IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO, & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 62 OF 2014

BETWEEN

D M M....……..…….APPELLANT

AND

REPUBLIC.…….……..…….……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa

(Odero, J.) dated 15th June 2012

in

H.C.CR.C. No. 31 of 2008)

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JUDGMENT OF THE COURT

This is yet another appeal in which the judgment of the High Court is impugned for failure to comply with the provisions of the ***Criminal Procedure Code*** prescribing the procedure for dealing with an accused person who, on account of unsoundness of mind, is unable to make his defence. While the appellant contends that the judgment is a nullity by reason of failure to adhere to the prescribed procedure, the respondent thinks otherwise.

The information upon which the appellant was tried charged him with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The particulars were that on 1st December 2008, in Taita Taveta County, the appellant murdered ***M M (the deceased).***

The appellant is a son of the deceased. Their relationship was rather strained because the appellant was in the habit of beating up the deceased. Twice, the appellant had been jailed for assaulting the deceased. Indeed on the material day, the appellant had just come home, having completed his latest term of imprisonment for assaulting the deceased. Two of the appellant's younger brothers, ***C M (PW1)***, aged

16 years old and ***R M (PW2)***, a class 3 pupil aged 12 years old, were at home when the appellant arrived from prison. At about 7.00 pm the appellant sent PW1 to the shops to buy some salt. Fearing for the welfare of the deceased who had not yet come home that evening, PW1, as he left for the shop, sent PW2 to look for the deceased and to warn him not to go home because the appellant had returned.

PW2 succeeded in getting the deceased and warned him that the appellant was at home. The deceased however insisted that no one could prevent him from going to his home. He went home in the company of PW2 and greeted the appellant, who did not respond. PW2 then went off, leaving the deceased alone with the appellant at home.

PW1 returned home from the shop after about 15 minutes, only to find the deceased dead in the kitchen with cut wounds on the head. Outside the kitchen was a bloodstained *jembe*, but the appellant was nowhere to be found. PW1 called for help from neighbours who came to the scene and in turn called police from Wundanyi Police Station. The deceased's body was removed to Wesu Hospital Mortuary before being transferred to Moi District Hospital, Voi, where ***Dr. Charo Wilson (PW7)*** conducted a postmortem examination three days after the death of the deceased.

The postmortem report indicated that the deceased sustained a deep penetrating wound on the back of the head, 10 cm long with exposed skull bone and compound fracture to the back of the head. PW7 formed the opinion that the cause of the death of the deceased was cardiopulmonary arrest due to head injury and that the head injury was most likely caused by a sharp object.

Members of the public arrested the appellant in a neighbouring village the next day and took him to Mwatate Administrative Police Camp where he was re-arrested, transferred to Wundanyi Police Station and subsequently charged before the High Court as aforesaid. Before pleading to the charge, the appellant was subjected to psychiatrist examination by ***Dr. C. M. Mwangombe*** on 9th December 2008 and his behaviour, mood, speech and cognition were found to be normal and he was declared fit to plead. He was all right throughout the prosecution case when 9 prosecution witnesses testified.

However, he started exhibiting mental instability and disturbance when he was due to present his defence. On 8th December 2011 the trial court noted that the appellant seemed disturbed and incoherent, with a vacant look. Accordingly it directed that he be taken for psychiatric evaluation. On 11th January 2012, Dr. Mwangombe examined him once gain and found him to be deluded and unfit to stand trial. On 22nd February 2012, the trial court, relying on the psychiatrist's report directed the appellant to be taken to Port Reitz hospital for treatment. By a further report dated 11th April 2012, the Doctor found the appellant fit for trial and accordingly the appellant presented his defence on 9th May 2012. In his defence he stated that the deceased was his father, but denied having killed him or knowing how he had met his death.

The trial court was satisfied that the circumstantial evidence adduced by the prosecution proved beyond reasonable doubt that the unlawful death of the deceased was caused by the appellant with malice aforethought. Accordingly it convicted him as charged and sentenced him to 40 years imprisonment, thus precipitating this first appeal.

The appellant's learned counsel, ***Mr. Ole Kina,*** faulted the trial court for proceeding with the defence hearing when all indications were that the appellant was not fit to stand trial. He submitted that after his conviction, the appellant was found to be unable to present this appeal and that a report from the medical superintendent, Port Reitz Hospital, Mombasa dated 30th June 2014 had confirmed that he suffered from psychotic mental illness, paranoid schizophrenia and was not fit to pursue his appeal. Counsel further submitted that having initially found the appellant incapable of conducting his defence, the trial court was obliged to follow strictly the procedure prescribed by section 162 of the Criminal Procedure Code and having failed to do so, the resulting conviction and sentence were nullities. Relying on the judgment of this Court in ***Karisa Masha v. Republic, Cr. App. No. 78 of 2014***, counsel submitted that an accused person who is unable to understand the proceedings ought not to be convicted but should instead be ordered detained at the President's pleasure. Accordingly counsel urged us to allow the appeal, quash the conviction and order the appellant to be detained at the President's pleasure.

Mr. Monda, learned Senior Assistant Director of Public Prosecution opposed the appeal submitting that the appellant never raised insanity as a defence. In his view the proceedings were properly and lawfully conducted and the conviction was proper. However, having found the appellant to have been of unsound mind, counsel submitted, the trial court should have invoked the provisions of section 167 of the Criminal Procedure Code instead of sentencing the appellant. Counsel conceded that the sentence of imprisonment for 40 years was illegal and asked us to set the same aside and in lieu thereof make an order committing the appellant to a mental hospital.

This is a first appeal and the appellant is entitled to raise matters of fact and law and is further entitled to expect from this court a fresh and exhaustive examination of the evidence as a whole, and the Court's own judgment. In carrying out that mandate however, we shall pay due regard to the fact that on matters touching on the credibility or trustworthiness of witnesses, we do not have the advantage that the trial court had and will therefore defer to its conclusions unless no reasonable tribunal could have reached its conclusion on the evidence before it. (See ***Kiilu & Another v. Republic [2005] KLR 174).***

As we indicated at the beginning of this judgment, the main issue in this appeal is whether the appellant's case was handled in accordance with the relevant provisions of the Criminal Procedure Code. We agree with counsel for the respondent that there was no scintilla of evidence that the appellant could have been suffering from a decease of the mind at the time when the offence was committed. The real question is his state of mind during his trial.

Again, it is common ground that during the presentation of the prosecution case, the appellant was alright and was able to participate without let or hindrance. Problem's started when he was placed on his defence and the psychiatrist confirmed that he was unfit for trial. On 22nd February 2012, after considering a report by the psychiatrist, the learned judge directed that the appellant be taken to Port Reitz for treatment. It is the manner in which the learned judge dealt with the appellant at that stage which raises the question whether she complied with the prescribed procedure.

In our view, it is not clear from the record whether the learned judge, in dealing with the appellant as she did, invoked ***section 162(2)*** of the Criminal Procedure Code or ***section 167 (1) (b)*** of the same Code. The former provision applies where the court is of the opinion that the accused person is of unsound mind and incapable of making his defence. In such a case the court is required to postpone the trial and if appropriate, admit the accused person to bail or where that is not feasible, order the accused to be detained in safe custody in such a place and manner as it may think fit. The court is next required by ***section 162(4)*** to transmit the court record or a certified copy thereof to the Cabinet Secretary for consideration by the President.

By ***section 162(5)*** the President, upon considering the report, may by order under his hand addressed to the Court direct that the accused be detained in a mental hospital or other suitable place of custody and the court shall issue a warrant to that effect until the President makes a further order or until the court orders the accused person to be brought before it. Where the accused person is subsequently found to be capable of making his defence, ***section 163 (1)*** requires the medical officer in charge of his place of detention to forward a certificate to that effect to the Director of Public Prosecutions who in turn is required to inform the court whether the Republic intends to pursue the prosecution or not. Where the Republic does not wish to proceed with the matter, the accused person is to be discharged and released from custody and where the Republic wishes to pursue the prosecution, the trial of the accused person shall resume.

Then there is the procedure prescribed by ***section 167*** of the Criminal Procedure Code where the accused person is not *per se* insane, but still he does not understand the proceedings. Where such an accused person is tried by the High Court, the court is required by ***section 167(1)(b)*** to try the case and either acquit the accused person or if it is satisfied that the evidence would justify a conviction, order the accused person to be detained during the President's pleasure, at which time he is deemed to be in lawful custody. The trial court is next required by section 167(4) to forward to the Cabinet Secretary a copy of the notes of evidence at trial and a report containing any recommendation or observations on the case as it may think fit to make. Lastly under section 167(3) the President is empowered at any time, of his own

motion or after receiving a relevant report, to order the detained person to be discharged subject to appropriate conditions on his welfare and supervision.

The report submitted to this Court by the medical superintendent, Port Reitz Hospital, Mombasa dated 30th June 2014 confirms that the appellant suffers from psychotic mental illness, paranoid schizophrenia and was not fit to pursue his appeal. In our view, granted the history we have set out above, this is not a condition which developed post-conviction, but is one which would have required the trial court to handle the appellant's case strictly as provided in section 162 of the Criminal Procedure Code. In ***Leonard Mwangemi Munyasia v Republic*, *Cr. App. No. 112 of 2014,*** a psychiatrist expressed the view that the appellant, who had a history of mental instability, was "fit to plead" as a result of which the appellant was tried and convicted of murder. On appeal this Court took into account the previous and supervening mental condition of the appellant and found that there was doubt whether he was truly sane. The Court also emphasized that the purpose of the provisions of the Criminal Procedure Code detailing the procedure for dealing with an accuse person who is insane is to avoid the likelihood of sentencing a person with mental disorder. In that case, like the present one, the appellant was found to suffer from psychosis, schizophrenia and bipolar disorder. The Court stated:

> ***"Technical terms such as bipolar disorder, schizophrenia and mild psychosis have been used in evidence to describe the appellant's state of mind. How do these conditions affect a person's state of mind? Again, these are questions, which ought to have been answered at the trial by the experts. But according to World Health Organization Publication, the ICD-10, Classification of Mental and Behavioural Disorders, 1992, a patient suffering from psychosis experiences hallucinations and/or delusions that they believe are real, and may behave and communicate in an inappropriate and incoherent fashion. Schizophrenia is a condition of mental disorder which makes a patient have false beliefs, unclear or confused thinking and auditory hallucinations. While bipolar disorder, on the other hand is a brain disorder that causes unusual shifts in mood and energy activity levels. Clearly the condition the appellant suffered have severe effect in a patient's mind and perception. The condition according to the above literature may be long term, transient and intermittent in nature...The law recognizes, as we have seen, that the society has people like the appellant who may fall in this category of the population, and therefore provides for the procedures to be followed by the court in two instances where the question of insanity arises at the trial.***

We are satisfied that the trial court did not apply the procedure set out in section 162 of the Criminal Procedure Code as it was duty bound to do. In ***Karisa Masha v. Republic***, ***Cr. App. No. 78 of 2014***, this Court emphasized that it was critically important that the prescribed procedure, which we have set out above, be followed strictly. In the pertinent passage from that judgment, which we quote in *extenso*, the Court expressed it self thus:

> ***"When the trial judge made the order of 20th September 2011 postponing the trial of the appellant and committing him to Port Reitz Hospital, it was pursuant to section 162 of the Criminal Procedure Code. By invoking that provision the court was proceeding on the basis that the appellant was of unsound mind and incapable of making his defence. Instead of the order which it made committing the appellant to Port Reitz Hospital, section 162 (4) obliged the court to order the appellant to be detained in such place and manner as it may think fit (including Port Reitz Hospital) and to transmit the court record or certified copy thereof to the Cabinet Secretary responsible for the Kenya Prison Service for consideration by the President. Upon considering the record the President would, by order, direct the appellant to be detained in a mental hospital or other suitable place of custody until such time as the President makes a further order or until the court, upon receiving a certificate from the relevant medical officer that the appellant was capable of making his defence and upon hearing the Director of Public Prosecutions on whether he wished to proceed against the appellant or not, orders the appellant to be brought before it for further proceedings...We would add 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. In this case, it must be borne in mind that under section 162(5), 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. 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. 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. While we understand the basis of the practice of sidestepping the legal requirements involving the Cabinet Secretary and the President to be a desire to speed up the trial or conclusion of the issue of the accused person's mental status which is otherwise delayed by the bureaucracy of the two offices, we must emphasize that these are requirements of the law in respect of which no office can claim to be too busy. The solution, in our opinion, lies not in short-circuiting the requirements of the law; but in insisting that the concerned offices discharge their legal duties with due dispatch as expected under the Constitution and the Criminal Procedure Code."

Accordingly, the conviction and sentence of the appellant to 40 years imprisonment on the basis of a trial that did not comply with section 162 of the Criminal Procedure Code was flawed. We hereby quash the conviction, set aside the sentence and in lieu thereof substitute an order for the detention of the appellant at Port Reitz Hospital where he shall in the meantime continue treatment. The Deputy Registrar shall forthwith transmit to the Cabinet Secretary responsible for the Kenya Prison Service a copy of the proceedings of the High Court as well as a copy of this judgment, to the intent that the appellant shall be dealt with in the manner set out in section 162 of the Criminal Procedure Code. It is so ordered.

Dated and delivered at Malindi this 29th day of July, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR