Case Number:	Criminal Appeal 59 of 2014
Date Delivered:	10 May 2016
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Kiarie Waweru Kiarie
Citation:	Hassan Hussein Yusuf v Republic [2016] eKLR
Advocates:	-
Case Summary:	**Detention of Sick or Mentally Unstable Persons In Prison instead of a Health Facility Unconstitutional** **Hassan Hussein Yusuf v Republic** **Criminal Appeal 59 of 2014** **In the High Court of Kenya at Meru** **K W Kiarie, J** **May 10, 2016** **Reported by Emma Kinya Mwobobia & Ian Kiptoo** **Brief facts** The Appellant was Charged with an offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code and was tried and convicted but at the time of sentencing, the Court realised that he was of

unsound mind. When the psychiatrist confirmed that indeed he was mentally unstable, it was ordered that he be detained at the prison at the president's pleasure. He appealed against the conviction and the order of detention at the President's pleasure.

Issues

i. Whether the detention of a sick or mentally unstable person in prison was a violation of their freedom from torture and cruel, inhuman or degrading treatment or punishment.
ii. Whether section167 of the Criminal procedure Code was unconstitutional to the extent that it provided for the detention of a mentally unstable person in prison at the President's pleasure after conviction .

Consttitutional law-*fundamental rights and freedoms-absolute rights - freedom from inhuman, cruel and degrading treatment –whether the detention of a mentally unstable person convicted of an offence in prison at the President's pleasure was a violation of their rights and freedoms – Constitution of Kenya, 2010 articles 25 and 29; Criminal procedure code section 167*

Criminal Procedure – *Sentencing– Punishments – mentally unstable persons – provision for punishment for mentally unstable persons – requirement for the detention of mentally unstable persons convicted of an offence to be detained in prison at the President's pleasure – whether the provision was constitutional – Criminal Procedure Code section 167*

Held

1. According to the trial Court's record, the Court had sufficient evidence to found a conviction on and therefore the ground on inadequacy of evidence could not stand.
2. The trial Court could not be faulted for not making an earlier order for the medical

examination of the Appellant. Some cases of mental instability did not manifest in the same manner and some took longer to be detected.

3. There was nothing illegal about the trial court's order for the Appellant to be detained in prison at the President's pleasure under section 167 (1) of the Criminal Procedure Code.
4. There were two mandatory procedural requirements upon a court making an order under section 167 (1) of the Criminal Procedure Act:

a. Every such order was to be be subject to confirmation by the High Court. A perusal of the trial Court record revealed that after the order was made, it was not sent to the High Court for confirmation.
b. The confirming or presiding Judge ought to 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 requirement was not met since the file was not sent to the Judge for confirmation.

5. Failure to comply with the mandatory provisions was prejudicial to the Appellant especially after being diagnosed with partial mental instability and would probably have required a brief period in a health facility and thus, he was entitled to an acquittal.
6. A sick person's place was at the hospital and not in prison. Section 167 of the Criminal Procedure Code was discriminative to people with mental illness for prescribing their detention to be in prison instead of a health facility and for their detention to be indeterminate. It offended articles 25 and 29 (f) of the Constitution.
7. Keeping a sick person for an indeterminate period in a prison was cruel, inhuman and degrading treatment. The order envisaged under section 167 (1) of the Criminal Procedure Code was a punishment and any punishment that could not be

	determined from the onset was cruel, inhuman and degrading. Therefore, section 167 of the Criminal Procedure Code was unconstitutional to the extent that it offended the provisions of the Constitution. *Appeal allowed, detention order set aside. Appellant be escorted to a medical facility with the capacity to re-evaluate his mental condition.* *If in the opinion of a psychiatrist he did not pause any danger to the public and himself, he was to be set at liberty and prison authorities would ensure that he was facilitated to his home. If the opinion was otherwise, he ought to be admitted for treatment until such a time it would be safe to release him.* **Cases** ***East Africa*** 1. *Okeno v Republic* 1972 EA 32 – (Mentioned) ***East Africa*** **Statutes** **1.** Constitution of Kenya, 2010 articles 25, 29 (f) –(Interpreted) 2. Criminal Procedure Code (cap 75) section 167 (1) – (Interpreted) 3. Penal code (cap 63) section 306(a) – (Interpreted) **Advocates** 1. Mr Kariuki for the Respondent
Court Division:	Criminal
History Magistrates:	-
County:	Meru
Docket Number:	-
History Docket Number:	-

Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.59 OF 2014

HASSAN HUSSEIN YUSUF ..... APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(From the original conviction and sentence in Criminal Case No.1797 of 2008 of the Principal Magistrate's Court at Isiolo by Hon. C.O.Owiye – Resident Magistrate)

JUDGMENT

The appellant, **HASSAN HUSSEIN YUSUF,** was Charged with an offence of breaking into a building and committing a felony contrary to section 306(a) of the penal code.

The particulars of the offence were that on 24th October 2008 at Garbatulla location in Garbatulla, within Eastern Province, the appellant broke and entered into Ansaar mosque and stole four Qurans valued at Kshs.2000, the property of Ansaar mosque.

The appellant was tried and convicted but at the time of sentencing it dawned on the court that he was of unsound mind. He now appeals against the conviction and the order of detention at the pleasure of the president.

From the grounds listed by the appellant, I have been able to distill the following four grounds:

1.That the learned magistrate erred in law and in fact by failing to make a finding that no eye witness was called by the prosecution.

2. That the learned magistrate erred in law by failing to consider the appellant's defence.

3.That the learned trial magistrate erred in law and in fact by convicting and sentencing him without sufficient and independent evidence.

4. That the trial magistrate erred in failing to order that he be taken for a mental examination.

The state opposed the appeal through Mr. Kariuki, the learned counsel.

The facts of the case were briefly as follows:

On 24th October, 2008 at about 11 am the appellant entered Ansaar mosque without removing his shoes as required. He removed some Quran books and dumped them in a pit latrine. He was arrested tried and convicted. At the sentencing stage it occurred to the trial magistrate that he could be mentally ill. When the psychiatrist confirmed that indeed he was mentally unstable, it was ordered that he be detained at the prison during the president's pleasure.

When the appellant was given a chance to tender his defence, he said he had nothing to say.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

Aisha Abdi (PW1) a 13 years old girl testified of what she witnessed the appellant do and of her conversation before he committed the offence. The appellant's claim that no eye witness was called has no merit.

The appellant did not tender any defence and there was no defence available for the consideration by the trial court.

My perusal of the record confirm that the trial magistrate had sufficient evidence to found a conviction on and therefore the ground on inadequacy of evidence cannot stand.

The learned trial magistrate cannot be faulted for not making an order earlier than he did, for medical examination of the appellant. Some cases of mental instability do not manifest in the same manner and some take longer time to be detected.

The appellant was ordered to be detained in prison during the president's pleasure under section 167 (1) of the Criminal Procedure Code. There was nothing illegal about it. The section provides:

(1) If the accused, though not insane, cannot be made to understand the proceedings—

(a) in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President's pleasure; but every such order shall be subject to confirmation by the High Court;

(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 President's 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.

There are two mandatory procedural requirements upon the court making an order under section 167 (1) of the Criminal Procedure Code.

1.Every such order shall be subject to confirmation by the High Court. My perusal of the trial court record shows that after the order was made, the same was not send to the High Court for confirmation.

2.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. Since the file was not send to the judge for the confirmation, obviously this why this requirement was not met.

In my opinion failure to comply with these mandatory provisions was prejudicial to the appellant especially after being diagnosed with partial mental instability. He would probably have required a brief period in a health facility. This will entitle him to an acquittal. I wish to make the following observations:

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. Article 25 provide as follows:

25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited––

(*a*) freedom from torture and cruel, inhuman or degrading treatment or punishment;

It is my opinion that keeping a sick person for an indeterminate period in a prison is cruel, inhuman and degrading treatment.

Article 29 (f) of the constitution provide as follows:

29. Every person has the right to freedom and security of the person, which includes the right not to be—

.....

.....

(*f*) treated or punished in a cruel, inhuman or degrading manner.

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.

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 reevaluate his mental condition. If in the opinion of a psychiatrist he

will not pause 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.

DATED at Meru this 10th day of May, 2016

KIARIE WAWERU KIARIE

JUDGE