



**NNN v Republic (Criminal Revision E290 of 2023)
[2024] KEHC 2227 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL REVISION E290 OF 2023
LM NJUGUNA, J
MARCH 6, 2024**

BETWEEN

NNN APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant has filed a notice of motion together with a supporting affidavit dated 29th November 2023 seeking review of the judgment of the court in Embu High Court Criminal Case Number 28 of 2003. Through this application the applicant seeks review of the sentence in light of the Court of Appeal decision in Julius Kitsao Manyeso v. Republic, Malindi Court of Appeal Criminal Appeal No. 12 of 2021 delivered on 07th July 2023.
2. The applicant was found guilty but insane and the court ordered that he be detained at the President's pleasure. The trial judge also ordered that the applicant be held at any maximum-security prison as he awaits the directive of the President. The applicant appealed against the findings of the trial court *vide* Nyeri Court of Appeal Criminal Appeal No. 443 of 2010 and the appeal was dismissed.
3. Through Criminal Misc. Application No. E025 of 2022 dated 15th June 2022, the applicant herein sought review of the findings of the trial court in light of the decision in *Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* (Petition 226 of 2020) [2022] KEHC 114 (KLR) (Constitutional and Human Rights) (1 February 2022) where the applicant was one of the petitioners. The application for review was dismissed through a ruling dated 03rd February 2023 when the court found itself lacking jurisdiction to determine the matter.
4. The respondent did not file any response to the application.
5. The application herein was canvassed by way of written submissions.



6. It was the applicant's argument that in light of the decision in the case of *Julius Kitsao Manyeso v. Republic*, Malindi Court of Appeal Criminal Appeal No. 12 of 2021 this court is able to determine this application. That he has been incarcerated for 20 years at the president's pleasure, during which time he has learned meaningful skills which he can use productively once he is set free. That he lives peacefully with his fellow inmates at the prison facility. He urged the court to reconsider his sentence and exercise leniency towards him.
7. The respondent submitted that this court still lacks jurisdiction to determine the application herein as the same was held in the Criminal Misc. Application No. E025 of 2022 by this court on 03rd February 2023.
8. From the foregoing, the issue for determination is whether this court has the power to review the sentence meted out to the appellant.
9. The High Court's supervisory jurisdiction in criminal cases is established under Section 362 of the *Criminal Procedure Code* as follows:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”
10. In the Malaysian case of *Public Prosecutor v Mubari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735 it was held:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.
11. Prior to the Court of Appeal decision in the case of *Julius Kitsao Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (07th July 2023) (supra), it was the case that the High Court cannot exercise its supervisory powers under Section 362 of the *Criminal Procedure Code* upon itself or upon courts of concurrent jurisdiction where it sat as a trial court. This was the basis for dismissal of the Criminal Misc. Application No. E025 of 2022. In the said decision, the superior court was alive to the fact that the High Court sits as a court of original jurisdiction in murder cases and at the same time, the supervisory powers under section 362 of the *Criminal Procedure Code* do not apply to the Court of Appeal. This jurisprudence, therefore, donated jurisdiction to the High Court to be able to review its own findings on sentences meted out at the trial.
12. The applicant herein was found guilty of murder but insane and this special finding was made through a judgment dated 05th October 2010. The Court of Appeal decision upholding this finding was delivered on 06th July 2016. The special finding of guilty but insane is provided for under sections 162-167 of the *Criminal Procedure Code*, which have since been adjudged unconstitutional. The High



- Court at Nairobi made the determination in the case of *Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* (Petition 226 of 2020) [2022] KEHC 114 (KLR) (Constitutional and Human Rights) (1 February 2022) (supra in which the applicant herein was a petitioner.
13. The petitioners in that petition sought, inter alia, that Sections 162-167 of the *Criminal Procedure Code* be rendered unconstitutional. The Court discussed a myriad of issues including the fact that detaining persons found guilty but insane, at the President's pleasure offends separation of powers between the arms of government. The court also stated that the prison system is well equipped to execute court orders and that the court is well able to issue conclusive orders in criminal cases. The Judge stated thus, among other things, in his final orders:
- a. "A declaration hereby issued that detaining of persons with mental challenges who are facing criminal trials or who have been tried and special findings made that such persons were 'guilty but insane' in prisons at the President's pleasure pursuant to 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 under any other law constitute a threat to the doctrine of separation of powers and the independence of the Judiciary.
 - b. A declaration hereby issued 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."
14. I place reliance on the 2 above cited cases because of the points in time when the decisions were rendered. The timing is so important that the case of *Julius Kitsao Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (07th July 2023) (supra) confers jurisdiction to this court and the case of *Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* (Petition 226 of 2020) [2022] KEHC 114 (KLR) (Constitutional and Human Rights) (1 February 2022) (supra) empowers the court to authoritatively review its findings at trial.
15. Having considered the Probation Officer's report, the circumstances under which the offence was committed, the sentiments of the family of the deceased and the community and the fact that the applicant herein has been behind bars for the last 13 years, I hereby make the following orders:
- a. The order of this court issued on 05th October 2010 that the applicant should be detained at the President's pleasure is hereby set aside;
 - b. The order of this court issued on 05th October 2010 that the applicant be held at a maximum-security prison as he awaits the President's directive, is hereby set aside; and
 - c. The applicant is hereby set at liberty forthwith, unless otherwise lawfully held.
16. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 06TH DAY OF MARCH, 2024.

L. NJUGUNA
JUDGE



.....for the Applicant

.....for the Respondent

