



**DL v Republic (Criminal Revision E099 of 2024)
[2025] KEHC 13144 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL REVISION E099 OF 2024
SC CHIRCHIR, J
SEPTEMBER 24, 2025**

BETWEEN

DL APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged at the lower court with the offence of attempted incest, contrary to section 20 (2) of sexual offences Act, No. 3 of 2006. (The Act). He pleaded guilty to the charge and was convicted on his plea.
2. Upon conviction, he indicated to the court that he was mentally unstable prompting the trail magistrate to refer him for mental assessment. The mental assessment report showed that the applicant was suffering from a psychiatric condition. The Magistrate then ordered that the applicant to be detained at the pleasure of the president.
3. The Applicant was detained at Kamiti Maximum Prison then later referred to Mathari National Teaching and Referral Hospital for treatment. In August 2024, the hospital discharged him to Kamiti prison on with a report, that the applicant had recovered.
4. The applicant states that though he has now recovered, he committed the offence when he was mentally sick; that he has been in custody for accumulated period of 15 years, 2 months. He further states that he was a first offender and has since reformed. He argues that this court has the authority to discharge him pursuant to the Provisions of Section 163 (3) of the Criminal Procedure Code. (CPC)
5. Although, the respondent initially filed a Replying Affidavit opposing the application ,in their submissions they have conceded to the Application. In making their concession, the respondent has relied on the case of Kimaru & 17 others Versus Attorney General & Ano Kenya National Human Rights & Equality Commission (interested party) [2022] KEHC 114 (KLR)where the High Court



declared Section 162 (4) and (5) ,section 166(2),(3),(4),(5), (6)&(7) and 167 (1) (a) (b) ,(2) (3) and 4 of CPC as unconstitutional for infringing various Articles of the constitution.

Determination

6. The facts and circumstances of the case had earlier been set out. The order directing the holding of the Applicant was based on Section 166 (1) and (2) of CPC. The section provides as follows:
 - (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.
7. The order of committal was made on 22.10.2009. The Applicant was then held at Kamiti main prison for 4 years before being taken to Mathari teaching and referral hospital on 21.10.2013. He spent 11 years in the hospital before his transfer back to Kamiti maximum Prison on 05.08.2024.
8. Section 166 (2) to (7) of the CPC has been a subject of Constitutional litigation before the superior courts . In the case of Kimaru & 17 Others – Vs- Attorney General (supra) The petitioners had challenged the constitutionality of sections earlier referred to at paragraph 5 of this Ruling. The judge made a number of declarations and I will only cite the ones I consider relevant to the present Application. The Judge held interalia:
 - a)
 - b) A declaration hereby issues that sections 162(4) and (5), 166 (2), (3), (4), (5), (6) and (7) and 167(1)(a), (b), (2), (3) and (4) of the Criminal Procedure Code or any other law providing for the detaining of any person with mental challenges who face a criminal trial or has been tried and a special finding made that such a person was ‘guilty but insane’ at the President’s pleasure contravenes articles 25(a), 27(1), (2), (4), 28, 29(d) and (f), 50, 51(1) and (2), 159(2)(a), (b) and (d) and 160(1) of the Constitution. Such provisions are hereby declared unconstitutional, null and void.
 - c) A declaration hereby issues that an accused who is found to be unfit to stand trial or to continue participating in a criminal trial due to mental challenges or an accused who is tried of a criminal offence, and was found to have been insane at the time of committing the crime is a person with disability and ought to be accorded the necessary protection and assistance required under the Constitution and the law.....”
9. The Judge further stated that an accused who was found to be unfit to stand trial or continue participating in a trial due to mental illness or one who had been tried and found ‘guilty but insane’ was a person with disability and ought to be accorded the required protection as provided for under Article 54 of the Constitution and the law and that such a person is sick and his place was at the hospital and not in prison.



10. Further one of the declarations the judge made indicate that the declarations on the unconstitutionality of the aforementioned sections of the CPC was to have a retrospective effect. He held: “ (i) Once any person with mental challenges facing a criminal trial or who has been tried and a special finding made that such a person was ‘guilty but insane’ is arraigned before court pursuant to order (h) above, the court shall make appropriate orders and directions upon taking into account the mental status of the accused and the period the accused has been detained in prison at the President’s pleasure.
11. I am persuaded by the decision of Justice Mrima in this regard, including the directions he gave on what happens to those convicts who are already ‘serving’ sentence under the president’s pleasure. The Applicant herein was convicted and committed in the year 2009 while the Judge’s decision was made in February 2022. The Applicant’s situation is well covered in view of the aforesaid retrospective declaration.
12. The applicant has been under confinement for a total of 15 years; 4 in prison and 11 in a mental hospital. He has now been certified as having recovered. However, the continued holding of the applicant is no longer tenable as section 166 (2) has since been declared unconstitutional.
13. Consequently, the Application is hereby allowed. The applicant is hereby, discharged. He shall be set free forthwith, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 24TH DAY OF SEPTEMBER, 2025.

S. CHIRCHIR

JUDGE

In the presence of:

Roba Katelo- Court Assistant

The Applicant.

Mr. B. Ngetich for the Respondent.

