



IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CRIMINAL APPLICATION NO. 12 OF 2020

CHARLES KIPKOECH CHIRCHIR.....APPLICANT

VERSUS

REPUBLIC.....STATE

RULING

1. The Applicant was charged with murder contrary to section 203 as read together with section 204 of the Penal Code in Nakuru Criminal Case No. 82 of 2009. In a judgment dated 06/12/2013, the Learned Justice Omondi, H.A. found the Applicant guilty but insane of the offence of manslaughter. Consequently, the Learned Judge ordered that the Applicant be detained at the President's pleasure; and further that he be accorded medical attention for his mental illness.

2. Slightly more than eight years since his detention, the Applicant has now approached this Court seeking for a review of his sentence. Though as a pro se litigant the Applicant does directly state so, it is clear from the perusal of his Application that he seeks for a declaration that detention at the President's pleasure is inconsistent with the Constitution of Kenya. He prays for his sentence to be substituted with a definite sentence pursuant to the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR* and various subsequent decisions of the Superior Courts applying it in various settings.

3. During the hearing of the Application, the Prosecutor, Mr. Jamsumbah, indicated that he was not opposed to it but urged the Court to obtain a Social Inquiry Report to guide it on the appropriate sentence. The Court requested for the report and also ordered a mental assessment to ascertain the mental status of the Applicant at present.

4. The two issues for determination in the present Application are the following:

a. First, whether the sentence imposed on the defendant, that is, indefinite detention at the President's pleasure is constitutional in light of the *Muruatetu Case* and its progeny; and

b. Second, if the sentence imposed is not constitutional, what the appropriate sentence should be.

5. The question of unconstitutionality of sections 166 and 167 of the Penal Code which mandate the detention of an individual at the President's pleasure where they are adjudged guilty of an offence but found to have been insane at the time of the commission of the charged offence has been considered in a number of cases. All of them, to my knowledge, have been unanimous that the two sections are unconstitutional. This opinion is exemplified in *Republic v S O M [2018] eKLR* in the following words by Majanja J.:

5. Although, the Francis Muruatetu Case dealt with the mandatory death sentence, the principles it espouses are nonetheless applicable to this case. I would like to point out that the provisions of section 166 of the CPC dealing with conviction and sentence of an accused found guilty but insane are mandatory from the point of view of the accused and the court. They do not give the court any discretion irrespective of the nature of the mental illness or condition of the accused. The ultimate sentence imposed on an accused found guilty but insane is at the discretion of the President who determines under what conditions the accused serves either in a mental institution or a prison or is ultimately discharged.

*6. The constitutional underpinning of the rights of persons with disability cannot be gainsaid. Central to these rights is the right to be treated with dignity guaranteed under Article 28 of the Constitution. Article 54(1)(a) of the Constitution buttresses the right of a person with disability, "to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning." Kenya is also a signatory to the Convention on the Rights of Persons with Disabilities which is now part of Kenyan law by dint of Article 2(6) of the Constitution.... (emphasis mine)" (See also *Republic v E N W [2019] eKLR* (ruling on sentence), *Peter Kingori Gitahi v Director of Public Prosecutions [2019] eKLR* and *Paul Omondi Odipo & 4 others v Republic [2020] eKLR*).*

6. Other cases are in accord. And I agree. It is not well established from our decisional law that a sentence that a person be held at the President's Pleasure is unconstitutional for at least four reasons:

a. First, it impermissibly gives the President a sentencing role in a way which breaches the doctrine of separation of powers since

sentencing is a judicial function.

b. Second, the sentence abrogates judicial discretion in sentencing since it gives the Judicial Officer hearing a case no opportunity to consider the facts and circumstances in order to fashion an appropriate sentence.

c. Third, a sentence to hold an individual at the President's pleasure is an indefinite sentence which, according to emerging and evolving standards of decency and international human rights law is an inhuman and degrading punishment.

d. Fourth, a mandatory sentence to send a person who has been adjudged insane is, in essence, disregarding the rights of the Accused Person as a person with disability. This is because there is no process or judicial determination whether the Accused Person is in need of medical treatment for his condition. Instead, it is left to the unchecked and unreviewable discretion of the President to determine the place of detention; and whether the Accused Person is in need of medical treatment or attention.

7. In short, therefore, the Applicant's Application seeking review of his sentence is merited: the sentence imposed, to wit, to hold the Applicant in detention at the President's pleasure is hereby set aside.

8. The second issue we now turn to, then, is what the appropriate orders to issue be in the circumstances.

9. The circumstances in which the killing happened are indicative of the Applicant's mental illness. In the night of 26/09/2009, the Applicant attacked the Deceased (John Kiplangat Kirui) seemingly without any provocation or reason. He beat him up with a wooden stick until some people intervened and raised alarm. The Deceased was his fourth-degree uncle (he was a cousin to the Deceased's father). Hence, the attack and killing was even more shocking and consequential.

10. During trial, the Learned Judge accepted evidence that showed that the Applicant was mentally ill at the time the offence was committed. He was still under medication at the time of trial but the Judge noted that with the aid of medication, the Applicant was lucid.

11. Dr. Karanja of Gilgil Sub-County Hospital conducted a mental assessment on 27/05/2020 and filed a report in Court. He reported that the Applicant's memory, abstract, judgment, attention and concentration are intact. He is no longer on medication. The doctor concludes that he is currently stable and not exhibiting any psychopathology.

12. The Social Inquiry Report ordered by the Court returned a grim picture. It reports that back home, the relatives are still angry at him; and that he has no abode to go back to. It states as follows:

This matter involves close family members. During our inquiry it is confirmed that this petitioner has no social capital. The general mood of the village is that of fear and hatred. His elderly father is sick and cannot therefore make any decision in this matter. The other uncles do not want to associate with him.

At home he has no accommodation. The local administration are not committing themselves to provide security to the petitioner in the event that the court reviews his sentence. This is an unfortunate state of affairs considering the mental health of the petitioner. The victim's family are yet to forgive him.

13. Although the mental report by Dr. Karanja states that the Applicant is now stable, the doctor did not ascertain what mental illness the Applicant suffered previously and what medications he was on. The report is inconclusive whether it is expected that the Applicant will be on those medications for the rest of his life.

14. During his appearances in Court, the Applicant sometimes appeared "tuned out". It seems clear to the Court that the Applicant is not ready or able to deal with life outside custody especially in the context of a hostile community due to his mental illness-induced violent past.

15. It seems to me that the Applicant would benefit from comprehensive assessment and diagnosis of his mental illness and prolonged treatment. Only after such treatment under observation and scrutiny would a Court be able to make a determination if the Applicant's case warrants an order of release. The Court will, therefore, take this course: order the detention of the Applicant for treatment at Mathari Mental Hospital for a period of three years. At the conclusion of the three years, if the Applicant is in stable condition, he shall be presented to Court for an order of release.

16. **Consequently, the final orders of the Court are as follows:**

a. The sentence imposed – that the Applicant shall be held in detention according to presidential pleasure – is hereby set aside.

b. In its place, the Court orders that the Applicant shall be held at Mathari Teaching and Referral Hospital for treatment and observation for a period of three (3) years from the date of this ruling.

c. At the conclusion of the treatment period in (b) above, a comprehensive mental assessment report shall be filed in Court. The Court shall then determine the suitability of releasing the Applicant. The Applicant shall be entitled to a release order if the mental assessment report filed at the conclusion of his treatment period recommends that he may be released.

17. Orders accordingly.

Dated and delivered in Nakuru this 22nd Day of April, 2021.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.