



REPUBLIC OF KENYA



**KENYA LAW**  
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**M'Imunya v Director of Public Prosecution (Petition E001 of 2023)  
[2023] KEHC 2953 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2953 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
PETITION E001 OF 2023  
TW CHERERE, J  
MARCH 30, 2023**

**BETWEEN**

**ISAAC M'MARIGU M'IMUNYA ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**JUDGMENT**

1. Petitioner was arrested on August 7, 1998 and was on September 7, 1998 arraigned Meru in Criminal Case No 17 of 1999 for the offence of murder contrary to section 203 as read with Section 204 of the [Penal Code](#).
2. By a judgment in delivered on February 13, 2007, Petitioner was found guilty but insane and the court under the powers donated by Section 166 (2) of the [Criminal Procedure Code](#) directed that he be held at the President's Pleasure.
3. By Petition dated December 30, 2022 filed on January 3, 2023, Petitioner states that he is of sound mind and seeks to be allowed to mitigate so that he vcan be sentenced to a determinate sentence. Ms Rita for the prosecution did not oppose the application.
4. Numerous court decisions have cast doubt on the constitutionality of indeterminate sentence on an accused at the instance of an authority other than the courts. For example, in [Republic V SOM, Kisumu High Court Criminal Case No 6 of 2011](#) parts of the provisions of section 166 of the Criminal Procedure Code were declared unconstitutional on the basis of a finding the indeterminate sentence under section 166 of the Criminal Procedure Code is cruel and inhuman. In [AOO and 6 Others v Attorney General and Another NRB Petition No 570 of 2015 \[2017\] eKLR](#), the court held that the provisions of the Penal Code where a child found guilty of murder is held at the pleasure of the President is unconstitutional as it violates the right to a fair trial under the [Constitution](#).



5. In *Hussan Hussein Yusuf v Republic Meru High Court Criminal Appeal No 59 of 2014 [2016] eKLR*, the court held that section 167(1) of the CPC which directs 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. In *Joseph Melikino Katuta v Republic, Voi HC Criminal Appeal No 12 of 2016 [2016] eKLR*, the court emphasized 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*.
6. From the foregoing, I also find that section 25 (3) of the Penal Code which donates judicial power to the President is unconstitutional and offends article 160(1) of the *Constitution* and that the administration of justice, a process that entails arraignment of an accused person to court up to sentencing is a function of the judiciary.
7. Consequently, I find that the Petition is merited. A medical report dated March 21, 2023 reveals that Petitioner is in a normal state of mind.
8. The Petitioner shall therefore be afforded an opportunity to mitigate before sentence.
9. In the meantime, the Deputy Registrar of this court is directed to assign counsel to represent the Petitioner for purposes of mitigation and sentence.
10. This matter is fixed for mitigation and sentence on April 26, 2023

**DELIVERED AT MERU THIS 30<sup>th</sup> DAY OF March 2023**



**WAMAE.T. W. CHERERE**

**JUDGE**

**Court Assistant - Kinoti**

**Petitioner - Present in person**

**For the State - Ms. Rita**

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