



**HMM v Director of Public Prosecutions & another (Constitutional Petition E323 of 2020)
[2023] KEHC 2620 (KLR) (Constitutional and Human Rights) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E323 OF 2020**

AC MRIMA, J

MARCH 31, 2023

BETWEEN

HMM PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Background:

1. The Petitioner herein, HMM, is an inmate at Manyani Maximum Prison. He was charged in High Court of Kenya at Milimani Criminal Case No 98 of 2011, R. v HMM (hereinafter referred to as ‘the criminal case’) with an information of Murder.
2. He was found guilty and consequently, a special finding was made and the Petitioner was sentenced under Section 166(2) of the *Criminal Procedure Code* (hereinafter referred to as ‘the *CPC*’) and was detained at the pleasure of the President.
3. Resulting from the foregoing, the Petitioner was aggrieved that he is serving an unknown and indefinite prison term in violation of his rights under the *Constitution*.
4. The Petition was opposed by the Respondents.

The Petition:

5. Through the Petition dated October 9, 2020, supported by the Petitioner’s Affidavit deposed to on an even date, the Petitioner sought to challenge his incarceration.



6. He pleaded that serving time in prison unaware of the time he will be held amounted to inhuman and degrading treatment in violation of his right enshrined under Article 25(a)(c), 27(1), 28,29(a), 48, 50(1), 43(2) and 51 of the Constitution.
7. He averred that despite section 166(4) of the CPC which requires the officer in charge of prison or mental hospital to file an initial report after three years and a subsequent report upon expiry of two years on the mental condition of the prisoner, no such reports have been made for forwarding to the president for necessary recommendation.
8. The Petitioner posited that despite the Commissioner of Prisons submitting a report on July 15, 2019 to the Power of Mercy Advisory Committee (hereinafter ‘POMAC’ or ‘The Committee’) CPC in respect of persons detained under section 166(2) of the CPC, no communication has been forthcoming from the Committee regarding his fate.
9. The Petitioner averred that he is periodically reviewed by a psychiatrist and has been adhering to his instructions and is now cognizant of his environment and fully recovered.
10. He pleaded that from July 1, 2017 to December 10, 2017, he served as a volunteer secondary school teacher at Kamiti Maximum Security Prison Secondary School.
11. He further averred that on September 4, 2017, he was admitted to Kenyatta University where he undertook Master of Business Administration, a post graduate distance learning program.
12. On the foregoing, the Petitioner posited that it was necessary to have the Director of Prosecutions and the Attorney General, the 1st and 2nd Respondents herein, to be held accountable for non-performance of their constitutional mandate.
13. He pleaded that the deliberate refusal to make inquiry into his mental health was an outright breach of its Constitutional obligation under Article 25(a) which requires the Respondents to place him under the care and control of a specialized medical practitioner.
14. The Petitioner asserted that the High Court in Kisumu Criminal Case No 6 of 2011, had declared as inhuman and degrading an unknown and indefinite prison term.
15. It was his case that the lack of an inquiry into his mental health under section 166(4) of the CPC had occasioned him psychological trauma and violated his right to life under Article 26 of the Constitution.
16. He further pleaded that his right to dignity under Article 28 and his economic and social rights guaranteed under Article 43(1)(a) of the Constitution continue to be violated by the Respondent’s failure to detain him in a mental health facility.
17. In sum, the Petitioner pleaded that the Respondents had abrogated their statutory duty envisaged under section 166(4) of the CPC as appreciated alongside section 3,5(1), 15 and 23(1) of Persons Deprived of Liberty Act.
18. On the foregoing factual and legal basis, The Petitioner prayed for the following reliefs;
 - i. A declaration be issued that the Petitioner is entitled to the rights set out in Article 25(a), 27(1), 27(2), 28,29(a), 43(1)(a), 51(1) of the Constitution of Kenya.
 - ii. A dealation be issued that the failure of the Respondent to perform their constitutionally mandated duties has violated the Petitioner’s right and



continues to violate Article 25(a), 27(1), 27(2), 28, 29(a) 43(1)(a), 51 of the [Constitution of Kenya](#).

- iii. An Order for the Petitioner to be released from prison and be freed from serving an indefinite prison sentence.
- iv. Any other order and or directions that this Court may deem fit to grant.

The Submissions:

19. The Petitioner filed written submissions dated December 7, 2021 and supplementary submissions dated February 10, 2022.
20. The Petitioner impugned the Order in the Criminal Case directing that he awaits an order from the president stating that it condemned him to serve an indefinite prison term.
21. It was his case that from November 10, 2016 to date, no inquiry had been made by the Respondents into his mental health as required under section 166(4) of the [CPC](#), subjecting the Petitioner to torture, cruelty and inhuman treatment.
22. It was further his submission that under section 3 and 15 of [Person Deprived of Liberty Act](#), he is entitled to the protection of all fundamental rights and freedoms which have otherwise been breached by the Respondents which include medical examination, treatment and healthcare including preventive care.
23. It was submitted deriving from the foregoing failure ad delay, his right to administration Action provided for under section 7(1) of the [Fair Administrative Action Act](#) had been violated.
24. The Petitioner pointed out that the Officer in Charge Manyani Maximum Prison, who is a functionary and subordinate of the Minister and Permanent Secretary unto who the Attorney general advises, had not made any effort required of him under section 166(4) of the [CPC](#)
25. In citing unconstitutionality of section 166(2) of the [CPC](#), the Petitioner relied on the decision in [Republic v SOM](#) (2017) eKLR where it was observed as follows;

“However, this is not the end of the matter as I have doubts at to the constitutionality of these provisions particularly in light of the recent Supreme court decision in Francis Karioko Muruatetu and Another v Republic SCK Petition No15 and 16 (UR) where the Court held that it is the judicial duty to impose a sentence that meets the facts and circumstances of the case. this suggests that a law that violates the length of the sentence to another authority violates the fundamental rights and freedoms of the accused.”
26. The Petitioner further found support in the case of Meru High Court Criminal Appeal No 16 of 2015, [BKJ v Republic](#) where it was observed that;

...keeping a mentally ill person in prison for an indeterminate period of time is cruel, inhuman and degrading treatment contrary to Article 25 and 29 of the [Constitution](#).
27. The Petitioner submitted that in [Republic vErick Ochieng Okoth](#) (2021) eKLR the learned Judge applied section 7(1) of the sixth schedule to the [Constitution](#) to align the provisions of the [CPC](#) to the [Constitution](#) there ought to be modifications, adaptations, qualifications and exceptions necessary to bring its provisions into conformity with the [Constitution](#).
28. To that end, it was submitted that in the case ([Republic vErick Ochieng Okoth](#) (2021) eKLR) the Judge was of the position that in section 166 of the [CPC](#), reference to the ‘president’ shall read to mean



‘The Court’ so as to ensure the convict is be right to court periodically so 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.

29. The Petitioner further submitted that by serving time with persons of sound mind in prison at the time of commission of the offence, he was being discriminated against in and denied equal protection of the law guaranteed under Article 27 of the Constitution.
30. In the supplementary submissions, the Petitioner, in reference to this Court’s decision in Constitutional Petition No 226 of 2020, Isaac Ndegwa Kimaru & 17 Others v The AG & DPP urged the court to adopt its position.
31. In respect to his mental condition, the Petitioner submitted that according to the psychiatric evaluation report, produced by the 2nd respondent herein in the affidavit sworn by Dr. Linda Muriuki on September 24, 2021, he has recovered and of no longer a danger to the society.
32. In conclusion, and based on the finding in the case of Isaac Ndegwa & Others v the AG & others, (*supra*) the Petitioner urged the court allow the Petition as prayed and to set him free.

The 1st Respondent’s case:

33. The Director of Public Prosecutions opposed the Petition through Grounds of Opposition dated May 31, 2021.
34. It was its case that the Petition lacks precision and clarity as the Petitioner merely stated his rights and but failed to demonstrated how each of the specific rights were violated.
35. It was further its case that the Petition does not disclose any cause of action against the 1st Respondent as the matter relates to post sentencing procedure as opposed to investigations and prosecutions.
36. It, therefore, was its case that the orders sought are not tenable against the 1st Respondent since the issue of sentencing does not fall within its mandate.
37. It was urged that the Petition be dismissed with costs for being an abuse of court process.
38. The 1st Respondent did not file written submissions.

The 2nd Respondent’s Case:

39. The 2nd Respondent opposed the Petition through the Replying Affidavit of Lydia Muriuki the Secretary and Chief Executive Officer of the Power of Mercy Committee, deposed to on September 24, 2021.
40. He deposed that the Petitioner, petitioned POMC on June 28, 2019 and pursuant to section 2 of Power of Mercy Act (POMA), the relevant section that determines admissibility of the Petition and donates powers to POMC, the Committee held a meeting on May 24, 2021 and reviewed the Petitioner’s Petition.
41. She deposed that pursuant to section 22 of the POMA, the section that sets the parameters for the making of recommendations to the President under Article 133 of the Constitution, it was decided that the Petitioner’s case be deferred for 6 months to allow for a further report of reconciliation with the Victim’s family.
42. It was her deposition that the foregoing decision was based on pre-release report which indicated that though the victim’s family were not interested in any form of compensation, they expressed fears that



the Petitioner may harm them if released. The Probation Officer recommended that the two families be given more time to pursue reconciliation.

43. In reference to the Psychiatric Evaluation Report, it was her deposition that contrary to the Petitioner's assertions, he underwent psychiatric evaluation by Dr. Kisivuli A.J of Kamiti Maximum Prison Hospital.
44. It was her position therefore that the 1st Respondent had not in any way failed in discharging its constitutional and statutory functions. She deposed that the Committee's responsibility is purely advisory while the exercise of Power of Mercy is the prerogative of the President.
45. It was her case that while formulating the recommendations to the President, the Committee follows strict criteria stipulated under section 22 of the POMA to ensure that only people eligible, rehabilitated, remorseful and well behaved who would easily reiterate into the society and resettle if pardoned are recommended.

The submissions:

46. In further support of its case, the 2nd Respondent filed written submissions dated 20th January 2022.
47. The 2nd Respondent identified the issues for determination as being whether it violated the rights of the Petitioner and whether the Petitioner should be released from prison for serving an indefinite prison sentence.
48. In denying violation of the Petitioner's rights, the 2nd Respondent submitted that there was no demonstration of any infringement. To that end, the decisions in *Anarita Karimi Njeru v Republic* and the one in *David Mathu Kimingi v SMEC International PTY Limited* (2021) eKLR were invoked where the need of particularity and clear demonstration of manner of violation in constitutional petitions was emphasized.
49. On the question as to whether the Petitioner ought to be released from prison, the 2nd Respondent submitted that it largely depends on the report by probation officer.
50. It was submitted that according to the said report dated November 19, 2019, the Probation officer was of the opinion that the Petitioner should not be released on the basis of the fears expressed by the victim's relatives.
51. It was its case that the Petition lacks merit and ought to be dismissed with costs.

Analysis:

52. The instant Petition majorly raises the issue as to the constitutionality of Section 166(2) of the *CPC*. The issue has been previously and severally been determined by the High Court.
53. Since there is no need of re-inventing the wheel, this Court in High Court at Nairobi Constitutional Petition No 226 of 2020, *Isaac Ndegwa Kimaru & 17 Others v The AG & DPP* (2022) eKLR held as follows: -
 - (a) A declaration hereby issues that detaining of persons with mental challenges who are facing criminal trials or who have been tried and special findings made that such persons were 'guilty but insane' in prisons at the President's pleasure pursuant to Sections 162 (4) and (5), 166 (2), (3), (4), (5), (6) and (7) and 167 (1) (a), (b), (2), (3) and (4) of the CPC or under any other law constitute a threat to the doctrine of separation of powers and the independence of the Judiciary.



- (b) A declaration hereby issues that Sections 162(4) and (5), 166 (2), (3), (4), (5), (6) and (7) and 167(1)(a), (b), (2), (3) and (4) of the CPC or any other law providing for the detaining of any person with mental challenges who face a criminal trial or has been tried and a special finding made that such a person was ‘guilty but insane’ at the President’s pleasure contravenes 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. Such provisions are hereby declared unconstitutional, null and void.
- (c) A declaration hereby issues that an accused who is found to be unfit to stand trial or to continue participating in a criminal trial due to mental challenges or an accused who is tried of a criminal offence, and was found to have been insane at the time of committing the crime is a person with disability and ought to be accorded the necessary protection and assistance required under the Constitution and the law.
- (d) A declaration hereby issues that no Court of law shall henceforth commit any person facing a criminal trial found to suffer from mental challenges to any prison facility in Kenya to be detained under the President’s pleasure pursuant to any law.
- (e) A declaration hereby issues that no prison facility in Kenya shall accept and detain any person found to suffer from mental challenges under the President’s pleasure. For clarity, a prison facility shall only accept such persons with mental challenges committed to the facility under the orders of the Court which orders shall not include any order to hold such persons under the President’s pleasure.
- (f) A declaration hereby issues that any continued detention of persons with mental challenges who are facing criminal trials or who have been tried and special findings made that such persons were ‘guilty but insane’ and that they be detained at the President’s pleasure is unconstitutional.
- (g) A declaration hereby issues that the Advisory Committee on the Power of Mercy established under Article 133 of the Constitution has no jurisdiction to deal with persons with mental challenges who are facing criminal trials or who have been tried and special findings made that they were ‘guilty but insane’ until such a time when such persons are sentenced by Courts of Law.
- (g) An order hereby issues that any prison facility in Kenya holding any person with mental challenges facing a criminal trial or who has been tried and a special finding made that such a person was ‘guilty but insane’ and be detained at the President’s pleasure shall forthwith make arrangements and arraign such a person before the Court that committed the person to the prison facility.
- (h) Once any person with mental challenges facing a criminal trial or who has been tried and a special finding made that such a person was ‘guilty but insane’ is arraigned before Court pursuant to order (g) above, the Court shall make appropriate orders and directions upon taking into account the mental status of the accused and the period the accused has been detained in prison at the President’s pleasure.
- i. In the event the prison facility is unable to arraign such a person before Court as ordered in order (g) above, the facility shall immediately so inform the Court and the Court shall make appropriate orders and directions as it deems fit.
- (j) The Honourable Deputy Registrar of the Constitutional and Human Rights Division of the High Court shall, in the next 14 days, transmit copies of this judgment to the parties in this



matter as well as to the Commissioner-General of the Kenya Prisons Service, the Speaker of the National Assembly, the Registrar of the High Court and the Registrar of the subordinate Courts.

- k. The Speaker of the National Assembly shall take steps towards ensuring that the impugned sections of the CPC, Cap. 75 of the Laws of Kenya are aligned with the Constitution and in terms of this judgment.
 - l. The Speaker of the National Assembly shall file an Affidavit in this Court on the status of implementation of this judgment in the next 12 months.
 - m. The Honourable Deputy Registrar shall, at the expiry of 12 months from the delivery of this judgment, fix this matter before Court for appropriate directions.
 - n. There shall be no orders as to costs.
54. Given the orders in the above case, the instant Petition stands spent. The prayers sought by the Petitioner herein were fully granted and if the orders in Isaac Ndegwa Kimaru & 17 Others v The AG & DPP were duly implemented, then the Petitioner's plight ought to have been attended to.
55. Resulting from the foregoing, this Court hereby makes the following final orders: -
- a. This Petition is hereby determined in terms of the judgment in High Court at Nairobi Constitutional Petition No 226 of 2020, Isaac Ndegwa Kimaru & 17 Others v The AG & DPP (2022) eKLR.
 - b. In the event the Petitioner is yet to benefit from the implementation of the said judgment, then the said judgment shall forthwith be implemented in respect to the Petitioner herein.
 - c. There shall be no orders as to costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF MARCH, 2023.

A. C. MRIMA

JUDGE

Judgment

virtually delivered in the presence of:

N/A, for the Petitioner.

N/A, for Director of Public Prosecutions for the 1st Respondent.

Miss. Robi, Counsel for the 2nd Respondent.

Regina/Chemutai – Court Assistants.

