acquittal. We find no reason to hold that it is. Indeed, in view of the traditional duty of the first appellate Court to re-examine the trial Court record exhaustively and make its own conclusions on matters of fact and law, we find no reason to bar an intending appellant who seeks to question glaring blunders of law and fact which a trial Court may have made."

We may now add that **Section 6** of the **CPC** provides that the "***High Court may pass any sentence authorized by law".*** There can be no argument that the finding made under **Section 166** of the CPC is a form of sentence authorized by that provision of the law and is amenable to appeal. We so find.

7. Having answered the first two issues in the affirmative, the third issue is whether it is necessary for an appellant detained in a mental institution to attend Court. We have examined the relevant rules of procedure and find no compulsion to do so. The most relevant is **Rule 71** of the **Court of Appeal Rules, 2010** which governs appearance at the hearing and provides in **sub-rule (2)** as follows:-

"Where an appellant is represented by advocate or has lodged a statement under rule 66 or is in prison, it shall not be necessary for him to attend personally the hearing of his appeal, unless the Court shall order his attendance:

Provided that if an appellant is on bail……" (Emphasis added)

Sub-rule 3 covers the situation where the appellant is in prison and has expressly stated that he does not wish to attend, while **sub-rule 4** covers a situation where the appellant fails to appear either in person or by advocate, if he has one, and has not expressly stated that he would not attend, in which case the hearing would proceed, the absence notwithstanding. **Rule 66** which is referred to in **sub-rule (2)** provides in relevant part:

"An appellant … who does not intend to appear in person or by advocate at the hearing of the appeal may lodge with the Registrar or with the deputy registrar at the place where the appeal is to be heard a statement in writing of his arguments in support of .. the appeal.."

8. It is evident from the foregoing that the absence of an appellant or a respondent, during the hearing of an appeal is contemplated by the rules. In this matter, the appellant is neither on bail nor in prison, but is undergoing treatment in a mental hospital. There is neither indication nor certainty as to when the appellant will leave the Hospital and an indefinite adjournment of the appeal is unacceptable. She has not filed a statement as envisaged in **Rule 71 (2)** above. However, she is represented by an Advocate who is at liberty to urge the appeal on her behalf, unless the Court in its discretion orders the presence of the appellant for reasons to be given. Failure by the

advocate to proceed would render the appeal liable to dismissal under **Rule 71(4).**

9. In view of our findings, we order that this appeal be fixed for hearing in the next session of the Court in Nakuru for final disposal.

Dated and delivered at Nakuru this 14th day of April, 2016

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR