



KMG v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party) (Criminal Revision E156 of 2024) [2025] KEHC 9591 (KLR) (21 May 2025) (Ruling)

Neutral citation: [2025] KEHC 9591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E156 OF 2024
DO CHEPKWONY, J
MAY 21, 2025**

BETWEEN

KMG APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

ODPP 2ND RESPONDENT

AND

**KENYA NATIONAL HUMAN RIGHTS AND EQUALITY
COMMISSION INTERESTED PARTY**

RULING

1. This ruling determines the Applicant’s undated Notice of Motion which arises from her conviction in *Kiambu High Court Criminal Case No.85 of 2016* in which the court found her guilty of the offence of Murder but concluded that the Applicant was at the time of commission of the offence insane. In the present application, the Applicant seeks this Court to release her and or set her at liberty given that she is no longer insane and rehabilitated in the years she has been in custody.
2. As pointed out, the accused person was charged and convicted for the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of offence being that on 14th November, 2016 at [Particulars Withheld] in Komothai Sub County within Kiambu County, the accused person/Applicant murdered JGN.



3. The case proceeded for hearing and Judgment was delivered by Hon Kasango J where she found the Applicant guilty of the offence of murder but noted that she was insane when she committed the offence in accordance with Section 166(1) of the *Criminal Procedure Code*. The court went on to state:-

“By virtue of Section 166 (2) of Cap 75 , this court shall report, this case for order of H.E the President and in the meanwhile, this court hereby orders K.M.G (the Accused) to be detained at Lang’ata women prison or at such other prison or other facility where she shall receive specialised treatment where necessary.’
4. In seeking to be released or set at liberty since she is now sane, the accused person heavily relies in the Judgment of Hon A.C. Mrima (J) in the Petition No. 226 of 2020 in the High Court of Kenya at Constitutional and Human Rights Division. She avers that the court in the said Judgment held that detaining persons with mental challenges or persons who are guilty but insane at the Presidential pleasure, is a threat to the doctrine of separation of powers and the independence of the judiciary.
5. The Applicant avers that the *Criminal Procedure Code* or any law which provides that detaining any person with mental challenges upon criminal trial at the Presidential Pleasure contravenes Article 25(a), 27 (1), (2), (4), 28, 29 (d), (f), 50, 51 (1) and (2), 159(2) (a) and (d) and 160 (1) of the *Constitution* of Kenya. She contends that a mentally challenged accused person participating in criminal trial ought to be accorded the necessary protection and assistance as provided under the Constitution of Kenya but not to be detained in a prison facility allegedly at the President’s pleasure.
6. The Applicant further argues that the Advisory Committee of the Power of Mercy established under Article 133 of the *Constitution* has no jurisdiction to deal with accused persons sentenced by the Courts of Law hence in her case, the court should grant the orders sought.
7. The Application was served upon the Respondents and Prosecution Counsel sought for time to file a response to the application. The court was lenient by granting the time to file response but as at the time of writing this Ruling no response had been filed. The court took it that the Respondents were not opposed to the application but in any event, this court will proceed to consider the application on merit.
8. It is without doubt that the Judgment herein was made pursuant to special finding of guilty but insane hence the procedure that follows is provided for under Section 166(2) of the *Criminal Procedure Code* which provides:-
 - (2) when a special finding in 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 a place and in such manner as the court shall direct”
9. It is this provisions which the Applicant submits that it was declared unconstitutional. In any event, the court confirms that in the case of *Kimaru & 17 Others vs Attorney General & Another ; Kenya National Humans Rights and Equality Commission (Interested party)*(Petition 226 of 2020) KEHC 114(KLR) Murima J declared Sections 162 to 167 of the *Penal Code* unconstitutional. The Judgment in this case was delivered on 10th February, 2022 and it has not been opposed that the Applicant has since been held at Langata is a specialized facility for detaining persons who are mentally challenged. I totally agree that detaining a mentally challenged person in prison is inhumane and against the laid



down law for such persons. As such, I totally agree with the finding in the case of Meru High Court Criminal Appeal No 16 of 2015, *BKJ v Republic*, where it was observed that:-

“...keeping a mentally ill person in prison for an indeterminate period of time is cruel, inhuman and degrading treatment contrary to Article 25 and 29 of the Constitution”.

10. Similarly, the High Court in the case of Meru Criminal Appeal No. 59 of 2014, *Hassan Hussein Yusuf v Republic* [2016] eKLR held as follows:-

“A sick person's place is at the hospital and not in prison. I find Section 167 of the *Criminal Procedure Code* discriminative to people with mental illness for prescribing their detention to be in prison instead of a health facility and for the detention to be indeterminate. This offends Articles 25 and 29 (f) of the Constitution. The order envisaged under Section 167(1) of the *Criminal Procedure Code* is A punishment. Any punishment that cannot be determined from the onset is cruel, inhuman and degrading. I therefore make a finding that this section is unconstitutional to the extent it offends the said articles of the Constitution.”

11. Consequently, and in agreement with the Judicial authorities cited above, the court finds that the conviction of the accused person/Applicant was lawful and properly grounded in law. However, the court hereby set aside the order committing the accused person/Applicant to Langata Womens Prison at the direction of the President pursuant to Section 166(2) of the *Criminal Procedure Code*.

12. In its place, the court orders that the Applicant be transferred to a specialised Mental Health Facility designated for the custody and care of persons with mental illness. The accused person/Applicant shall be held therein until such time s the qualified Psychiatrist certifies that she has regained mental stability and no longer posses a danger to herself or the public. Upon receipt of such certification, this Court shall resume proceedings for sentencing.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF MAY , 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:-

Applicant in person present

M/S Ndeda present for the Respondent

Court Assistant - Martin

