



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

(CORAM: CHERERE-J)

**CRIMINAL APPEAL NO. 29 OF 2017**

**B R O.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Background**

1. On 8<sup>th</sup> February 2018, this court ordered that the applicant be detained at the President's Pleasure and committed him to Mathari Mental Hospital to continue treatment.

**Application**

2. Being dissatisfied with the said order, the applicant filed a Notice of Motion dated 24<sup>th</sup> May, 2018, in which he prays THAT:

**a. The Court corrects/amends the final order made in the Judgment and warrants drawn pursuant to the said orders as not to subject the applicant/appellant to a punishment/sentence which he is not supposed to**

**b. The court makes such other or further orders as it shall deem just and expedient to the benefit of the applicant**

3. The application is based on grounds among others that Section 166 of the Criminal Procedure Code is unconstitutional and in breach of Articles 25(a); 27; 29(f) and 43 of the Constitution and that the orders made by this court amounts to imprisonment for an indefinite period which may be more than the 4 years the applicant was meant to serve upon conviction by the lower court.

4. The application is supported by an affidavit sworn by Mr. Onsongo, advocate for the appellant/applicant on 24<sup>th</sup> May, 2018 in which he reiterates the grounds on the face of the application. Further reliance was placed on the following:

**i. The Constitution of Kenya**

**ii. *Hassan Hussein Yusuf v Republic* [2016] eKLR**

**iii. *A O O & 6 others v Attorney General & another* [2017] eKLR**

**iv. Article 7 and 10(1) of the international covenant on civil and political rights**

**v. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

5. In response to the application, the state filed a replying affidavit sworn by Peter Muia, Prosecuting Counsel on 4<sup>th</sup> October, 2018. He supported the application and placed reliance on a Hong Kong authority ***Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457.**

6. I have carefully considered the application in the light of the affidavits. I have also considered the various decisions cited by the parties and I am convinced that the provisions that impose an indeterminate sentence on an accused at the instance of an authority other than the courts violate the right to freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to a fair trial; the equality and freedom from discrimination and the deprivation of freedom arbitrarily or without just cause.

7. Consequently, I find that this court has power under Section 382 of the Criminal Procedure Code to reverse its order to prevent a failure of justice.

8. Accordingly, the orders made on 8<sup>th</sup> February, 2018 are reversed in the following terms:

**The applicant/appellant is hereby committed to Mathari Mental Hospital where he shall continue to receive treatment for a term of four (4) years from date of conviction subject to period review by the court in accordance with section 166 of the Criminal Procedure Code and in any case before the expiry of every one (1) year.**

**DATED AND DATED IN KISUMU THIS 25th DAY OF October, 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant** - Felix

**Appellant/Applicant** - N/A

**For the Appellant/Applicant** - N/A

**For the State** - Mr Muia