

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO 197 OF 2013

**Revision from the original conviction and sentence by the Principal Magistrate at Wajir in
Criminal Case No. 432 of 2013**

MOHAMED SONAR NOOR.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

Mohamed Sonar Noor, the applicant, has moved this court through his advocate Mr. Stephen G. Wanyoike seeking revision of the orders of the Principal Magistrate at Wajir. The applicant was convicted on his own plea of guilty in a charge of defilement and sentenced to life imprisonment. The application was made orally and is anchored under Section 166 (1) and (2) of the Criminal Procedure Code and Article 50 of the Constitution of Kenya 2010.

The applicant is seeking to set aside the conviction and sentence on the ground that when the plea was taken the applicant was suffering from a disease of the mind which fact was not taken into account by the trial magistrate; that the court was not briefed on this state of affairs and proceeded to take the plea, convict and sentence the applicant. Counsel submitted that the applicant was not given a fair chance to stand trial. He further submitted that upon being informed by the relatives of the applicant that he was not mentally stable, he was taken for mental check-up and it was confirmed that he suffers from Schizophrenia. Counsel asked the court to review the conviction and sentence and refer the applicant for treatment before the plea is taken. Counsel relied on **Criminal Case No 7 of 2001 Republic v. Daniel Kyalo Maundu** and **Criminal Case No 9 of 2002 Naomi Muthoni Koikeken v Republic.**

The application was opposed by the state through the learned State Counsel Mr. Allan Mulama who submitted that under Section 166 Criminal Procedure Code an accused person can rely on the defence of insanity and the court can make a special finding. Counsel cited **Criminal Appeal No 98 of 1981 Mbugua v Republic** in which the court dismissed an appeal where the appellant had relied on defence of insanity. He submitted further that the lower court did not make a mistake in this case and the application ought to be dismissed.

I have considered this application and the cited authorities which deal with appeals in which the defence of insanity was raised. These authorities do not help either party. The issue before me is not an appeal nor is it a full trial. The issue is whether the applicant was mentally fit to take the plea.

The powers of this court to review orders of the lower courts are donated to it by Section 362 Criminal Procedure Code. This court has powers under that section to call and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. I note that the applicant has not invoked these provisions. However, that notwithstanding, this court takes into account substantive justice.

The taking of the plea in the lower court is a proceeding of that court. This is subject to review by this court if there is reason to believe that it was not conducted procedurally or legally. The mistakes that occurred were not made by the trial magistrate. The law presumes any person presented in court to be of sound mind until contrary is proved (**See Section 11 of the Penal Code**). It is unfortunate that other than

the practice in murder trials, the accused persons are not automatically examined to determine their mental status before the plea is taken. It is my view that every accused persons, especially those facing serious offences, must as of right be subjected to medical check-up in regard to their mental status before a plea is taken. This would not be asking for too much given the guarantees, inter alia, to rights to a fair trial in our Constitution. The trial court in this case acted properly just like in all other criminal cases before him. The accused or his family ought to have furnished the trial court with information that he suffers from a mental illness to prompt the court to order for a medical report to determine if he was fit to take the plea and stand trial.

The applicant is within his rights in coming to his court. Article 50 (q) guarantees him right to fair trial if convicted to appeal to, or apply for review by a higher court. It is the procedure and practice in cases where an accused is said to suffer some mental illness to have him treated first before he can take the plea or participate in the trial. Where the trial court is aware of the mental status of any accused person brought before it for plea the right thing to do is to refer such an accused person for treatment to enable the plea to be taken when he is mentally fit to take it. At this stage this court is not concerned with whether the defence of insanity is available to the applicant. The issue before me is whether the applicant was fit mentally to take the plea. I have seen copy of the medical report from Dr. Adan Khalif of Wajir District Hospital dated 23rd October 2013 confirming that the applicant suffers from Schizophrenia. It is therefore proper to have him examined to determine if he is fit to take the plea and if not he be put on treatment before the plea can be taken.

In view of the above I hereby quash the conviction and set aside the sentence. The applicant shall be referred to hospital for medical examination to determine if he is fit to stand trial. Thereafter the applicant shall be presented before a magistrate other than the one who initially took the plea for plea taking. If he is unfit to stand trial he shall be treated until such a time that he is fit to take the plea. I make orders accordingly.

S.N. MUTUKU

JUDGE

Signed, dated and delivered this 12th day of November 2013.