



Case Number:	Criminal Case 6 of 2011
Date Delivered:	30 Apr 2018
Case Class:	Criminal
Court:	High Court at Kisumu
Case Action:	Ruling
Judge:	David Shikomera Majanja
Citation:	Republic v S O M [2018] eKLR
Advocates:	Mr Olel, Advocate for the Accused. Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.
Case Summary:	<p><b>Section 166 of the Criminal Procedure Code which provides for a finding of guilty but insane is unconstitutional as the sentence imposed is indeterminate and at the executive's discretion.</b></p> <p><b>Republic v SOM</b></p> <p><b>Criminal Case No 6 of 2011</b></p> <p><b>High Court at Kisumu</b></p> <p><b>D S Majanja, J</b></p> <p><b>April 30, 2018</b></p> <p><b>Reported by Beryl A Ikamari</b></p>

**Statutes**-interpretation of statutory provisions-constitutionality of a statutory provision-constitutionality of section 166 of the Criminal Procedure Code which provided that in cases of a finding of guilty but insane, the sentence would be indeterminate and at the President's discretion-whether the imposition of such a sentence ought to be a judicial function which was to be undertaken independently by the Judiciary without the executive's involvement and whether the imposition of an indeterminate sentence was unconstitutional-Constitution of Kenya 2010, articles 28, 54(1)(a) , 2(6), 160, 25 & section 7(1) of the Sixth Schedule to the Constitution; Criminal Procedure Code (Cap 75), section 166.

### **Brief facts**

The Accused was convicted of the offence of murder. The Court made a special finding under section 166(1) of the Criminal Procedure Code to the effect that the Accused committed the act of killing but was insane. The Accused was to be kept in custody at Kisumu Maximum Security Prison pending the President's order in accordance with section 166 of the Criminal Procedure Code.

The Accused questioned the constitutionality of section 166 of the Criminal Procedure Code and stated that it provided for a mandatory sentence which did not give the Court discretion in setting the sentence. He contended that the Court ought to impose a definitive sentence that met the facts and circumstances of the case. He relied on the case of *Francis Karioko Muruatetu and another v Republic* SCK Petition No. 15 and 16 of 2015 [2017] eKLR in which the proposition was made to the effect that a law that failed to take into account the peculiarities of each case was unconstitutional. That case declared the mandatory death sentence imposed for the offence of murder unconstitutional for various reasons.

### **Issue**

1. Whether for purposes of a finding that an Accused person was guilty but insane, the

imposition of an indeterminate sentence at the discretion of the President was unconstitutional.

**Relevant provisions of the law**

***Criminal Procedure Code (Cap 75), section 166;***

*166. Defence of lunacy adduced at trial*

*(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 a 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.*

*(4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report.*

*(5) On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such*

*conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.*

*(6) Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.*

*(7) The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.*

#### **Held**

1. Although the *Francis Muruatetu Case* dealt with the mandatory death sentence, the principles it espoused were applicable to the circumstances of the instant case. The provisions of section 166 of the Criminal Procedure Code on a finding of the Court that an Accused was guilty but insane were mandatory in nature. The Court had no discretion irrespective of the nature of mental illness or condition of the Accused. The ultimate sentence imposed would depend on the discretion of the President who would determine the conditions under which the Accused would serve the sentence either in a mental institution or a prison or whether the Accused would be discharged.
2. The rights of a person with a disability

included the right to be treated with dignity. Article 28 of the Constitution recognized the right to dignity and article 54(1)(a) of the Constitution provided for the right of a person with disability to be treated with dignity and respect and to be addressed and referred to in a manner that was not demeaning. Kenya was also a signatory to the Convention on the Rights of Persons with disability which was part of the laws of Kenya recognized in article 2(6) of the Constitution.

3. Courts have cast doubts on the constitutional validity of provisions that imposed an indeterminate sentence at the instance of an authority other than the Courts. In *AOO and 6 others v Attorney General and another* NRB Petition No. 570 of 2015 [2017] eKLR, the Court found that detention of a child found guilty of the offence of murder at the President's pleasure was unconstitutional. It was held that the indeterminacy of the sentence exacerbated the cruel, inhuman or degrading nature of the sentence as the period of incarceration was unknown to the Accused and depended on the President's discretion. The Court also held that leaving the length of the sentence to the discretion of the President violated article 160 of the Constitution which provided for the independence of the Judiciary.
4. The vesting of discretion on how the Accused would be treated after conviction on the executive was inimical to the fundamental duty of the Judiciary to determine the guilt of the Accused and terms upon which he or she would serve the sentence. By vesting discretionary power on the executive and taking away the judicial function to determine the nature of the sentence to be imposed after the special finding was made, section 166 of the Criminal Procedure Code went contrary to article 160 of the Constitution and was unconstitutional. It also violated the right to a fair trial as protected under article 25 of the Constitution.
5. Under section 7(1) of the Sixth Schedule to the Constitution, the Court was entitled to

construe existing laws, such as the Criminal Procedure Code as one of the 'existing laws' that continued to be in force, with such modifications, adaptations, qualifications and exceptions necessary to bring its provisions into conformity with the Constitution. The defect in section 166 of the Criminal Procedure Code was that the review of the sentence was to be done by the President and not the Court and hence reference to "the President" under that section had to be read to mean "the Court." In effect, the modification would mean that the Accused would be brought before the Court periodically for a review of the matter. If necessary the Court would call for evidence including the evidence of experts before making an appropriate order within a framework of a definite period of detention to be imposed by the Court.

6. The Accused had been in custody since the year 2011. Pursuant to a directive of the Court, the Probation Service provided a report on the social circumstances of the Accused dated February 5, 2018. The report said that his family and the community were not prepared to accept him back home due to fear of his past antecedents. The report recommended that the Accused was not suitable for a non-custodial sentence as he was not in a mental state to comprehend the conditions of a non-custodial order. Additionally, a consultant psychiatrist examined the Accused and concluded that he was not in control of his mental faculties and that he would benefit from further treatment.
7. Considering the circumstances of the offence, its gravity and the mental state of the Accused, it was appropriate for him to be committed to a mental institution namely Mathari Mental Hospital for a term of fifteen (15) years subject to period 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.

*Application allowed.*

Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Accused committed to a mental institution for a period of 15 years.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL CASE NO. 6 OF 2011**

**CORAM: D. S. MAJANJA J.**

**BETWEEN**

**REPUBLIC.....PROSECUTION**

**AND**

**S O M.....ACCUSED**

**RULING ON SENTENCE**

1. On 19<sup>th</sup> December 2017, I convicted the accused, **S O M**, of the murder of his grandmother, **A H O** ('the deceased') contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The incident took place on 11<sup>th</sup> January 2011, within Ukwala location of Ugenya District, Siaya County. As I found that the accused committed the act that led to the death of the deceased, I made a special finding under **section 166(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* ("the *CPC*") to the effect that the accused committed the act of killing but was insane at the time.

2. I stated in my judgment that I am by law required to direct that the accused be kept in custody at Kisumu Maximum Security Prison pending the President's order in accordance with **section 166** of the *CPC* which provides as follows:

*Defence of lunacy adduced at trial*

*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 a 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.*

*(4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report.*

*(4) On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.*

*(5) Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a*



*person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.*

*(7) The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.*

3. Counsel for the accused, Mr Olel, submitted that the Supreme Court decision in ***Francis Karioko Muruatetu and Another v Republic SCK Petition No. 15 and 16 of the 2015 [2017]eKLR*** was dispositive of this matter in so far as it declared the mandatory death sentence imposed for murder unconstitutional for several reasons. He argued that the nature of the sentence provided under **section 166** of the **CPC** was mandatory in nature and the court had no discretion. He contended that the court should impose a definitive sentence. In that case, the Supreme Court held that it is the judicial duty to impose a sentence that meets the facts and circumstances of the case and a law that fails to take into account the peculiarities of each case is unconstitutional. The court observed that:

*[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.*

4. The court then went on to place the concerns of the mandatory death penalty within the context of the right to dignity enshrined in **Article 28** of the Constitution as follows;

*[50] ..... Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.*

5. Although, the ***Francis Muruatetu Case*** dealt with the mandatory death sentence, the principles it espouses are nonetheless applicable to this case. I would like to point out that the provisions of **section 166** of the **CPC** dealing with conviction and sentence of an accused found guilty but insane are mandatory from the point of view of the accused and the court. They do not give the court any discretion irrespective of the nature of the mental illness or condition of the accused. The ultimate sentence imposed on an accused found guilty but insane is at the discretion of the President who determines under what conditions the accused serves either in a mental institution or a prison or is ultimately discharged.

6. The constitutional underpinning of the rights of persons with disability cannot be gainsaid. Central to these rights is the right to be treated with dignity guaranteed under **Article 28** of the Constitution. **Article 54(1)(a)** of the Constitution buttresses the right of a person with disability, *"to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning."* Kenya is also a signatory to the ***Convention on the Rights of Persons with Disabilities*** which is now part of Kenyan law by dint of **Article 2(6)** of the Constitution.

7. Several decisions have cast doubt on constitutional validity of provisions that impose an indeterminate sentence on an accused at the instance of an authority other than the courts. In ***AOO and 6 Others v Attorney General and Another NRB Petition No. 570 of 2015 [2017]eKLR***, Mativo J., held that the provisions of the **Penal Code** where a child found guilty of murder is held at the pleasure of the President as unconstitutional they violate the right to a fair trial under the Constitution. After examining various provisions of the Bill of Rights including the right to dignity, the right to a fair trial and the rights of the child, the learned Judge held the indeterminacy of the sentence exacerbates the cruel, inhuman or degrading nature of the punishment on the grounds that the maximum period of incarceration remains at all times unknown to the accused and the period of incarceration is dependent on the executive. The learned Judge further held that since the imposition of a sentence was judicial function, the provision leaving the length of the sentence to the President violates **Article 160** of the Constitution which provides and affirms the independence of the Judiciary on the following terms:

**160.** (1) *In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.*

8. The issue of detention at the pleasure of the executive is neither new nor novel. It has been dealt with in other Commonwealth jurisdictions. In ***Browne v The Queen* [2000] 1 AC 45**, the Privy Council held that a sentence of detention at the Governor-General's pleasure was contrary to the Constitution of Saint Christopher and Nevis because it constituted a deprivation of liberty otherwise than in execution of an order or sentence of the court. It held that since the Governor-General was part of the executive and since the selection of punishment was an integral part of the administration of justice, a sentence which depended on the pleasure of the Governor-General was not compatible with the constitutional separation of powers.

9. The Privy Council in ***Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411** held that, by giving the Governor-General as an officer of the executive the power to determine the measure of an offender's punishment violated the principle of the separation of powers implicit in all constitutions based on the Westminster model, including that of Jamaica. In this case the Privy Council held that since the applicable Order in Council empowered the court to modify and adapt existing laws so as to bring them into conformity with the Constitution, accordingly the relevant statute ought to be modified throughout by substituting the words "the court" for "Her Majesty" or "the Governor General".

10. Our courts have also been concerned about the treatment of persons with mental disability under the provisions of the ***CPC***. In ***Hussan Hussein Yusuf v Republic Meru High Court Criminal Appeal No. 59 of 2014 [2016]eKLR***, Kiarie J., held that **section 167(1)** of the ***CPC*** which provides that a person suffering from mental disability and is unable to understand the proceedings is to be detained at the pleasure of the President is unconstitutional as it violates **Articles 25 and 29** of the Constitution that prohibit cruel, inhuman and degrading treatment. The learned judge reiterated this position in ***B K J v Republic MERU HC Criminal Appeal No. 16 of 2015 [2016] eKLR***. In ***Joseph Melikino Katuta v Republic Voi HC Criminal Appeal No. 12 of 2016 [2016]eKLR, Kamau J.***, emphasised 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.**

11. Turning back to the provisions of **section 166** of the ***CPC***, it is clear that the court's duty comes to an end when it enters the special verdict against the accused and directs the accused's detention pending the President's decision. As Mativo J., noted in ***AOO and 6 Others v Attorney General (Supra)***, *"The imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and is therefore the exercise of judicial, not executive, power."* This holding is, in my view, consistent with that the Supreme Court held in the ***Muruatetu Case (Supra)***. 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.

12. I therefore find and hold that the provisions of **section 166** of the ***CPC*** 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 in the executive. It also violates the right to a fair trial protected under **Article 25** of the Constitution.

13. **Article 2** of the Constitution provides that any law which is inconsistent with the Constitution is to the extent of the inconsistency void. Under **section 7(1)** of the ***Sixth Schedule*** to the Constitution, the Court is entitled to construe existing laws, such as the ***Criminal Procedure Code*** as one of the 'existing laws' that continue to be in force, with such modifications, adaptations, qualifications and exceptions necessary to bring its provisions into conformity with the Constitution.

14. In this case the defect in **section 166** of the ***CPC*** is that the review is carried out by the President rather than the court hence the reference to "*President*" shall be read to mean, "*the Court*." The effect of this is to ensure that the accused is brought before the court periodically so as that the court may review the matter and if necessary call for and take necessary expert and other evidence before making an appropriate order within the framework of a definite period of detention imposed by the Court.

15. Counsel for the accused submitted that the court should sentence the accused to a specific period of time given that he has been in custody since 2011. After reading the judgment, I directed the Probation Service to provide a report on the social circumstances of the accused. The report dated 5<sup>th</sup> February 2018 noted that the community and his family were not prepared to accept him back home due to fear of his past antecedents. The report recommended that the accused was not suitable for a non-custodial sentence as he was not in a mental state to comprehend the conditions of a non-custodial order. It also noted that;

*[The accused] is twenty six years old young man who has freely admitted the offence against him and is praying for leniency from this honourable court ..... During the interview, the offender did not show any remorse towards this offence, meaning that he had not come to terms with the gravity.*

16. Dr Nyaura, a consultant Psychiatrist, who had examined the accused during the pendency of these proceedings concluded that the accused was not in control of his mental faculties and that he would benefit from further treatment.

17. I have considered the circumstances of the offence, its gravity and the mental state of the accused and 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 period review by the court in accordance with **section 166** of the *CPC* and in any case before the expiry of every **two (2) years**.

18. **Section 166** of the *CPC* comes under the heading, “*Procedure in Lunacy ....*” which underpins the 18<sup>th</sup> Century foundations of the current law. Modern Psychiatry has brought new insights to the human mental condition while human rights standards have influenced the improvement of the conditions and treatment of persons with mental disability in the criminal justice system. I therefore direct that the Deputy Registrar to forward this decision to the National Council on Administration of Justice (NCAJ) Committee on Criminal Justice Reform (NCCJR) appointed by the Chief Justice Vide Gazette Notice No. 5857 of 19<sup>th</sup> June 2017 to review various aspects of the criminal justice system in order to inform further reforms in this area of law and procedure.

19. In conclusion, I now make 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 he review carried out under that section shall by the Court.

(c) I direct that the accused shall be committed to a mental institution namely Mathari Mental Hospital for a terms of **fifteen (15) years** subject to period 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**.


**DATED and DELIVERED at KISUMU this 30<sup>th</sup> day of April 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Olel, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.

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