**IN THE COURT OF APPEAL**

**AT MOMBASA**

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

**CRIMINAL APPEAL NO. 78 OF 2014**

**BETWEEN**

**KARISA MASHA……APPELLANT**

**AND**

**REPUBLIC……RESPONDENT**

**(Appeal from the conviction and sentence of the High Court of Kenya at Mombasa, (Odero, J.) dated 20th February 2013**

**in**

**H.C.CR.C. NO. 22 OF 2008)**

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**JUDGMENT OF THE COURT**

Although the appellant, ***Karisa Masha,*** challenges his conviction and sentence by the High Court for the offence of murder primarily on the ground that the prosecution did not prove malice aforethought on his part, in our estimation this appeal turns purely on whether the trial of the appellant, who the court found not to have been capable of understanding part of the proceedings, was conducted in accordance with the prescribed procedure. Upon finding, at the conclusion of the trial, that the appellant did not understand part of the proceedings, the learned judge (***Odero, J.)*** invoked ***sections 167(1) (b)*** and ***167(2)*** of the ***Criminal Procedure Code*** and ordered him to be detained at the President's pleasure at ***Port Reitz Hospital***, Mombasa.

The appellant's prosecution arose from the events that took place at about 11.00 am on 5th August 2008 at Madzimbani Village, in Kaloleni District of the former Coast Province. On that day and at the time, the appellant's stepmother, ***Kavumbi Kitsao Masha (PW1)*** was at her farm when she saw the appellant, who was armed with a *panga*, chasing a woman called ***Changawa Karisa (the deceased)***. PW1 heard the deceased screaming and from a distance of about 20 meters saw the appellant slash her with the *panga* several times on the head and the neck. Screaming in turn, PW1 ran off to call neighbours for help. By the time she got back to the scene, the deceased was already dead. PW1 was the only eyewitness to the commission of the offence.

Five other prosecution witnesses, namely ***Fundi Ngumbao Fondo (PW2)***, ***Karisa Masha (PW3***, the

husband of the deceased), ***Kadzo Kaingu (PW4), Sidi Charo Fondo (PW5)*** and ***Zhosi Kalume (PW6)*** were all neighbours of the deceased and confirmed that they arrived at the scene only to find her already dead.

The evidence of ***Chief Inspector Anthony Njeru (PW9)*** was that on the same day at about 1.00 pm, the appellant presented himself at Mariakani Police Station armed with a bloodstained *panga* and reported that he had killed a person. PW9 arrested him and recovered the *panga,* before proceeding to the *locus in quo* where he found and removed the body of the deceased to the mortuary.

***Dr. Ntali Mbuuko (PW7)***, the provincial pathologist, Coast region, adduced the medical evidence on the cause of death of the deceased. According to that witness, the deceased sustained 2 deep horizontal cuts at the back of the neck. So severe were the cuts that both the cervical spine and the spinal cord were severed. He concluded that the cause of death was severed spine and cord due to deep cuts at the back of the neck, caused by a sharp object like a *panga*.

The hearing of the prosecution case proceeded without much incident. Matters however, took a dramatic turn when the appellant was placed on his defence on 25th March 2011. On the date scheduled for hearing of the defence, ***Mr. Tindi***, the learned counsel then on record for the appellant, applied for adjournment, informing the court that the appellant was unwell and unable to conduct his defence. Counsel also applied for the appellant to be subjected to a further psychiatric examination. Although counsel did not disclose what ailed the appellant, his request for psychiatric examination left little doubt that he was suggesting the appellant was suffering from mental illness. The learned judge acceded to both the applications, adjourned the defence hearing, and directed that the appellant be subjected to a second psychiatric evaluation, and that the report be filed in court.

The record shows that when the hearing resumed on 20th September 2011, the appellant's counsel informed the court that he was unable to obtain instructions from the appellant, who was ***"mentally unstable".*** It appears that the psychiatric report ordered by the court had also not been produced as of that date. In any event, the court made the following order:

***"Having seen accused, he looks tired, weak and is staring into space. He is not in a correct frame of mind to issue instructions to his lawyer. As such I do invoke this court's powers under section 162(2) of the Criminal Procedure Code. I postpone these proceedings. In terms of section 162(4) of the Criminal Procedure Code I hereby direct that the accused be taken to Port Reitz Hospital for treatment. Accused to be produced in this court and a medical report filed on 9.12.2011."***

By invoking section 162 of the Criminal Procedure Code and postponing the proceedings, the trial court was implying that it had found the appellant to be of unsound mind and incapable of making his defence. As we shall show later in this judgment, the manner in which the court proceeded was not in accordance with the requirements of section 162.

The case was again mentioned on 14th December 2011 when the appellant informed the court that he was still not able to make his defence because, although he had been treated, he had continued to suffer attacks of anxiety. The court then adjourned the trial for mention two days later. On the date of the mention, the court noted that ***"a letter"*** dated 23rd September 2011, of which we shall say more later, indicated that the appellant was ***"fit to plead"*** and so directed him to present his defence on 9th February 2012.

On the next two occasions when the hearing of the defence was to take place, the trial could not proceed because on the first date the appellant was unwell while on the second he could not even be produced in court because he was hospitalized.

The hearing was next scheduled for 28th June 2012. As previously, his counsel informed the court that the appellant's mental state was still in doubt because he was not able to communicate with counsel. Once again a request for a further psychiatrist evaluation was made and granted. On that day the Court made

the following order:

***" [Court] notes that the accused is mumbling, appears unkempt and says he cannot remember what has been ailing him. OC Shimo la Tewa to facilitate a psychiatrist evaluation. Report to be filed in court. Mention on 12th July 2012."***

The psychiatrist's report was ultimately availed to court on 1st August 2012 and on 14th August 2012 the court observed that the report indicated that the appellant was ***"fit to plead".*** This report was virtually a carbon copy of the earlier one dated 23rd September 2011. Accordingly the court directed that the appellant should give his defence on a date, which the court set. On the date of the hearing, the appellant's counsel informed the court that:

***"My client wishes to keep silent in his defence. We invoke the provisions of section 2 of the Criminal Procedure Code and section 167 (b) Criminal Procedure Code."*** (Emphasis added).

On his part, the appellant is recorded telling the court:

***"I do not know what is going on. I do not know why I am in court."***

Before concluding the day's proceedings the court recorded as follows:

***"Court notes the accused is restless. Keeps yawning and interrupting proceedings."***

On the basis of the above evidence the learned judge convicted the appellant of murder as charged. The court found that the he did not suffer any mental illness at the time he committed the offence and that he had the requisite malice aforethought. However, the court further noted that after the appellant was put on his defence, his mental problems started, occasioning delay in the conclusion of the trial. The court concluded as follows:

***"Although this court found that the accused was sane at the time he committed the act, it has become very evident that his mental state has greatly deteriorated during the course of the trial. It is not certain that the accused is now in a position to understand the proceedings. As such I do therefore invoke section 167 (1) (b) and section 167 (2) of the Criminal Procedure Code and I direct that the accused be detained during the President's pleasure at Port Reitz Hospital in Mombasa from where he will receive the requisite treatment."***

Aggrieved by his conviction and sentence, the appellant lodged the current appeal through his learned counsel, ***Mr. Ole Kina***. The respondent opposed the appeal through ***Mr. Monda***, learned Assistant Director of Public Prosecutions. As we have already indicated, the appeal was fought primarily on the question whether the prosecution had proved malice aforethought on the part of the appellant. A second issue which was taken up, and which we think is really what this appeal turns upon, is whether the appellant was properly tried in accordance with the prescribed procedure.

On whether malice aforethought was proved, we note that the appellant's mental status ***at the time of the commission of the offence*** was never made an issue at his trial. While in ***PMI V. REPUBLIC, CR. APP. NO. 91 OF 1981*** it was suggested that it the duty of the defence to raise the defence of insanity, in ***JULIUS WARIOMBA GITHUA V. REPUBLIC, CR APP. NO. 261 OF 2006*** and ***LEONARD MWANGEMI MUNYASIA V. REPUBLIC, CR. APP. NO. 112 OF 2014***, this Court stated that it is the duty of the trial court where the defence of insanity is raised or where it becomes apparent from the accused person's history and antecedent, to inquire specifically into the question. We agree that the trial court cannot ignore evidence on record suggestive of the appellant's insanity merely because the defence has not specifically raised it. Indeed as the Court stated in ***MARII V. REPUBLIC (1985) KLR 710***, the state of mind of the accused is to be gathered from the evidence in the case.

Under ***section 11*** of the Penal Code every person is presumed to be of sound mind and to have been of sound mind at any time in question unless the contrary is proved. That presumption can be rebutted by the

accused person adducing evidence to show on a balance of probability that he was insane at the time of commission of the offence. (See ***MARII V. REPUBLIC, supra).*** There is no gainsaying that the burden to rebut the presumption lies on the appellant.

In this appeal, neither the defence, nor the evidence adduced by the prosecution even remotely suggested that the appellant could have been suffering from a disease of the mind at the time he committed the offence. The little cross-examination of the prosecution witnesses by counsel for the appellant that took place did not even obliquely advert to insanity on the part of the appellant. There was no reference to a history of mental illness or any other factor suggestive of mental incapacity. In short there was absolutely no evidence before the court upon which it could have been concluded that the presumption of sanity had been rebutted or dislodged.

Although Mr. Ole Kina invited us to conclude from the lack of motive and the fact of the appellant surrendering himself at Mariakani Police Station that he could have been insane, we find that on the facts of this case and the evidence that was adduced, there is no basis for concluding that the appellant was suffering from a disease of the mind at the time of commission of the offence so that he did not know, within the meaning of the ***McNaughten Rules,*** what he was doing or if he did, that it was wrong. Moreover, under ***section 9(3)*** of the Penal Code, lack of motive of and by itself cannot lead to the conclusion that we are invited to make and even where motive becomes an element for consideration, it is in cases resting purely on circumstantial evidence, which is not the case here. (See ***LIBAMBULA V. REPUBLIC [2003] KLR 683***).

It is therefore clear to us that in this appeal, the question of the mental status of the appellant relates only to the time of his trial, not the time of commission of the offence. Under the Criminal Procedure Code those are two separate and distinct issues that attract different kinds of procedure. Having found that the appellant did not suffer from any mental incapacity at the time of the commission of the offence, in our opinion the trial court cannot be faulted for concluding that from the circumstances in which the appellant killed the deceased, malice aforethought could be inferred under ***section 206*** of the Penal Code. (See ***EKAITA V. REPUBLIC (1994) KLR 225).*** In particular taking into account the dangerous nature of the weapon that the appellant used, the part of the body of the deceased that was targeted, the nature of the injuries that were inflicted and the degree of force used by the appellant, the conclusion by the trial court cannot be faulted. (See ***STEPHEN NJENGA WANJIRU V. REPUBLIC, CR APP NO. 108 OF 2013).***

Turning to the question whether the appellant's trial was conducted in accordance with the prescribed procedure, in ***MWANGEMI MUNYASIA V. REPUBLIC, supra,*** this Court considered at length the different procedures that apply firstly where the accused person was legally insane when he committed the offence and secondly where the accused person, though sane when he committed the offence, is insane at the time of his trial and unable to follow the proceedings. There is a third scenario which we shall consider, namely that addressed by section 167 of the Criminal Procedure Code which applies where the accused person was not legally insane at the time of the commission of the offence or at the time of his trial, but cannot otherwise be made to understand the proceedings.

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.

In ***GRACE NYAROKA V. REPUBLIC, CR. APP. NO. 246 OF 2006 (NYERI),*** this Court noted that the trial judge had acted much like the trial judge in the present appeal by cutting out the roles of the Cabinet Secretary and the President under section 162(4) and directly ordering the appellant's detention in hospital for treatment. In *orbiter* remarks the Court stated as follows:

***"That short-circuiting of the whole process is now the practice which is probably based on the sound reason that if the whole process is followed to the letter the matter might take a very along time to conclude***."

In ***MWANGEMI MUNYASIA V. REPUBLIC, supra*** we stated as follows regarding the above observation:

***"For our part, and granted the provisions of the law, we think the court without an order of the President would have no powers to commit an accused to a mental hospital directly."***

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.

The resumed trial of the appellant was based on two letters signed by ***Dr. C. M. Mwangome,*** consultant psychiatrist dated 23rd September 2011 and 1st August 2012. We consider it necessary to reproduce them here because of the observations we are about to make. The first letter was in these terms:

***Ref. No PSY/MR&F/VOL.9/867 Date: 23rd Sept, 2011***

***The Deputy Registrar,***

***Mombasa High Court***

***P.O. Box 90140***

***Mombasa***

***RE: CR. 22/2008***

***REPUBLIC VS KARISA MASHA***

***I interviewed the above named accused on 22.9.2011 in the presence of CPL JAMES POLOYO, WARDERS NIXON BWIRE and ROBERT KEMBOI who said the accused was of normal behaviour while in remand prison.***

***On examination, his appearance, behaviour, mood, speech and cognition were normal.***

***<u>OPINION: FIT TO PLEAD</u>***

***DR. C. M. MWANGOME, M. MED***

***CONSULTANT PYSCHAITRIST/SADMS***

The second letter was as basic as the first and did not contain any additional particulars. It read as follows:

***Ref. No PSY/MR&F/VOL.10/59 Date: 1st August, 2012***

***The Deputy Registrar,***

***Mombasa High Court***

***P.O. Box 90140***

***Mombasa***

***RE: CR. 22/2008***

***REPUBLIC VS KARISA MASHA***

***I interviewed the above named accused on the 1.8.2012 in the presence of SGT MOHAMED BOCHOLA, WARDERS NIXON BWIRE and CARLOS MUNYOKI who said the accused was of normal behaviour while in remand.***

***The accused denied any history of mental illness.***

***On examination, his behaviour, mood, speech and cognition were normal.***

***<u>OPINION: FIT TO PLEAD</u>***

***DR. C. M. MWANGOME, M. MED***

***CONSULTANT PYSCHAITRIST/DDMS***

In effect the consultant psychiatrist found the appellant sane and capable of making his defence and therefore his trial resumed under section 164 of the Criminal Procedure Code, leading to his conviction and sentence as aforesaid. Notwithstanding the opinion of the psychiatrist that the appellant was sane and capable of making his defence, the learned judge found as a fact that the appellant could not understand the remainder of the proceedings. Accordingly she invoked section 167 of the Criminal Procedure Code, which provides as follows:

***167. (1) If the accused, though not insane, cannot be made to understand the proceedings -***

***(a)…;***

***(b) in cases tried by the High Court, the Court shall try the case and at the close thereof shall either acquit the accused person or, if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President's pleasure.***

***(2) A person ordered to be detained during the President's pleasure shall be liable to be detained in such place and under such conditions as the President may from time to time by order direct, and***

***whilst so detained shall be deemed to be in lawful custody.***

***(3) The President may at any time of his own motion, or after receiving a report from any person or persons thereunto empowered by him, order that a person detained as provided in subsection (2) be discharged or otherwise dealt with, subject to such conditions as to the person remaining under supervision in any place or by any person, and such other conditions for ensuring the welfare of the detained person and the public, as the President thinks fit.***

***(4) When a person has been ordered to be detained during the Presidents pleasure under paragraph (a) or paragraph (b) of subsection (1), the confirming or presiding judge shall forward to the Minister a copy of the notes of evidence taken at the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.***

The above provision addresses the situation where the accused person, although not legally insane, is not capable of understanding the proceedings. In terms of section 167 (1) (b), the High Court is required to try the case and either acquit the accused or if it is ***"satisfied that the evidence would justify a conviction"***, order the accused person to be detained at the President's pleasure. In our opinion, the above provision neither requires nor entitles the trial court, if it is satisfied that the evidence can found a conviction, to convict the accused as the trial court did. It must be remembered that the accused person in question does not understand the proceedings and therefore has not taken any meaningful part in his trial or part thereof. Failure of the accused person to understand the proceeding has considerable inhibitive effect on his ability, as in this case, to mount his defence, however strong it may be. To convict such an accused person on the basis of proceedings that he does not understand is clearly a violation of the right to fair trial guaranteed by ***Article 50*** of the ***Constitution***. That is not what section 167 (1) (b) of the Criminal Procedure Code envisages and clearly the trial judge erred in that respect.

We are however satisfied that in the circumstances of this case, the trial court was justified in holding that notwithstanding the psychiatrist's letters regarding his sanity, the appellant could not understand the proceedings. In our view the psychiatrist did not conduct any meaningful evaluation or examination of the appellant. The information that he relied upon on both occasions, apart from his fleeting observations, was from prison officers and warders who expressed the opinion that the accused behaved normally in remand. There was absolutely no attempt to interview any members of the appellant's family or to establish his background, mental history and antecedents.

We agree with learned counsel for the appellant that there was no justification why the psychiatrist had to rely exclusively on the opinion of prison warders when ***section 29*** of the ***Prisons Act*** requires that a medical officer, responsible for the health of prisoners, must be stationed at or be responsible for every prison. Under ***rule 26*** of the ***Prison Rules,*** the medical officer is, among other things, required to see every prisoner at least once every month while under ***rule 28*** he is required to report to the officer in charge any case where he considers a prisoner to be mentally disordered. Clearly, it is the opinion of such a medical officer that the psychiatrist should have sought, rather than that of prison warders.

Although the psychiatrist's two letters were written almost one year apart, they stand out for their striking similarity in format and content and the fact that the second letter does not even allude to the first, by way of follow up, since the psychiatrist was seeing the appellant for the third time; there is another report by the same psychiatrist dated 26th May 2011 which is exactly the same as the two reports reproduced above. In the reports, the psychiatrist expressed the opinion that the appellant was fit to plead yet the appellant had taken his plea years before.

In our opinion, that is further evidence that the physiatrist's contact with the appellant was so causal that he did not even appreciate the stage that the appellant's trial had reached. In light of these circumstances, it is not possible to believe that the appellant would, before the psychiatrist be of normal behaviour, mood, speech and cognition and a day or two later in court be totally incapable of appreciating where he was, as recorded in the proceedings.

We have come to the conclusion that the trial judge, after finding that the appellant was insane under

section 162 (2) and (4) of the Criminal Procedure Code and incapable of conducting his defence, erred by not following the prescribed procedure pertaining to the detention of the appellant in a mental hospital. Secondly, having subsequently found that the appellant had become sane but was still incapable of being made to understand the proceedings pertaining to the conduct of his defence, the learned judge erred by convicting the appellant for the offence of murder instead of proceedings as required by section 167. Save to that extent, we do not find merit in the appeal.

Taking all the foregoing into account and the powers of the Court under ***rule 31*** of the ***Court of Appeal Rules***, we allow this appeal in part on the following terms:

i. ***The order of the High Court dated 20th February 2015 convicting the appellant for the offence of murder is hereby quashed;***

ii. ***In lieu thereof we substitute an order under section 167(1) (b) of the Criminal Procedure Code that the appellant shall be detained at the President's pleasure;***

iii. ***Pursuant to section 167 (4) of the Criminal Procedure Code, the Deputy Registrar shall forthwith forward a copy of the proceedings of the High Court as well as this judgment to the Cabinet Secretary responsible for the Kenya Prison Service;***

iv. ***Pursuant to the same section, we recommend that the appellant be detained at a mental hospital where he shall continue to undergo treatment.***

v. ***The Deputy Registrar shall forward a copy of this judgment to the Cabinet Secretary responsible for the Kenya Prison Service for purposes of noting and taking remedial measures regarding the examination and evaluation of prisoners by psychiatrists.***

It is so ordered.

**Dated and delivered at Mombasa this 4th day of December, 2015.**

**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**