



**Kirongo v Republic (Miscellaneous Criminal Application
E014 of 2022) [2023] KEHC 19181 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
MISCELLANEOUS CRIMINAL APPLICATION E014 OF 2022**

J WAKIAGA, J

JUNE 27, 2023

BETWEEN

BENARD MUIRURI KIRONGO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By a notice of motion under certificate of urgency undated but filed in Court on 23rd June 2022, the applicant moved the Court for orders that the court be pleased to revise the earlier orders in Criminal Case No 432 of 2008 at Kandara in line with the directives dated February 1, 2022 in the High Court Petition No 226 of 2020 Isaac Ndegwa Kimaru & 17 others, on the ground that continues detainment of the applicant under section 162 -167 of the *Criminal Procedure Code* had been declared to be unconstitutional as it violates articles 25(a) 27 (1) (2) (4) , 28 , 29 (d) and (f), 50, 51(1) and (2) 159 (2) (a) (b) and 160 of *the Constitution* .
2. It was supported by an annexed affidavit in which it was deposed that he was charged with the offence of cutting down crops contrary to section 334(a) of the *Penal Code* which carries a sentence of not more than 14 years in Criminal case No 432 of 2008 at Kandara and a special finding was reached that he be detained at the pleasure of the President, which he has been since 8th May 2009, which sentence has since been declared unconstitutional.
3. It was stated that he had been reviewed by a psychiatric which recommended that he was fit and healthy and was therefore ripe for consideration of discharge by the power of mercy committee.

Submissions

4. The petitioner filed written submissions in which he submitted that the High Court had in the case of *Isaac Ndegwa Kimaru & 17 others v Attorney General And Another* Petition No 226 of 2020 [2022] KEHC 144 (KLR) declared the provision under which he was sentenced unconstitutional and directed



that those affected by the order to file their respective applications for review of sentence and that the court ought to take into account the fact that the value of the crops he is alleged to have destroyed was Kshs.9,992 and that he has been in custody owing to the ground of insanity.

5. In view of the holding in Isaac Ndegwa's case he was entitled to review of the sentence mated against him and that had he not been found insane he would have only served a sentence of up to 14 years subject to remission under section 46 of *cap 90* laws of Kenya
6. Ms Muriu for the State did not oppose the application and urged the court to look at the psychiatric evaluation for dated May 21, 2019 which recommended that he be reviewed by the Power of Mercy Committee.

Determination

7. The issue of insanity and the place of mental illness in the criminal justice system in Kenya is far from being settled as there are conflicting jurisprudence emerging from the Kenyan superior courts. In *Wakesho V Republic* [2021] KECA 223 (KLR) the Court of Appeal set out the distinction between guilty for reason of insanity and guilty but insane and held that it was a legal paradox to find a person guilty but insane in light of the requirement of criminal responsibility and culpability and stated that a finding of not guilty for reasons of insanity would be more legally sound in the circumstances where the accused person was suffering from a defect of reason caused by decrease of mind at the time of the commission of the offence.
8. The court held that the court should be granted discretion to impose appropriate measures to suit the circumstances of each case upon a finding of not guilty for reasons of insanity and that to go through a motion of trial whose nature and effect the accused person did not understand and a conviction based on section 166 of the *Criminal Procedure Code* was manifestly unfair in light of article 50(2) of *the Constitution*. The court proceeded to quash the conviction and ordered that the Appellant be taken to a mental hospital until such a time when he was not a danger to society or himself.
9. In Isaac Ndegwa Kimaru (Supra) as regard section 166 of the CPC having reviewed several decisions of the Court stated that the Section was unconstitutional on the basis of the doctrine of separation of powers and that the persons so held at the pleasure of the President were entitled to protection under article 54 of *the Constitution* and Part 3 of the *Persons with Disabilities Act* and that such a person is sick whose place is in hospital and not prison.
10. The court proceeded to order that the persons who are detained at the pleasure of the President in prison facilities ought to be arraigned before the courts which committed them and the courts must take charge of those persons and make appropriate orders and directions.
11. In this cause the applicant has approached the Court by way of revision of the sentence dated 8th May 2009 wherein the court entered a finding of guilty but insane and detained the same at the pleasure of the present. In view of the court of Appeal decision in *Wakesho* (supra) I review the findings and substitute the sane with a finding of not guilty by reason of insanity.
12. The applicant shall be escorted to the mental facility for review and if found not to be a threat to society and or to himself to be set free forthwith having been in custody for a period of 14 years and it is ordered.
13. This file to be mention before the Deputy Registrar of this court after 30 days to confirm the execution of this order and to close the file.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 27th DAY OF JUNE 2023

J. WAKIAGA



JUDGE

In the presence of:

Mr. Waweru - Prosecution

Jackline – Court Assistant

