



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 103 OF 2019**

ALI BEMBUZI MWAPOMBE.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

**JUDGMENT**

**The Petition**

1. The Petitioner was tried and convicted for the offence of murder contrary to Section 203 as read with Section 204 of the Penal code as captured in the Judgment of the High Court in **Republic v Ali Bemбузи Mwapombe[2002] eKLR** (enclosed). The learned Judge Lady J. Khaminwa entered a special finding of guilty but insane and proceeded to detain the Petitioner at the President's pleasure. The legal provision is to be found in Section 166 (1) and (2) of the Criminal Procedure Code Cap 75. The Petitioner has been held in custody at the President's pleasure since then until he lodged a Constitutional Petition No. 103 of 2019 Mombasa on the 29th may, 2019 in which he seeks to be released to join the society. The Director of Public Prosecutions (DPP), filed submissions dated 13<sup>th</sup> April, 2021 in response to the said petition. The Petitioner seeks to be released from prison and freed from serving an "indefinite period in jail." On application by the Respondent a socio-enquiry report following an investigation by the Probation and After-Care Service Mombasa was filed in court.

2. The Petitioner's case is that the trial court found him guilty but insane and accordingly detained him at the pleasure of the President under Section 166 of the CPC which provides as follows:

**"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.**

**(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 on 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. The Petitioner now seeks to be released from serving an indefinite period in jail which according to him amounts to breach and violation of his constitutional right since being unaware of the time he shall spend in jail amounts to inhuman and degrading treatment.

4. The Petitioner does not challenge the trial or his conviction but challenges the indefinite period in jail. Under Section 166 (4) CPC the Officer In Charge of a mental prison or hospital is required to file an initial report after three years on the mental condition of the prisoner. After the initial report, the said In-Charge would then make a report after expiry of two years. These reports would be forwarded to the President who in exercise of his discretion would move the patient from hospital to prison, or a mental facility, or order him or her to remain under supervision as the case may be.

5. The Petitioner’s case is that he has since fully recovered from the mental condition and prays that he should be released to join the society.

6. On 27<sup>th</sup> February, 2019 the Medical Officer of the Coast Province General Hospital prepared a Psychiatric Report on the Petitioner. The report was favourable and stated in part as follows:

**“...on examination, his appearance, behaviour, mood, speech and cognition were normal.**

**opinion: he has no mental illness currently ...”**

7. On 8<sup>th</sup> December, 2020 during the tenancy of these proceedings this Court directed a mental assessment on the Petitioner. A report dated 25<sup>th</sup> February, 2021 from Coast General Teaching & Referral Hospital stated that the Petitioner had no mental illness.

8. In **Republic v S. O. M 2018 eKLR** Majanja J declared Section 166 of CPC unconstitutional to the extent that it takes away the judicial function to determine the nature of the sentence or consequence of 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, and directed that any review on the special finding of guilty but insane be carried out by a court of law. The Judge then went ahead and sentenced the Petitioner to fifteen (15) years in a mental hospital subject to the required periodical review under Section 166 CPC.

9. While the decision of Majanja J has not been challenged, it is also my view that it is sound law and I am persuaded by its legal premise in this matter. It is the position of this Court that the Petitioner cannot serve an indefinite term in prison. In this particular case the Petitioner is now healed. This means that he should be sent to the trial court to determine what sentence to be given. However, in my view, the Petitioner has come to this Constitutional Court under Article 22 and 23 of the Constitution. These Articles authorize this Court to enforce the Bill of Rights. Therefore since the Petitioner has come to this Court alleging violation of his rights, if this Court finds the allegations proved, this Court has the jurisdiction under the said Articles to render an appropriate remedy without referring this matter to the trial court.

10. It is the finding of this court that the rights of the Petitioner have been violated when he was sentenced to serve unknown and indefinite period in jail. This sentence amounted to a violation of his rights under the constitution. When the Petitioner was insane, it may be said that he was not aware of his surroundings and although being confined in prison without a known period of his sentence, the Petitioner could only complain through other people who understood his situation. But as soon as the Petitioner’s insanity was cured in the year 2019, and the Petitioner became legally aware that he was serving an unknown and indefinite sentence, the Petitioner thereby suffered mental torture and depression, human indignity and degradation which the constitution comes in to cure. Indeed, since the Petitioner became sane, he has mounted several legal challenges to his incarceration, this being evident of the extent to which he felt the violation. This Court has the jurisdiction, and the remedy, available for that violation.

11. This court ordered a Social Inquiry Report to be filed on the Petitioner. This was done on 9<sup>th</sup> March, 2021. The report notes that the Petitioner murdered his brother. The family has however remained close to him. They have forgiven him and are ready to welcome him back home in Ngolini Village, Kwale County. As a result of the social inquiry conducted, the Petitioner currently does not seem to have a mental disability; has a positive attitude towards and respect to the law. He has a strong desire to be observing the law and live peacefully. His significant others have remained in touch and have to continue bonding with him even for the years he has been in custody. As a result of reconciliation efforts done by both families and elders, the Petitioner can now be received in the community and Ngolini village in particular has healed with time and has put aside all the different opinions that may have occurred due to the offence. There is no detected threats or insecurity against the petitioner. In conclusion, the home environment is favourable for re-integration.

### **Disposition**

12. From the foregoing the Court is of the view that the Petitioner is entitled to a relief under Article 22 and 23 of the constitution. That relief must necessarily come by way of dispensing out an appropriate sentence in the light of the aforesaid proved violations. Accordingly, the Court makes the following orders:

(1) A remedy of Sentencing for a definite and known period in jail.

(2) The Petitioner has served 25 years in prison. I therefore sentence the Petitioner to the time served. The Petitioner is hereby set at

liberty, and forthwith released from prison unless he is otherwise lawfully held.

That is the Judgment of the Court.

**Dated, Signed and Delivered at Mombasa this 29<sup>th</sup> day of April, 2021.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Mr. Mohamed Court Assistant