Case Number:	Criminal Appeal 91 of 1981
Date Delivered:	13 May 1982
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	David Christopher Porter, Chunilal Bhagwandas Madan, Cecil Henry Ethelwood Miller
Citation:	P I M v Republic [1982] eKLR
Advocates:	Mr Hayanga for Appellant Mr Mugo for Respondent
Case Summary:	**P I M v Republic** **Court of Appeal, at Nairobi** **May 13, 1982** **Madan, Miller & Potter JJA** **Criminal Appeal No 91 of 1981** ***Criminal Practice & Procedure*** *- appeal against special finding - special finding of guilty of the act charged but insane under Section 166(1) of the Criminal Procedure Code - appeal against special finding on the ground that neither prosecution nor accused submitted as to insanity - whether a consequential order of detention upon special finding is a sentence of imprisonment - definition of sentence.* ***Appeal*** *- appeals from a special finding - jurisdiction to hear appeals from a special finding under Section 379 of the Criminal Procedure Code - whether a special finding is a conviction and sentence of imprisonment within the meaning of Section 379.*

Judgment *- declaratory judgment - meaning of - circumstances calling for - reference for a declaratory judgment by the Attorney General as per Section 379(5) on points of law of exceptional public importance.*

The appellant was charged with murder and pleaded not guilty to the charge. At no time during the trial did he raise the defence of insanity and neither did the prosecution submit that the appellant was insane. The High Court made a special finding under Section 166(1) of the Criminal Procedure Code that the accused was guilty of the act but insane when he did it.

The appellant sought an appeal against this special finding on the ground that neither the prosecution nor the defence raised the issue of insanity and that he ought to have been found guilty of manslaughter by reason of his state of intoxication as submitted at trial. The question as to whether the Court of Appeal had jurisdiction to hear appeals against a special finding arose.

The Attorney General filed a certificate under Section 379(2) of the Criminal Procedure Code (Cap 75) for a declaratory judgment on two points of law of exceptional public importance that arose in this case. The points were as follows:

a) Does an appeal lie against a special finding under Section 166 of the Criminal Procedure Code by the High Court of guilty of the act charged but insane?
b) Is a special finding a conviction or an acquittal for the purposes of Section 379 of the Criminal Procedure Code?
c) If neither the accused nor the prosecution raise a plea of insanity, is the trial judge entitled to make a special finding of insanity?
d) Is the consequential order of detention a sentence?

Held:
On Appeal

1. A special finding under Section 166(1) of the Criminal Procedure Code (Cap 75) is not a conviction and sentence of imprisonment within the meaning of

Section 379 of the Criminal Procedure Code (Cap 75).

2. No appeal lies from the High Court to the Court of Appeal in respect of a special finding under Section 166(1) of the Criminal Procedure Code (Cap 75).
3. This appeal is struck out as being incompetent.

On the Declaratory Judgment

4. The jurisdiction of the Court of Appeal to hear appeals from criminal trials in the High Court is derived exclusively from Section 379 of the Criminal Procedure Code.
5. A special finding of guilty but insane is not a conviction but an acquittal.
6. A presidential order of detention of a person in respect of whom a special finding is made is not punitive but preventive and that is because it is detention for safe custody for an indefinite period.
7. The practice in Kenya is that evidence of the state of mind of the accused should be called by the defence. Legal insanity should be proved by the evidence given at trial and this case is a good example of the dangers of departing from this practice.
8. (*Obiter* Potter JA) There should have been a defence of diminished responsibility not amounting to insanity as defined in the Penal Code (Cap 63) reducing murder to manslaughter but since no such defence was advanced, the court should have found the accused guilty of murder since there was no dispute as to the fact that he killed his daughter.
9. (*Obiter* Potter JA) “This case amply illustrates the dangers of departing from the practice laid down in *Muswi s/o Musela v Reg* (1956) 23 EACA 622. If the appeal had been competent we would have ordered a retrial.”

Cases

1. *Felstead v Rex* [1914] AC 534 **Approved**
2. *Rex v Ireland* [1910] 1 KB 654 **Approved**
3. *Republic v Saidi Kabila Kiunga* [1963] EA 1 **Reversed** 4. *Muswi s/o Musela v*

	Reg (1956) 23 EACA 622 **Approved** 4. *R v Casey* 32 Cr Appeal R 91 **Referred** 5. *R v Abramovitich* 7 Cr App R 145 **Referred** 6. *R v Smith* 8 Cr App R 72 **Referred** **Texts** 1. TRF Butler, M Garsia (Ed), *Archbold: Pleading, Evidence and Practice in Criminal Cases*, Sweet & Maxwell: London, 33rd Edn (1954) p 20 2. J Smith, B Hogan, *Criminal Law*, Butterworths: London, 4th Edn (1978) p 176 **Statutes** 1. Criminal Procedure Code (Cap 75) Sections 166(1), (2), (3), (4), (6); 379, 379(5) 2. Trial of Lunatics Act 1883, Section 2(1) [UK] 3. Criminal Appeal Act 1907 [UK] 4. Criminal Procedure (Insanity) Act 1964 [UK] 5. Homicide Act 1957 [UK] 6. Penal Code (Cap 63) Section 12 **Advocates** 1. *Mr Hayanga* for Appellant 2. *Mr Mugo* for Respondent
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	78 of 1980
Case Outcome:	Appeal allowed.
History County:	Nairobi
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

information.

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: Madan, Miller and Potter JJA)

CRIMINAL APPEAL NO 91 OF 1981

BETWEEN

PMI …… APPELLANT

AND

REPUBLIC.....…….....…….....RESPONDENT

(Appeal from the judgment of the High Court of Kenya atNairobi (Nyarangi J) dated 25th June, 1981

in

Criminal Case No.78 of 1980

AND

ATTORNEY-GENERAL'S REFERENCE NO 1 OF 1982

IN

REPUBLIC ……..…… PROSECUTOR

AND

PMI ……...ACCUSED

(Review of the judgment of the High Court of Kenya at Nairobi (Nyarangi J) dated 25th June, 1981

in Criminal Case No.78 of 1980

Upon

the Attorney-General's reference by certificate under Section 379(5) of the Criminal Procedure

Code dated 7th January, 1982)

JUDGMENT OF THE COURT

The appellant, **P M I**, was charged in the High Court with the murder of **H W**, his baby daughter aged

11/2 years, during the night of June 21 and 22, 1979. The appellant pleaded not guilty to the charge in the presence of his advocate and at no time did he change his plea. The appellant was tried by Nyarangi J with three assessors. The prosecution maintained throughout the trial that the appellant was guilty of murder. The trial judge made a special finding under section 166(1) of the Criminal Procedure Code that the accused was guilty of the act charged but was insane when he did the act, and he ordered accordingly. The judge in his finding used the word "offence" instead of the word "act", but this was clearly a slip.

The appellant has sought to appeal against that special finding, on the grounds that there was no evidence before the court that he was insane, that neither the prosecution nor the defence had submitted that the appellant was insane, and that by reason of his state of intoxication at the time of the killing the appellant should have been found guilty of manslaughter.

At the hearing of this appeal on December 11, 1981 the question arose as to whether this court was competent to hear the appeal. The jurisdiction of this court to hear appeals from trials held by the High Court in criminal matters derives from section 379 of the Criminal Procedure Code. The effect of that section in relation to a special finding of insanity is that no appeal lies unless the special finding and the consequent order for detention are a conviction and sentence of imprisonment within the meaning of the section.

Being of the preliminary view that there had been no conviction of the appellant, this court adjourned the matter and invited the Attorney-General to consider referring the case for review by this court under section 379(5) of the Criminal Procedure Code, on the footing that the appellant had in fact been acquitted by the High Court. The Attorney-General signed his certificate under that provision on January 7, 1982 and filed it with the Registrar of this court on the following day.

At the adjourned hearing of the appeal on January 12, 1982 the hearing of the appeal and of the Attorney-General's reference were adjourned at the request of Mr Hayanga for the appellant, at which adjourned hearing Mr Hayanga conceded that the appellant had not been convicted at his trial, within the meaning of section 379 of the Code, and that accordingly no appeal lay to this court. Having, with the assistance of Mr Hayanga for the appellant and Mr Mugo for the respondent, came to the same conclusion, we strike out this appeal as incompetent. Our reasons are more fully set in the declaratory judgment on the Attorney-General's reference, which we now deliver.

Judgment Of The Court On The Attorney-General's Reference

Potter JA The certificate of the Attorney-General filed under section 379 of the Criminal Procedure Code certified in broad terms that the point of law of exceptional public importance which, is involved in this case is that which arises under section 166 of the Code. We take that point of law to involve two main questions -

1. 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.

2. The accused not having raised the defence of insanity under section 12 of the Penal Code at the trial, was the trial judge entitled to make a special finding of insanity. Or, is it exclusively for the accused to raise the defence of insanity

As to the first main question, the jurisdiction of this court to hear appeals from criminal trials in the High Court is derived exclusively from section 379 of the Criminal Procedure Code. 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 - …"

Thus the question falls into two parts; firstly, is a special finding under section 166(1) of the Criminal Procedure Code a conviction; secondly, is the consequential order of detention a sentence of imprisonment.

Section 166(1)(a) of the Code is as follows –

"166(1)(a) Where any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such 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 such person is tried that he did the act or made the omission charged but was insane as aforesaid at the time he did or made the same, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane as aforesaid when he did the act or made the omission."

This provision of section 166(1)(a) is, in all material respects, in exactly the same terms as section 2(1) of the Trial of Lunatics Act, 1883 (Ch 38), from which it plainly is derived.

Precisely the same question as is now before us arose under 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." In Felstead v Rex [1914] AC 534, the House of Lords held (with not one of the six members of the court dissenting) 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. In relation to an earlier decision of the Court of Criminal Appeal in Rex v Ireland [1910] 1 KB 654, in which the court held that a person in reference to whom a special verdict was found was "a person convicted … ", Lord Reading said at page 543 –

"The Court was largely influenced to their conclusion by reason of the use of the word "guilty" in the special verdict. It is unfortunate that this word is there used, as it suggests the responsibility for a criminal act. If the requirement under the Act had been merely to find that the accused did the act, instead of that he was guilty of the act, there could have been no room for doubt that such a verdict was not a conviction, but was an acquittal."

As regards the second part of the question, whether a special verdict leads to sentence of imprisonment, section 166(1) paragraphs (b) and (c) provide –

"166(1)(b) When such special finding is 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 such manner as the court shall direct. (c) The president may order such person to be detained in a mental hospital, prison or other suitable place of safe custody."

Section 166(2) then provides that a report on a person detained shall be made for the consideration of the President three years from the date of the President's order of detention and thereafter every two

years, and section 166(4) also provides for a special report to be made at any time upon the authority of the President.

The provisions of the Trial of Lunatics Act, 1883, are to substantially the same effect, in that upon a special finding or verdict, the trial court orders the accused to be kept in custody until an order is made by the Head of State for the detention for safe custody of the accused person, and thereafter the duration of the detention is at the discretion of the Head of State.

In Felstead v Rex, at page 543 Lord Reading said of the appellant –

"By the verdict of the jury he has been acquitted of the crime, and the order for his detention for safe custody ie consequent upon the finding of insanity, and is not for a fixed period but during His Majesty's pleasure."

In our view the Presidential order for the detention of a person in respect of whom a special finding is made is not punitive but is preventive. And that is because it is detention for safe custody for an indefinite period, and not imprisonment for a fixed term.

It has been suggested to us that a special finding is neither a conviction nor an acquittal. We were referred to the Tanzanian case of Republic v Said Kabila Kiunga [1965] EA 1, in which Spry J said, on a revision of a special finding by a magistrate, that he could not order a retrial as a special finding was not a conviction or an acquittal for the purposes of the relevant provision of the Criminal Procedure Code. We agree with the learned judge that there was no conviction. That was all that was necessary for the decision of the case. Felstead's case was not brought to the attention of the court.

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.

Since the Criminal Procedure (Insanity) Act, 1964, the special verdict in England is "not guilty by reason of insanity". This change would seem, however, to have more connection with the changes in the English law by and since the Homicide Act, 1957, which introduced the defence of diminished responsibility, than with the comments made by Lord Reading in 1914 in Felstead v Rex regarding the use of the word "guilty" in the special verdict.

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.

We turn now to the second main question. The marginal note to section 166 of the Criminal Procedure Code reads - "Defence of lunacy adduced at trial." Legal insanity is defined by section 12 of the Penal Code, and it is a matter of defence which under section 166 of the Procedure Code has to be proved by what "is given in evidence on the trial …"

In Muswi s/o Musela v Reg [1956] EACA 622, the Court of Appeal for Eastern Africa held (in relation to a

Kenya appeal) that as a general rule evidence of the state of mind of the accused should be called by the defence. The English procedure as set out in 33rd edition Archbold p 20 should be followed unless there are special reasons to the contrary (where for instance, the accused is not represented it might be in the interests of justice that evidence as to his state of mind should be called by the prosecution)

Archbold 33 edn at p 20 states

"The procedure that the defence should call any witness whose evidence is directed to that issue should be strictly followed, the duty of the prosecution being limited to supplying the defence with a copy of any report or statement of any prison medical officer who can give evidence on that issue and to making such person available as witness for the defence; R v Casey, 32 Cr Appeal R 91: ICLC 2171. Where evidence to establish insanity has been called for the defence, the prosecution may call rebutting evidence, R v Smith, 8 Cr App R 72. And where it is clear from the crossexamination of witnesses for the prosecution that the defence of insanity will be raised and it is ascertained that no evidence will be called to establish this defence, the Crown may, before closing its own case, call evidence to negative insanity, R v Abramovitich, 7 Cr App R 145."

The relevant law has not changed in Kenya, though it has changed radically in England and in our view this judgment sets out the correct practice to be followed in Kenya. We would only comment that as the defence of insanity is today rarely if ever relied upon except in trials for murder in which the accused is represented, cases where for special reasons the prosecution should call the relevant evidence should hardly if ever arise.

Mr Hayanga for the appellant has submitted and Mr Mugo for the State has conceded, that there was no evidence given at the trial that when the appellant administered a lethal dose of rat poison to his child he was, through any disease affecting his mind either (1) incapable of understanding what he was doing, or (2) incapable of knowing that he ought not to do the act (see section 12 of the Penal Code). We agree.

Although the prosecution case was that the appellant was guilty of murder and although the issue of the appellant's state of mind was not raised by the defence, the prosecution called as its second witness a Dr Prakash Konnur, a consultant psychiatrist at Mathare Hospital, to say that on examining the appellant on March 13, 1980 she was satisfied that he was fit to plead and to stand his trial. This issue of fitness never arose upon the arraignment or subsequently. The witness should not have been called, nor should the judge have admitted the evidence.

It emerged from the oral evidence of this witness that the appellant had been a patient at the mental hospital "for some time" between the date of the alleged offence and the trial. The doctor was wrongly permitted to put in evidence as Exhibit 3 a report written by her some two days before she gave evidence. There was nothing material to the case in that report and if there had been the evidence should have been given orally. In that report there are references to the appellant suffering from paranoid schizophrenia, it is not stated when, and to his suffering from epilepsy of a psychosensory type at the time of the alleged offence. This form of epilepsy was diagnosed as a result of the appellant's complaints at the hospital that he had hallucinations of smell from time to time. At no point in her evidence did this witness attempt to demonstrate that the appellant was legally insane at the time of the death of the child, by reason of either of these complaints.

In his unsworn statement the appellant admitted that he had a problem with hallucinations of smell, but otherwise denied suffering from any complaint- which had not been cured by a few injections or sleeping pills. He described the events of the afternoon and evening of June 21, 1979 in detail. He contemplated suicide, then the idea faded and he went out and drank six beers and four tots of whisky in order to

ensure sound sleep. He woke, up in the night and thoughts of suicide recurred. He wrote a number of suicide letters.Then the idea occurred to him that the children should die with him as they would suffer without him. The appellant said –

"I intentionally wrote the letters in such a way as to absolve my wife and relatives of responsibility without recourse to second thought we took rat poison and slept. The decision to commit suicide and the split second decision that the children should die with me as well as the actual commission of the three offences were arrived at and implemented as a result of full exercise of free will on my part. I was not motivated, affected or influenced by any false beliefs psychological problems or illness or disease of mind, in thinking up and committing the three offences. I was however in a state of intoxication because I had taken much more liquor than was usual with me."

The letters were not put in evidence because the handwriting was not proved to be that of the appellant.

In his final address defence counsel submitted that the appellant had made a false confession in his unsworn statement through fear of being returned to a mental hospital, and that the circumstantial evidence was not incompatible with his innocence. Neither counsel made any reference to the possibility of a special finding.

The trial judge's summing up notes included the following:-

"PW 2 - Doctor- Saw accused at Mathare Mental Hospital - examined - could plead - Accused had been in Hospital for treatment for some time. (Accused had been mentally sick - hence admission into Mathare Hospital)"

The notes ended thus-

"Generally-
Accused admitted into Mathare Hospital after incident – poison in house - Is there evidence that poison was given to children" Could the accused have been sane""

It is clear that the judge did not properly direct himself or the assessors as to the law of insanity or as to whether there was any evidence of it, or as to whether the issue was properly before them.

Two assessors thought the appellant was guilty of murder. One assessor thought the appellant was "guilty of unintended murder", because he was mentally sick and loved his children.

In his judgment the judge first found that the appellant killed the deceased by feeding her with rat poison. He also found that that poison had been introduced by the appellant into the bedroom where it was administered as a matter of deliberate preparation. Mr Hayanga has not challenged those findings and we see no reason to criticize them.

The reasons given in the judgment for the special finding are as follows –

"As early as July 3, 1979 an application was made to the subordinate court for the accused to be examined for mental fitness. An order for examination by a psychiatrist was made on July 3, 1979. The accused was treated at Mathare mental Hospital and certified safe to plead on March 15, 1980.

In view of all that, it is clear that the accused was insane at the time he killed his daughter. The evidence satisfies me that the accused was insane so as not to be responsible for his acts or omissions at the time

he poisoned the deceased."

While it is difficult to make any sense of this passage, it would seem that the judge was troubled by such information as was before him, whether or not in the form of admissible and material evidence, as to the mental state of the appellant. He may have found it too hard to believe that a sane man of decent background could poison his own children. This case may indicate the need for a defence of diminished responsibility, not amounting to insanity as defined in the Penal Code, reducing murder to manslaughter, where the accused is found to have been suffering from such abnormality of mind, whether inherent or induced by disease or injury, as substantially impaired his mental responsibility.

This case amply illustrates the dangers of departing from the practice laid down in Muswi's case (cited above). If an appeal had been competent we would have ordered a retrial. Mr Mugo for the Attorney-General has invited us to say that the appellant should have been convicted of murder. We do not think that we can give an unqualified answer to that question. On the footing that there was a proper finding that the appellant killed the deceased child, and that no defence to the charge of murder was advanced that was supported by evidence, it could be said that the trial judge should have found the appellant guilty of murder. But since in our view the trial was unsatisfactory, we do not feel able to say what the verdict would have been after properly conducted trial.

Dated at Nairobi this 13th day of May, 1982.

C.B MADAN

.....

JUDGE OF APPEAL

C.H.E MILLER

.....

JUDGE OF APPEAL

K.D POTTER

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR