



**Republic v Kagua & another (Criminal Case 20 of 2015)
[2024] KEHC 371 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 371 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 20 OF 2015
HM NYAGA, J
JANUARY 25, 2024**

BETWEEN

REPUBLIC COMPLAINANT

AND

MARGARET WAMAITHA KAGUA 1ST ACCUSED

STEPHEN RUGUMI WAMBUI 2ND ACCUSED

RULING

1. The Accused persons were charged with Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that on 27th March, 2015 at Ruiru Village, Solai Division in Rongai Sub County within Nakuru County, jointly with others not before court they murdered Simon Nyoike.
2. On 9th April, 2015, the 1st Accused pleaded not guilty whereas the 2nd accused did not take plea as he was mentally unfit to do so. Subsequently the court set a hearing date of the 1st accused person’s case and directed the 2nd accused to be admitted to Mathare Hospital for treatment.
3. On 11th February, 2016, the counsel for the accused persons told court that the 2nd accused was found fit to stand trial as confirmed vide psychiatrist report dated 10th February, 2016. The charge was then read to both accused persons, they pleaded not guilty and trial commenced. The prosecution closed its case after calling nine (9) witnesses.
4. Vide a ruling delivered on 19th December,2019, the court found the accused persons had a case to answer and consequently placed them on their defence.
5. The defence hearing proceeded on 7th July, 2022. DW1, who was the 1st accused person adduced his testimony, however, while DW2 was testifying the court observed the 2nd accused was visibly mentally unwell and it directed that he be presented for psychiatric examination and a report to be filed.



6. The 2nd accused duly underwent psychiatric examination and a psychiatric report by Dr. Njau J.W dated 16th November,2022 and filed on 18th November,2022 confirmed that he suffers from a chronic psychotic disorder.
7. The prosecution counsel thereafter proposed that since the accused persons had been placed on their defence, the 1st accused should present his case while the second accused should be admitted to a medical facility for treatment.
8. The Counsel for the accused persons submitted that the second accused to be released to the hospital whereas the 1st accused be acquitted of the offence.
9. In his written submissions filed on behalf of the accused persons on 31st October,2023, the counsel submitted that the 2nd accused person having been unable to defend himself cannot be said to have been afforded a fair trial under Article 50 of the constitution. He posited that he is protected under Article 54 of the constitution as defined under Article 260 of the constitution read together with Article 25 and 29 F of the constitution.
10. He further posited that the courts have variously ruled that detaining the accused persons under the presidential pleasure is unconstitutional, and that Sections 162,166 and 167 of the Criminal Procedure Code contravenes Articles 25 and 29(f) of the constitution. In support of this proposition, he referred this court to the following cases: -
 - i. Kimaru & 17 others vs Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party) (Petition 226 of 2020) [2022] KEHC 114 (KLR) (Constitutional and Human Rights) (1 February 2022) (Judgment)
 - ii. Hassan Hussein Yusuf vs Republic [2016] eKLR
 - iii. Republic vs S O M [2017] eKLR
 - iv. Joseph Melikino Katuta vs Republic [2017] eKLR

Analysis & Determination

11. Both the prosecution and Defence concur that the 2nd Accused person should be committed to a mental hospital where he shall continue to receive treatment. However, their position differs with regard to the 1st accused. The prosecution proposes her case ought to continue whereas his counsel prays for his acquittal.
12. So what orders should this court issue at this stage?
13. Section 166 of the Criminal Procedure Code provides that:

“ 166.

- (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 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.”

14. The aforesaid cases cited by the Counsel of the accused persons buttress the fact that the above section is Unconstitutional.

15. Justice Mrima in *Kimaru & 17 others vs Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* (supra) held as follows: -

“Sections 162, 163, 164, 166 and 167 of the *Criminal Procedure Code*, Cap. 75 of the Laws of Kenya (the CPC) related to the power of the Presidency to hold inmates in prisons at its pleasure. The exercise of that power arose in two ways: It could be during the trial of an accused in a criminal case or at the conclusion of a criminal trial. The exercise of the power to hold accused persons at the pleasure of the president pending or during trial was provided for under sections 162, 163, 164 and 167 of the *CPC* whereas the power to hold the accused persons at the pleasure of the president after conviction, but before sentence, was provided for under sections 166 of the *CPC*.

Courts had previously dealt with the subject of the instant petition. The subject of the constitutionality of the impugned sections had been severally litigated. Those courts had found that the provisions were unconstitutional. Therefore, the instant court could not attempt to re-invent the wheel. The impugned sections were unconstitutional.

An accused who was found to be unfit to stand or to continue participating in a criminal trial due to mental challenges or an accused person who was tried and a special finding of guilty but insane made, was a person with disability and ought to be accorded the necessary protection and assistance required under the *constitution* and the law. Such a person was sick and a sick person's place was at the hospital and not in prison.

Sections 162 (4) and (5), 166 (2), (3), (4), (5), (6) and (7) and 167 (1) (a), (b), (2), (3) and (4) of the *Criminal Procedure Code* contravened articles 25(a), 27 (1), (2), (4), 28, 29(d) and (f), 50, 51(1) and (2), 159(2)(a), (b) and (d) and 160(1) of the *constitution*.”

16. In the case of *Hassan Hussein Yusuf vs Republic* (supra) the court in dealing with an appeal where the appellant was tried and convicted but at the time of sentencing it dawned on the court that he was of unsound mind, and was subsequently detained at the pleasure of the President found section 167 of the *Criminal Procedure Code* unconstitutional. The court held as follows:

“A sick person's place is at the hospital and not in prison. I find section 167 of the Criminal Procedure Code discriminative to people with mental illness for prescribing their detention to be in prison instead of a health facility and for the detention to be indeterminate. This offends Articles 25 and 29 (f) of the *constitution*. The order envisaged under section 167(1) of the Criminal Procedure Code is a punishment. Any punishment that cannot be



determined from the onset is cruel, inhuman and degrading. I therefore make a finding that this section is unconstitutional to the extent it offends the said articles of the constitution.”

In allowing the appeal, the court held as follows: -

“The appeal is allowed, the order of detention is set aside, However the appellant shall be escorted to a medical facility with the capacity to re-evaluate his mental condition. If in the opinion of a psychiatrist, he will not pose any danger to the public and himself he shall be set at liberty and prison authorities shall ensure that he is facilitated to his home. If the opinion is otherwise, he shall be admitted for treatment until such a time it will be safe to release him.”

17. In Republic vs S O M(supra) Majanja, J while delivering a ruling after convicting an accused person for the offence of murder and upon being satisfied that the accused person was insane at the time of committing the offence, observed as follows: -

“11. 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 advise of executive functionaries goes further to buttress this key point.”

The court went further and made the following orders: -

- “(a) I declare that the provisions of section 166 of the Criminal Procedure Code 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 to the President to determine the nature and extent of the sentence.
- (b) Consequently, I declare that in order to remedy the constitutional defect, the reference to “the President” under section 166 of the Criminal Procedure Code and that the review to be carried out under that section shall be undertaken by the court.
- (c) I direct that the accused shall be committed to a mental institution namely Mathari Mental Hospital for a term of fifteen (15) years subject to periodic review by the court in accordance with section 166 of the Criminal Procedure Code and in any case before the expiry of every two (2) years.”

18. In Joseph Melikino Katuta vs Republic, Kamau J. emphasized the point that keeping a mentally ill person in prison for an indeterminate period of time is cruel, inhuman and degrading treatment contrary to Articles 25 and 29 of the constitution.

19. The Court of Appeal in Wakesho vs Republic (Criminal Appeal 8 of 2016) [2021] KECA 223 (KLR) (3 December 2021) (Judgment) held as follows in regards to Section 166 of the Criminal Procedure Code: -

“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.

Second, the subs-stratum of the provisions as regards the right to fair trial in criminal cases in article 50(2) of the constitution is that an accused person should be fully informed, understands, and thereby effectively participates in a criminal trial. To go through the motions of a trial whose nature and effect an accused person does not from the outset understand or appreciate, and further still to be convicted on the basis of such a trial as is provided for in section 166 of the Criminal Procedure Act, is in our view manifestly unfair in light of our current constitutional dispensation. We therefore direct the Registrar of the Court send a copy of this judgment for the attention of the Attorney General. Enough said on that.”

20. Flowing from the above authorities, it is clear that court upon finding the accused person unfit to stand trial or to proceed with the trial, should release him or her to a mental institution for treatment.
21. In the instant case, the 2nd accused person was found unfit to stand trial vide a psychiatrist report dated 10th February, 2016. The condition was managed and hearing proceeded. Subsequently he could not continue with the trial. A medical report dated 16th November, 2022 indicates that he suffers from a chronic psychotic disorder which is a lifelong condition and has no cure.
22. In the circumstances, I concur with the parties herein that the 2nd accused should be admitted to a mental institution and I hereby direct that he continues undergoing treatment at Nakuru Provincial Hospital, Mental Health Section.
23. Regarding the 1st accused, she had already been placed on her defence and had given her evidence in defence. There is no reason for her case not continuing to its conclusion. An acquittal as proposed by her counsel can only be done if the court is to consider all the evidence and make such a determination under section 322 of the Criminal Procedure Code.
24. I therefore call upon the 1st accused to conclude her defence case, to enable the court move to the next stage of the trial in her respect.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF JANUARY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Wanjiru for state

Accused present

